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LAW REPORTS
1996

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1996

Editor: Hon. Mr Justice Nigel Hampton O.B.E.
(Chief Justice of Tonga)

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PREFACE

Now I know (at last) what it feels like to edit a current series of Law Reports, to report judgments which are both contemporaneous and familiar.

It also means you reflect (sometimes with surprise - if not a stronger reaction on occasionally) on some of your own work, and cast a critical eye over it. A salutary task!

From henceforth it is my fond (and fervent) hope that this series of reports will continue to be published annually. It is essential that that should be done. I encourage all who succeed me to continue this reporting.

I note with pleasure three developments of significance in 1996. First the Kingdom becoming a full subscriber to the Beijing Statement of Principles of the Independence of the Judiciary. Second, the opening of a splendid new Court house in Neiafu, Vava'u on 4 November 1996. Third the commencement of a continuing legal education programme for lawyers in the Kingdom. All progressive steps in the development of the law in Tonga.

Nuku'alofa, 1997

Nigel Hampton
[Chief Justice)

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Supreme Court, 'Eua
Lewis J
C 1116/95

21 September 1995, 9 January 1996

Costs - successful defendants - discretion
Law Practitioners - costs - numerous successful defendants

The defendants (28 in number) were successful in their defence of a claim heard by a jury. The plaintiff objected to costs.

Held:

1. The Court is vested with a discretion when awarding costs.
2. There is jurisdiction to award costs against a wholly successful defendant but such an order should be made only in exceptional cases.
3. There was nothing here to make this case exceptional, unusual or atypical.

Cases considered: Aiden Shipping case [1986] AC 965
Knight v Clifton [1971) 2 All ER 378

Counsel for plaintiff Mr Niu
Counsel for defendants Mr C Edwards

Judgment

An objection has been filed by the Plaintiff corporation to the bill of costs filed by the successful defendants in this action. There have been some 88 defendants to the proceedings heard and determined by a jury at 'Eua in July 1995. The jury was engaged for some IO sitting days if one includes the time spent in empanelling the members.

Although there was a striking similarity about the defences raised by the defendants all of whom were squash growers, it was necessary for counsel and indeed the jury to treat the defences as 88 separate cases. Each man as may have been expected, had differences in his circumstances from the next. That being the case the bill of costs presented by counsel and the solicitors of necessity reflects that fact.·

The plaintiff has made a number of complaints about the bill of the defendants. H is not proposed to set all the complaints out in this brief judgment, but they have been considered.

There is no doubt that this court is vested with a discretion when awarding costs - Aiden Shipping Case [1986) AC 965 per Lord Goft of Chievely at 981. In Knight v ·

Clifton [1971] 2 All ER378, C.A., it was held that the court had juri sdiction to award costs of a proceeding against a wholly successful defendant but such an order should be made only in eitceptional cases. There is in my opinion nothing which makes this case eitceptional unusual or a typical.

It is true that a defence included by the defendants (as *Mt* Niu of counsel for the plaintiff company pointsout) was that the defendants would rely upon mutual agreement to cancel the contractual arrangements made between them and the plaintiff. However in the preparation of their defences the defendants need to account for any eventuality reasonably within their contemplation and their contemplation, therefore, must of necessity be a long one especially where there are 89, (to later become 88 after the uncontemplated departue of one defendant inappropriately joined,) Clefendants.

I haveconsidered the complaints of the plaintiff. This isan unusual case only in the sensethat there hasbeen an unusually large numberof defendants. Itis tobe remembered that the onus of proof of the matter rested with the plaintiff corporation. Solicitors for the defendants were obliged toconsider all ramifications of the charges against them. In light of the large number of defendants whose cases were never entirely thesame it cannot in my view be said that the bill of costs filed by the defence is eitcessive and therefore should be taiteddown. On thecontrary, in my view theyare, with theeitception of certain items which have been taited out, moderate.

Taufa v Kupu & Minister of Lands

Land Court, Nuku'alofa
Lewis J
L255/94

9, 10, 11 August 1995, lO January 1996

Land - mistake - set aside grant - equity
Land - limitation of time
Limitation - land - estate holder & Minister

The first defendant was registered as the holder of a tait api, and issued a Deed of Grant, with respect to land which had been occupied by th.e plaintiff and cultivated by him for 25 years, and for which he had first applied in or about 1968 and again in 1992. By tnen the firs_t defendant had applied for the land and he was granted it in 1993. The plaintiff claimed that the grant to the first defendant, at all relevant times resident in the U.S.A., should be set aside and the land granted to him. The first defendant claimed the plaintiff was time barred pursant to s.34(2) Land Act

Held:

1. The plea of time bar was misconceived and irrelevant. The 3 month peri6d in s.34 is directed at a disagreement between the Minister of Larld and the holderof an hereditary estateconcerning the grantingof a tait allotment out of such an estate.
2. Where two contenders for title present for registration of the same allotment, the applicantsare governed by s.50 Land Act. Each must bejudged according to their merits in an even-handed way. Neither must fall prey nor victim to the negligence of the administration or to the wiles of one whowouldobtain issue of title first by stealth.
3. Here the plaintiff had toiled for more than 25 years on the land, had been assured theland was his, hisapplication had been approved by theestateholder, although the approval became frozen.
4. There was an error by the Ministry. The application by the first defenda nt's brother (for a different allotment) was confused with the first defendant's application for this allotment. There was clerical error; and evidence of mistake in the Minister holding 2 complete but unregistered applications for the same allotment; the error leading him to accept the second (the first defendan t's) and fail to consult the estate holder.
5. The grant should be set aside and the Minister directed to register in the

plaintiffs name; and not in the narrle of an absentee holder, whose residential intentions are unknown but who hasnot lived in Tonga since registration was first-effected in his name. The equity of ihe case was clear.

Statute considered Land Act

Counsel for plaintiff Mis Vaihu
Counsel for first defendant Mr Niu
Counsel for second defendant Ms Simiki

Judgment

The first defendant 'Inoke Fotu Kupu is possessed of a deed of grant registered in his name and dated 5 February 1993 in respect of a tax allotment situated at Fua'arnotu. His right and title to the 'api are challenged by the plaintiff. At the commencement of the hearing in thismatter, the firstdefendant filed an_amended defence without objectin. An un-numbered paragraph contained in the prayer alleges that the claim is statute barred - failing to bring the action within three months after the grant of the allotment was made to the first defendant It is regrettable that soimportant a defence was included solate and without any accompanying list of authorities. The success or failure of the plaintiff s claim turns on the point. I deal with it straight away.

The Land Act 1988 (Cap.132) Section 34(2) provides:-

> "(2) Before making a grant of a tax allotment out of an herec,litary estate the Minister shall consult theholder thereof and hear any objections he may make to the grant beingmade and where the Minister and the holder of the hereditary estate fail to agree, the Minister shall nevertheless .granrthe land as a tax allotment but such grant shall'within three months of the making thereof be liable toreview by the court, the decision of which on the matter shall be final.•

The allotment is inquestion forms part of an hereditary estate. The Land Act draws a distinction between estates (Tofias) and estates (Apis), however every Tofia and 'Api is hereditary according to the precribed rules of succession - Section 5. In the present case the dispute centres around a tax allotment. A grant of title was sought by both the plaintiff and the first defendant. There was never any "Objection• nor were there "Objections• from the holder, one Fau Pakileata. There was no failure of agreement between the Minister of Land and the holder concerning the making of the grant. Moreover, .the marginal note to section 34 is "Holder 1,1ot to refuse land for allotment."

In my opinion, the plea of •Statute Barred" to the plaintiffs claim on the grounds in section 34 of the Act is entirely misconceived and irrelevant to the issues raised by the plaintiff in the claim. The three montli limitation (if that is what it be) in section 34, is directed at disagreement between Minister ::ind holder concerning the granting of a tax allotment out of an hereditary estate. None of the preconditions for the application of the three month limitation exist on any view of the claim of the plaintiff here. The plea of "Statute Barred" fails.

The following narrative sets out the facts as I find them to be from the whole of the evidence. The plaintiff has carried the onus of proof of the claim before the court on the balance of probabilities.

Theplaintiff was born a legitimate Tongan male in the year 1925at Ha'apai. In 1951 then aged twenty six years he moved to Tonga and began to reside in the village of Fua'amotu.

In 1959hecommenced tocultivate the land the subject of this claim, namely an Tax Allotment of some 8acres (3.389 hectares) being land then part of a Tofi'a the hereditary title of which was in the name of Fau Pakileata. Fau was the foste.-brother of the plaintiff. In 195,9 the 'Api was not yet allocated.

In 1963 the Plaintiff married Fine Taufa. There have been no children of the union. Fine Taufa was born and lived thu village of Fua'amotu. Fua'amotu was at all material times on the estate of the Estate Holder Tungi.

The plaintiff registered as a voter in the electorate at Fua'amotu. He became the

village carpenter, he grew crops for the village. He carried out obligations to the Estate Holder Tungi. He was obliged from time to ti me to prepare polas and to collect and to pay monies for Tungi.

In 1968 the Minister of Land distributed lands at Kauvai. The 'Api in issue in the present claim was part of the Land distributed. The undisputed evidence is that no minor was entitled to inherit and receive registration in respect of any land. In 1%7 one Folau was appointed the estate holder's representative of Tungi for the land in question.

Fau gave 8acres to his younger brother and gave the plaintiff the 8 acres in issue since there were no others to take up that 'Api.Fau, together with the town officer, Tauke Laume (now deceased) and the plaintiff when to Folau, the estateholder's representative, and told him of the gift to the plaintiff and made application for registration of the 'Api in the name of 'Inoke Fili moe 'Eiki Taufa, the plaintiff.

On that same day, the day of 'Inoke Taufa's application, Saia Lepa Kupu made application to Folau for five lots. The evidence of Folau is that the King directed that Saia Kupu be given one allotment only and that he make application to the Estate Holder Kalaniuva lu for any other allotments he may need.

In 1970 the plaintiff enquired of Folau of the progress of the registration of the 'Api in hisname. Aftera conversation with Folau the plaintiffleft believing that his application for the 'Api was "with the King."

Folau was succeeded by one Fielakepa as Estate Holder forTungi. Time passed and in 1992 the plaintiff enquired of Fielakepa of the progress of his application twice.

Having received no statisfactory answers to his enquiries the plaintiff then had the town officer, Takai Laume, present another application, this time directly to Tungi personally. The plaintiff accompanied Takai to Tungi. Tungi asked the plaintiff if he had made applications for the 'Api on previous occasions and the plaintiff said that he had. Tungi signed the application (Exhibit Pl) on 8 April 1992.

Exhibit Pl bears an endorsement in the form of a note which i s referred to by the Registrar of a Land, Siosifa Tupouto'a, in his evidence. The note (handwritten) says:-

> "With respect I say the estateholder fully consents to give this land to the applicants and I seek instructions for payment of the survey fee. Simaima Muimuiheata (Sgd) 23.7.'92."

The note does not make it clearjust who Simaima Muimuiheata is, but no point is taken by counsel as lo the admissibility of the document. Presumabl y she was a clerical officer of the second defendant at the material time. The document bears a further handwritten note that the plaintiff paid the survey fee on 27.7.'92. Again, there is no dispute over the authenticity and admissibility of that fact.

The Minister wrote to the Secretary of Land on 6 A ugust 1992 and directed the Secretary as follows (Exhibit PS):-

> "Re Deed of grant 'Inoke Moe 'Eiki in his estate please prepare and draw up a deed of grant for a tax 'api for theapplication 6 Block 74/98acres l rood of perches and the estate holder has granted it to the applicant. Survey fee paid 27.8.'92 there is also an application for the allotment Minister S. Ma'afu Tupou (Sgd)".

The Secretary gave evidence that he did notcarry out the instrnction becausehesaw a letter from the Palace Office signed by Sateki H. 'Ahio dated 8 December 1992 and addressed to Hon. Minister of Land (Exhibit P2) as follows:-

> "Dear Sir,
>
> I hereby respectfully advise regarding an order from the estate of the Hon. Tungi concerning a tax allotment in his estate at Fua'amotu.
>
> This allotment has involved two respective applications by 'Olioni Kupu and 'Inoke F. Taufa.
>
> Therefore, you are hereby directed not to permit anyone to register this allotment until work is properly carried out and permission is given from the estate representative.
>
> Signed Satek:i H. 'Ahio
> for the Estate RepresentativeofTungi."

The letter P.3 was sent in error. 'Olioni Kupu's application had nothing to do with the land subject of these proceedings. The intent of the writer appears to have been directed toward the application of the first defendant, 'Inoke Fotu Kupu, (Exhibit P7) which had not only been lodged on his behalf by Saia Lepa Kupu on 1August 1990 but which was to be granted on 5 February 1993.

By undated letter from one M.S. Tu'ipulotu the plaintiff became aware of the competing application for grant of the allotment made by the first defedant. The letter (Exhibit 03) purports to be on the instructions of 'Olioni Kupu, brother of the first defendant. 03 asserts that the 'Api is that of 'lnoke Fotu Kupu. It asserts that the 'Api in issue had been subdivided by the Estateholder to the children of Saia Kupu and requires the plaintiff to vacate the land.

Judging by the response given 03 by one Luki Veikoso in his letter to 'Olioni and 'Inoke dated 9 November 1993 (Exhibit 04), the exhibit D3 was written or sent or both on 3April 1993 i.e.just over three weeks following issue of the grant of ti tie to 'I noke Fotu Kupu.

On 8December 1992 the now Estate Holder's representative Fielakepa, reported by letter (Exhibit P2) to the Minister of Land. The plaintiff saw the letter and went to see Fielakepa.

Events from December 1992 moved quickly. On 5 February 199'3 the first defendant 'Inoke Fotu Kupu received a Deed of grant (P9) for the 'Api in issue. Saia Lepa Kupu had been given an allotment of land on his appli cation to Tungi in 1968.

In 1989, in light of a Government decision lo extend a runaway at Fua'amotu ai port, land was resumed from the estates of Tungi Tu'ipelehake and Kalaniuvalu. Included among theland resumed was anallotment allocated tothe fatherof the fi rst defendant Saia Lepa Kupu. Saia was allocated another Tax 'Api in substitution for the one resumed. Saia fathered six sons. Each had a tax allotment except 'lnoke his third son. A II theapplications for tax allotments were prepared by Saia and then taken to Tungi by Saia Kupu.

The first defendant claims right to the tax allotment in question by reason of his bei ng the son of Saia Kupu whoclaims toderive his ri ght to the 'A pi by reason of a promise by the Estate Holder to Saia Kupu that the land of Fa u was to be "kept in his Tungi's name until his children of whom the first defendant is one, became of age."

The first defendant further pleads in his defence:-

> "9. The Estateholder never authorised Folau to allocate or grant the land in question to the plaintiff. With regards to paragraph 19 of the statement of claim the plaintiff was awared (Sic) of the letter from the estateholder on 8th December 1992 not to register the land in question upon the plaintiff. He had

a reasonable time to move out and stop cultivation of the land as he had no legal right to the land.•

'Inoke Fotu Kupu is a medical practitioner. He resides in the United States of America. According to Saia, 'Inoke has been in the United States for about six years; it is unclear from the evidence whether he is a permanent resident of the U.S.A. Saia Kupu says that 'Inoke Fotu Kupu was not in Tonga at the time of the application for a grant of the allotment, that 'Inoke has not farmed the land. 'Jnoke was not called as a witness in these proceedings. 'Inoke's father, Saia made application to the Estate Holder for the grant in his son's name. Saia has farmed the land and it was Saia who pointed out to the King the allotment spught to be registered in the name of his son. Saia was an unsatisfactory witness. 'He as evasive and indirect. It was necessary for counsel to press him to answer questions properly.

The following exchange relects the reluctance of the witness Saia Kupu:-

"Q. (Mrs. Vaihu)	When you made application in 1990 did you know someone was farming (the land)?
A'. (Sai Kupu)	A man came to see me when I was there and said he's been farming. I said go and see the land Registrar.
Q.	So if any body was farming you wouldn't know?
A.	Yes.
Q.	So you went to make an application without knowing what was on it?
A.	I was instructed by the estate holder lo those lands vacated.

After further cross examination Saia Kupu conceded that he, Saia, had pointed out the allotment presently the subject of this dispute to the government officer who filled out the form for him and that Saia then took it to the Estate Holder who signed the application which led to a grant to 'Jnoke.

In a situation like the present - one where two contenders for title present for registration of the same allotment, t he applicants are be governed by S.50 of the Land Act. They must be judged according to their merits in an even - handed way. Neither must fall prey nor victim to the negligence of an administration or to the wiles of one who would obtain issue of title first by stealth. This is a case where one applicant has toiled for more than 25 years on the land, has been assured that the land is his and whose application has been approved by the Estate Holder although the approval became frozen.

Counsel for the first defendant characterises the plaintiff's claim as being based on four limbs -

Tungi was not called upon to resolve the competing applications which he granted.

'Inoke Kupu was and is not a resident of Fua'amotu.

The plaintiff has occupied the allotment since the late nineteen sixties, probably longer.

The plaintiff has extensively farmed the allotment.

Mr Niu for the first defendant submits that a registered title evidenced by deed of grant may be set aside only upon proof of:-

Fraud.

Ministerial error.

Ministerial lack of jurisdiction or

The exercise of Ministerial discretion on wrong principles.

The first defendant submits ihat no such proof exists on the evidence led by the plaintiff in the present case.

Mr Niu argues that since the jurisdiction of the Minister has not been questioned and since neither fraud or mistake are alleged by the plaintiff, the only ground left for the plaintiff to prove is that the Minister proceeded to decided the matter on wrong principle.

I am satisfied from the evidence that Fau and the plaintiff made application for the land in question to the Estate Holder after the allocations of 1968 and I so find.

There is, says the first defendant, no proof that Tungi had any knowledge before 1992 (when the plaintiff saw the King in person) that the plaintiff had been cultivating the land for so long. That proposition is true but what is the merit in it? Tungi approved and signed the application in spite of his not knowing of the industry and occupation of the plaintiff.

The first defendant asserts that the plaintiff was a squatter since Fau had neither power nor authority to pass legal title to the plaintiff. It seems to me that all Fau could do was to ask the King, or his representative, to register the allotment in the name of the plaintiff, which is precisely what Fau did and as a consequence of which the King granted the plaintiffs application.

The signing by Tungi of the plaintiffs application was of course thwarted by the discovery that a grant of the land had already been made to the absentee defendant Kupu in 1990 following the activities of Saia. The discovery was in a round-about way. There was an error. The Minister of Land confused the application of 'Olioni Kupu for registration of his (different) allotment with the fact of the grant of the allotment is dispute in this claim to 'Olioni's brother 'Inoke Fotu Kupu.

The evidence of the Registrar of Land, Siosifa Tupouto'a, reveals the confusion and error. After the note of approval was endorsed on Pl, and Minister instructed his staff to draw up the deed of grant for the allotment in the name of the plaintiff (PS), then the Registrar received the letter from the Palace Office, (P2) directing that no registration be done until further investigation was done as to the availability of the allotment, and the permission of the estate holder be given.

It is likely that the application of 'Olioni Kupu caused confusion somewhere in the Office of the Registrar of Land. In fact, 'Olioni Kupu's application (P8) was made in respect of an entirely different allotment to the one in the present claim. Pl appears to relate to "Lot 6 Block 7419 SA IR OOP", whereas P8 appears to relate to 'Lot 4 Block/ 74/94 SA JR OOP," although it is difficult to read the handwriting in Pl.

On close examination of Pl the figure "6" appears to have been written over the figure "4" in the box marked "Hingoa 'oe 'Api". Although there was some cross-examination of the registrar by counsel for the first defendant, the resulting evidence can only be at its highest mere speculation on the part of the witness. Therefore concerning that matter I make no finding and draw no conclusions about the significance of- an apparent alteration or correction lo part of the description of the allotment application Pl.

Albest the apparent correction or alteration provides some support for an inference of clerical error leading lo the discovery by the plaintiff and the officers or the Ministry of Land that on 5 February 1993 a grant of title was made lo the first defendant 'Inoke Fot

Kupu following his application of 1 August 1990.

Fine Taufa, wife of the plaintiff, and a patently honest witness in my opinion, visited the Palace Office and consulted Fielakepa about the allotment registration in 1993. She fixes the date since Fielakepa was succeeded by the Hon. 'Ahome'e later in the year. Fielakepa showed her the allotment on a plain with Fau's name on it.

The Plaintiff was in the U.S.A. and Fine went to the Minister of Lands in August 1993. At the Ministry she learned that the subject allotment land had •gone to Saia Kupu's children". An Officer: walked in to the Minister's Office while Fine was present and spoke with the Minister saying "Fielakepa has phoned saying the registration was 'Inoke Fotu Kupu's'. The Minister said to Fine, 'You had better go back to the King and whatever the King says goes." Fine Taufa did not go back to the King. Her evidence is that she thought that she would leave it to her husband. He returned to Tonga in about October of 1993.

The plaintiff has argued that there is ample evidence of a mistake by the Minister of Land by his holding two complete but unregistered applications for the same allotment.

The plaintiff through counsel submits that to have accepted an application from a second applicant and then to have failed to consult the holder in terms of the provisions of S34(2) of the Act (infra these reasons page 2,) is a patent error. The grant should be set aside and the Minister directed to register the allotment in the name of Inoke Fili moe 'Eiki Taufa and not in the name of an absentee holder whose residential intentions are unknown but who has not lived in Tonga since the registration was first effected in his name. The equity of the case is clear. I will not characterise the plaintiff as a 'Squatter' as the first defendant asks me to characterise him. The association of the plaintiff with the land goes back more than 25 years. He farmed it continueusly. He cared for it. He earned his living from it. His evidence to this court was the evidence of a patently honest man. He repeatedly sought registration of the land after it was promised to him by Fau. He repeatedly failed to achieve that registration through no fault of his own until the estate holder the King finally approved and signed his application on 8 April 1992.

The justice of this matter is that the plaintiff should have the allotment in my opinion. It is not a question of 'First come First Serve'. Equity and common fairness dictate that there should be a registration and a grant to the plaintiff of the allotment in question.

Accordingly it is ordered that:-

1. The grant of this allotment to 'Inoke Fotu Kupu be set aside.
2. The Minister of Land takes all necessary steps to give effect to a registration and a grant of title to the plaintiff 'Inoke Fili Moe 'Eiki Taufa the allotment more particularly described as the tax allotment situated at Fua'amotu Tongatapu being that land in plan 5864 lot 6 and containing 3.389 HA.
3. That the costs of these proceedings be those of the plaintiff to be taxed or agreed.

Po'uhila v Veikune

Supreme Court, Nuku'alofa
Lewis *J*
076/94

5 December 1995, 10 January 1996

Contract - breach - custom or contract
Land - promise - contract or custom

The plaintiff sued the defendant estate holder alleging a breach of an agreement, for consideration, to grant the plaintiff a tax allotment.

Held:

1. It is ill becoming an estate holder, and unwise of him, to make a request for moneys, from an applicant (of him) for land. Equity sets its face against such an approach.
2. There was never any settled agreement merely a direction by the defendant to the plaintiff to come back after year (s.87 Land Act) and if the application had not been made the subject of a claim by an heir with an equal or better claim than the plaintiff, the defendant would approve the plaintiff's application.
3. In the year a better claimant was approved.
4. There never was consideration for any agreement. The essential test was whether the relationship between the parties had crossed the border from custom to contract.
5. In addition there was no proof that the plaintiff was a legitimate Tongan male over the age of 16 years (s. 14 Land Act).
6. Claim was dismissed.

Case considered — Veleika v Dep. Min. of Lands (Martin CJ, 1991)

Statute considered — Land Act

Counsel for plaintiff — Mr Appleby
Counsel for defendant — Mr Paasi

Judgment

This action alleges breach of contract The plaintiff claims that the defendant, estateholder fol' the 'Api Tukuhau in question, situated at Longoteme, Tongatapu, promised the plaintiff a grant of the tax allotment

The holderof the 'Api, one Fatai 'Alu, was the uncle of the plaintiff . Fatai 'Atu died on 12 April 1990. The plaintiff, then a resident of New Zealand came to Tonga for the funeral. He arrived in Tonga on 13 April 1990.

When the plaintiff arrived the funeral was over. The plaintiff then sought to consurt the defendani Hon. Veikune to claim the 'Api. There was a meeting at the defendant's house. The plaintiff asked the_estateholder for the 'Api. The defendant told the plaintiff and- his brother Muhu to return to him the next day. They did so. The plaintiff brought a pig and kumara taro yams ad popua and gave it to the estateholiier Hon. Veikune. It was eustom to do so. Neither side disputes the custom.

Having taken the offerings of the plaintiffthe defendant then questioned the plaintiff (who was again accompanied by his brother), how he related to the 'Api. The plaintiff described his relation ship. He told the estateholder that Fatai, the holder died leaving no heirs. The plaintiff told Veikune that he believed that the 'api would revert to the estateholder. The plaintiff referred to a hand drawn family tree and identified himself as the second son of Malia daughter of 'Atu and sister of Fatai. The famil y tree is document 2 of exhibit Pl.

The plaintiff says that at the conclusion of the discussion about the relationship the estateholder, using the English language said word s to the effect that he promised tomake a grant of _the land to the plaintiff . He says that he was happy that the estateholder had promised him the land and gave the estateholder $500.00. Veikune said according the recollection of the plaintiff, - •go back to New Zealand and before the first anniversary (of the death of the holder) come back and I'll give you the land". The plaintiff says that the defendant called him by telephone in New Zealand from Tonga and told him that Soane, (cousin of the plaintiff) has offered him (Hon. Veikune) $6000.00 to grant him the land but the defendant refused telling Soane that he had already promised it.

The evidence of Muhu Po'uhila, brother of the plaintiff supports the account of the conversation given by the plaintiff. He added that Hon. Veikune said words to the effect that they had a 'Right to the allotment.•

Muhu says that the estatehplder told them that once one year had passed from the death of the_former holder Fatai, the plaintiff was to come to see him and he would grant him the allotment.

The defendant estateholderdiffers in his account of the conversation. Hon. Veikune says that heasked the plaintiff how he related to the land in question. The plaintiff replied that his mother was the sister of Fatai 'Atu. Veikune srud to the plaintiff the Land Act enables heirs to claim in 12 months and if no-one claims the land within the twelve months, then if Po'uhila came to him after the twelve months was up he would grant him the land in question.

There were other things which occurred between the claimant and the estateholder. During the telephone call concerning Soane's approach (admitted by the defendant), Veik une asked for money from the plaintiff . Hon. Veikune told the plaintiff that Veikune's brother Mapa urgently needed $500 torepay a loan. Veikuneasked the plaintiff for the money. A lthough no one says soexpressly, it isclear that thedefcmlant was asking for a gift of $500 from the plaintiff . Itis common ground that the plaintiff complied with the request and advanced the defendant the money. Whether such an approach is custom is unclear - the plaintiff has not proved that it is not custom. There is every reason to believe that it is ill becoming an estate holder and unwise of him to make such a request of one of- his applicants. Equity, which is to ht'. done in this court, (Veleika v Deputy Minister of Lands, 1991per Martin CJ) sets its face agrunst such an approach_ The Hon_ Veikune has, however, in his evidence made an offer to return the sum.

The plaintiff also claimed to have advanced the defendant a further $200. That claim, purports to be thesum which the plaintiff asserts amounts to "consideration" atlaw for the pleaded contractual relationship, namely $700.

When he eventually returned to Tonga on 5 April 1991 the plaintiff was told by the eslaleholder that the land had been granted to one Lemoto Fetu'u son o(the brother of Malia, the plaintifr s mother and his cousin.

The plaintiff saysthe estateholder told him - 'I would take Lemoto tocourt for I want to know who gave the land to him". When he checked at the land registry the plaintiff found that the application for the grant (exhibit Pl document No.6) had been signed by the estateholder, the defendant himself, whereupon the plaintiff says heconcluded Hon. Veikune was a 'Liar'.

Having seen the application the plaintiff returned to Hon. Veikune's house with his brother and spoke with the estateholder. There, says the plaintiff, the Hon. Veikune told him that he Veikune would take Lemoto to Court to retrieve the land and, as I understood the evidence of the plaintiff , so that it could be granted to the plaintiff.

Document 5 of Exhibit Pl, is a letter of claim. It purports to be rrom the plaintiff to Ure defendant. Itasserts some of the matters the plaintiff complained about in evidence. It is wri tten by the solicitor for the plaintiff . It departs from the evidence of the plaintiff in one important and significant way. No where does the plaintiff say that the $500 and the $200 which he gave the defendant were sums agreed as payment (i.e. consideration passing from the promisee to the prorriisor) for the exchange, or promise by the Hon_ Veikune to secure a grant of the 'Api for th epl aintiff (if the court were to rind that the exchanges were as the plai'ntiff has them).

On thecontrary, the plaintiff i n his evidence addsalmost as an afterthought "On that day I am happy that he promised togive that land and I gave him some money - $500" and then 'I think I gae him $200 before I gave him the second $500.

Muhu sayson that topic "Veikuneasked when (the plaintiff) was going back and (the plaintiff) said next Wednesday and he said come back on Tuesday. We came back w ith some food_ "

Veikune's evidence is that he did not promise the land to the plainti ff and had there been no other claimants he would liave granted the plaintifrs request On the matter of the request he made of the pla intiff for$500, thedefendant, I must say, I found tobe frank and direct. The defendant says that the plaintiff had always said that the defendant should call him if he needed assistance. The defendant puts the discussion of Mapa's debt in the month of the holder, Fatai A f u's death, adding that he had no recollection of a discussion of helping with the grant or land in that context. What the defendant did in his request for money from theapplicant plaintiff was unw ise. potentially compromisingancl unacceptable in a Noble of the Rea lm in charge of the estates of the Crown : but what i t does not do is, it does not drive me to the conclusion that the defendant i s a liar who cannot be believed_

I prefer and accept the account given by the defendant of the transactions between the part ies. I have concluded that the plaintiff is quite mistaken in his recall of the discussion in issue. What would possibl y cause the defendant to make reference to the plain tiff waiting for a year more or less, unless it was that he had in mi nd the provi sions of the Land Act relating to claims by heirs?

The plaintiff puts the promises which he says amounted to a binding agreement as occurri ng days after the death of the uncle of the plaintiff, the holder of the 'A pi. The defenda11t stipulates, even on the plaintiff's account of things, a delay one year before the grant. What did he have in mind if it was nol lhe provisions of the La nd Act.

The Land Act 1988as amended (Cap 132) provides:-

> "87. If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or hi s Deputy within 12 months from the death of the last holder, such allotment if situate on Crown Land shall revert to the Crown and if situated on an hereditary estate shall revert to the holder."

I conclude that there was never any settled agreement merely a direction by the defendant to the plaintiff to come back in a year and if the 'Api had not been made the subject of a claim by an heir (or impliedly one with an equal or belier claim than that of the plaintiff) then he would approve the application of the"plaintiff.

When he did return to Tonga the plaintifrs hopes were dashed because the estateholder had approved Lemoto son of Fetu'u,a better claimant than the plaintiff on the 19 March, 1991.

I have concluded that there never was consideration for any agreement in this case. This claim is based by the plaintiff on an entirely misconceived premise. As Martin CJ said in Veleika (Supra) at page 7 - "The essential lest ..... is whether the relationship between the parties has crossed the border from custom to contract'.

I agree with the learned Chief Justice. I would only add in this case that, such as the relationship may have been, it got nowhere near the border.

The plaintiff's claim is dismissed.

There is an added consideration. There is no proof that the plaintiff is a legitimate Tongan male over the age of 16 years. The plaintiff was never challenged on this score. However it is bold for a plaintiff to assume acceptance of any element of proof because the Land Act section 14 creates an offence for an alien, that is one who i s not a Tongan, to hold or reside upon Land. Unless there is proof of Tongan nationality any agreement found to exist vesting title in such a non Tongan must be of necessity void for illegality.

Palu v Minister of Lands & ors

Land Court, Nuku'alofa
Lewis *1*
L.1124/94

11, 12 & 15January 1996

Land - surrender - co11ditio11al - right of inchoate heir

A prcl imary issue arose as to whether the plaintiff had standing lo bring a claim, as eldest legitimate son of a still survivin g father who on succeeding to an 8 acre tax allotment in 1991 lodged a claim to and was registered as holder of one half only, and purported to surrender the balance to the children of his illegitimately-born niece. The balance was registered in that way. The plaintiff claimed that thesurrender was nawed in that it failed to comply with s.54 Land Act and that it attempted to impose conditions on a surrender. The plaintiff claimed an anticipatory ri ght to sue, based on s.170 Land Act

Held:

1. s.170 intended to limit claims under the Act, not create them. Ilmay only assist to demonstrate that rights which are in existence are not yet extinguished by statutory bar.
2. Itwas common ground that ss.51 and 54Land A ct had not been complied with, which meant the conveyi ng away of 4acres from the registered allotment was done unlawfully by the father (who was not a party lo this action) and the Minister.
3. The condi tional surrender was and is void ab initio. Bui that did not give the plaintiff any standing, although it did give the Minister a duty to put matters right .
4. No right of action accrues to an eldest legitimate Tongan son of a registered holder by reason of the unlawful activity of the holder. Were it so all potential but inchoate heirs would be entitled to claim notwithstanding that the day of their inheritance might never come .
5. The plaintiff here had no right of action and no right to seek a declaration as to the purported surrender .

Case considered — Motuliki v Namoa & ors [1990] Tonga LR 61

Statutes considered — Land Act

Counsel for Plaintiff — Mr Niu
Counsel for first defendant — Ms Weigall
Counsel for second to thirteen defendants — Mrs Vaihu

Judgment

The facts upon which the court is asked to make a preliminary ruling regarding the standing of the plaintiff are as follows.

The plaintiff is the eldest legitimate heir and successor of one Tevita Latu Palu in respect of a Tax Allotment al Koloua Tongatapu which is recorded in the Register of the Minister of Lands page 169 Folio 6. It was first registered in the name of Palavi Palu on 17 February 1917 being in area 8 acres 1 Rood 18 perches and known as "Konga Toafa". It was registered in the name of Tevita Latu Palu on the 18 November 1991 and the area in respect of which Tevita Latu Palu was registered was recorded and changed to "four acres exactly" by Ministerial endorsement on the register (Exhibit P4).

The father of the plaintiff, Tevita Latu Palu ("Tevita"), succeeded as holder of the allotment after the death of his sister-in-law Ma'ulu Palu and the extinguishing of her life interest in the allotment. Tevita filed an affidavit of heir and a claim to the allotment with the first defendant the Minister of Lands.

At the time of lodging his claim with the first defendant Tevita requested that one half of the Tax Allotment (4 acres) be given to or for the children of Manu Ma'u, the illegitimate daughter of one Tevita Tekitau Palu the deceased brother of Tevita. It is unclear just how the subject of the conveyance away of four acres from the allotment did arise. Tevita says that the Minister asked him to do it. Perhaps the Minister did. For present purposes it is of little consequence. In fact the Minister granted four acres to Tevita and the other four or thereabouts to Manu.

Tevita's evidence is – 'I gave it to her to show my natural love and affection – I expected no compensation – I consented in Manu's favour – I gave it for Manu not her children - I withdrew my consent when my son(lhe plaintiff) came and said that he would not consent."

Thereafter, a subdivision of the four acres given to Manu occurred. For present purposes it is sufficient to say that the plaintiff, the eldest legitimate son of Tevita, did not consent to any of the transactions associated with the reduction of the 'Api Tukuhau from 8 acres to 4 acres.

Counsel for the defendants each make the poin t that Tevita (not a defendant to these proceedings), was never a holder in possession of the Tax A llotment comprised of 8 acres. He was, al his own request only ever the holder of 4 acres. The rest he "surrendered" within the meaning of the Land Act (without the plaintiff's consent.)

Those being the material facts, I now tum to the submissions of counsel for the first defendant.

The first defendant submits that the plaintifrs case is premature since he has not and cannot have standing as a claimant to the 'Api pursuant to the prov isions of the Land Act. He can not qualify to file an affidavit of heir unless and until one of three statutory events occurs namely that the registered holder.-

dies
becomes insane or,
surrenders his interest in the allotment

and that if he cannot claim titl e by reason of the continued existence of a registered holder then he has no rights.in law, only the expectation that he may one day succeed the holder by virtue of the rules of devolution under the Act. And that if he has no rights under the Land Act then he has no right to sue; that is he has no standing.

Ms. Weigall adds that in this case that Tevita made a "purported" urrendcr only, since the requirements of the provisions of section 54 as of the Land A1.: Hnended by amendment 18 of 1991 section (2) were rot met.

Section 54 of the Land Act as amc ed provides as follows

"(l) Whenever the holde, of .1 Tax r r Town A llotmf t rlesi• -'- •t. surrender any such a!lotment or any part rl:ereof, it shall b< -1f11I 'r <i•ch holder with the conseulof the Cabinet " su1ren-l•"lv 11" ill01t ..e ltvrany part thereof as aforesaid, and any 11lotm.:11t nr pa1 t t i Pi ;o surrendered shall, subject to the provision of this act, immt:di 11d - • -" · e upon the person who would be the heir of the holder if sue:, hi •11 n-1d died; and if there be no person on whom the allotment or .in;p;;r1 theeof can so devolve the allotment or any part thereof if sit uate oo1 crown land shall revert to the crown and if situate on an hereditary estate ·hall revert to the holder thereof.

(2) Notice of Cabinet's consent to the surrender shall be published by the Minister in one issue of the Tonga Government Gazette and in three Issues of a Tongan weekly newspaper withi n two months of the date of the Notice.

(3) The notice shall be in the form specified in schedule 1V A and will require any person claiming to be the legal successor to the surrendered Land to lodge his claim in writing to the allotment or part thereof by the date specified in the notice which date shall not be less than twelve months from the date that the notice is first published in accordance with sub-section (2), failing which the said allotm. t or par: thereof wil I revert to the estate holder.•

The first defendant submits that because the surrender here, on any view of it. failed to comply with the provisions of the Acl it was further nawed in tha it was. an ttempt by the claimant to impose a condition that the surrender be for a specific objective 1.e. the grant by the Minister to the Ministerto the children of an illegitimate and sperifieu donee. The grant, says the Minister, is therefore void. . .

As to the submission that the plaintiff has no standmg, Mr Niu, of counsel for the plaintiff submits that the law is that if it can be shown that a surrender has occurred in law and fact with unlawful consequences - (here the conveying away of half of the estate to an illegitimate person ortoher children) tfte unlawful conveyance creates a aseofaction which cannot vest in any person save the plaintiff in this case and the plamllff becomes possessed thereby of an anticipatory right to sue. .

Mr Niu bases his submission upon the provisions of the Land Act Section 170 as amended the provisions of which are as follows:-

"170. No person shall bring in the court any action but within 10 years after the time at which the right to bring r.uch action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through wliom he claims then within Len years next after the lime at which t _ ri Jt to bring such action shall have first accrued to the person bringing the same."

1hJ ...arginal note to the section, "Limitation of Action", allo"'.s a clue to the intention of the legislature. There is in my opinion no doubt at all the Parliament mtended

that section 170 of the Land Act to limit claims under the Act, not to create them.

Section 170 with respect to the argument of Mr. Niu, cannot help the plaintiff establish that he has standin g. S.170 may only assist todemonshate to a court that rights which are in existence are not yet extin guished by statutory bar.

A case with facts similar to that of the present one was considered and determined by the Privy Council in Motuliki v Namoa, Moluliki and the Minister of Lands Privy Council Appeal 5/90 [1990]Tonga LR 61. In that case thefather of theappellant in 1965 and 1%6, surrendered his Town Allotment and it was allocated to 'Elisi Namoa by the Minister of Lands. The surrender did not secure the consents necessary under ss 51and 54of the Land Act (Cap.132).At thetimeof thesurrender the Applicant was about 5 years old. The Land Court dismissed the appellant's claim to the allotment.' The appeal of the appellant to the Privy Council was dismissed.

The Privy Council held that the appellant was not prevented from bri nging the proceedings insofar as the proceedi ngs were brought outside the apparent limitation period set by section 170of the Act but that the limitation period did not commence to run until the appellant attained his majority and was claiming, not through his father, but independently of him since his father had, by surrendering the allotments without the required consents, surrendered also his right to challenge the legality of the &urrenders. The Privy Council, (stressing that the reasoning used was only because of the parti cular circumstances'of Motuliki), reasoned that

> 'The legality of the surrenderby Viliami could have been challenged by the Minister or by Viliami, but it was Viliami, who voluntarily surrendered his riglt lo the allotment, although the surrender was unlawful. Itappears lo us that by sodoing he also surrendered his right lo challenge what he had himself done, to the detriment of his heir. In these special circumstances we consider that the appellant had an independent right of action which he could pursue.'

The issue of limitation is not relevant to the present proceedings, and Motuliki must be approached bearing in mind the caution of the Privy Council that there were special circumstances surrounding it. I ju dge that to mean that Moluliki ought not to be read as establishing general principle or precedent.

It is common ground that, here, Tevita failed lo comply with the provisions of sections51 or 54 of the Land Act. That meansthat theconveying away from the registered allotment of an area four acres was done unlawfully by the then holderTevita and by the first defendant in the sense that even if the first defendant did not actually request the surrender but merely did what was asked of him by Tevita,i.c. effect the surrender, then the Minister facilitated the process by making the registration in the manner deposed to.

Ms. Weigall submits that any purported surrend er must be void ab inilio; that Moluliki involved at least a procedurally correct surrender albeit one with no consent whereas there was not the least compliance here; that since the conveyance of the land is void ab initio then no cause of action may accrue lo him.

tvlrs. Vaihu submits that if any one isentitled loa claim it is. and can onl y be, Tevita himself but not the plaintiff whom her clients maintain has no standing.

By what process of reasoni ng can i t be asserted that any right of action will accrue to an eldest legitimate Tongan son of a registered holder by reason of the lawful activity of the Holder? I do not understand the Privy Council to be making any such assertion in Motuliki. Were it so it would mean that all potential but inchoate heirs would be entitled

to claim notwithstanding that the day of their inheritance may never come by reason of their .early death or supervening insanity.

The circumstanceof thepresent case differ from Motuliki. The Minister argues that what was done by way of conve.yance or surrender of 4 acres to Manu Ma'u was void ab initio since the application for surrender was made for a specific purpose thatls to say to transfer to the land to Manu for herself aad her children. The Land Act does not allow of such a transaction. In my opinion the cor.ditiona l surrender was and is void ab initio. That does not give the plaintiff any standing but it does give the Minister a duty to put matters right.

Therein lies the essential distinction between this case and Motuliki . There the infant plainti ff, by reason of theunlawful surrender by his father, had and preserved a right of action. Here, there is ground foran interested party seekinga declaration from thecourt of thenature of the pu!'J>Orted surrender, but theinterested party must have aright of action and the plaintiff in this case does not. Only Tevita (who has sought to wiU1draw his surrender) and the Minister are in any position to put the mailer right. I rule that the plainti ff does not have standing in this claim.

R v Kula

Supreme Court, Nuku'alofa
Hampton CJ
Cr 940/95

8, 9, 10, 11 & 15January 1996

(..., *:minal law - judge alone - evidence.*
Criminal law - rape - recent complaint - corroboration
Evidence - inferences - recent complaint - corroboration

The accused was indicted for rape, indecent assaut, detention with the intention of normally knowing the complainant, and common assault. He was tried by judge alone, and convicted on the first three courts, and acquitted on the assault charge.

Held:

1. (Obiter) Common assault is an offence punishable "on summary conviction' and doubt expressed as to whether s.5 of the Supreme Court Act ('all the powers of the Magistrates' Court') could give the Supreme Courtjurisdiction in summary criminal matters as argued.
2. On the court of indecent assault consent could not be a defence as the complainant was proved as being 14 years of age.
3. Inferences, if drawn, were drawn on the basis of them being reasonable and fair deductions which the court was satisfied logically followed from other facts found satisfactorily established. The court was not indulging in guesswork or speculation.
4. Evidence of recent complaint would not and could not be used as being in any way corroborative of the alleged occurrence or as evidence that the alleged occurrence happened or as to how it happened. The only relevnce of such evidence is that it may show that the complainant's conduct after the alleged events was consistent with her evidence about those events.
5. The ourt would also look to see, when considering the facts, if there is any evidence, independent of the complainant, which might support her account of events. Although not necessary as a matter of law, the court would be reluctant to act on the complainant's account if it were not supported in some ihdependent way. . .

[Note - an appeal against conviction and sentence was dismissed and is reported 111 this volume immediately following].

Statutes considered — Criminal Offences Act

Cousel for Crown — Mrs Taumoepeau
Counsel for accused — Mr Niu

Judgment

The Accused was indicted on 4 counts, all of those counts relating lo allegations arisingoutof, in effect, the same incident which occurred in theearly hours of the morning of Saturday 10 June 1995 at Hufangalupe Beach, near Vaini, Tongatapu. That incident involved just 2 parties, the then 14 year old school girl complainant and the then 31year old Accused. I add here, because it is of some relevance, that the Accused is a man of some experience, education and intelligencewho had held significant positions within the Civil Service of Tonga and who is married with a number of children.

The 4counts are in this order in the indictment; rape (sec. 118(1) Criminal Offences Act Cap.18) indecent assault, (sec. 124(1) & (2)), abduction (or rather a forcible detention), (sec.128) and common assault (sec. 112(b)); although chronologically the allegations should run as follows: the assault, the abduction (or detention), the indecent assault and the rape.

During the course of final submissions lraised with counsel one aspect of the common assault count and, as a result, the Crown elected not to see! caverdict on that count taking the (sensible) view that the assault allegation was factually a part of, and effectively subsurmed in, the abduction/detention charge. I did not then, but I do now, enter a formal verdict of not guilty on that count, if that is indeed necessary and appropriate in view of the reservation which lraised and which I set out below.

Sec. 112creates an offence of common assault which is punishable "on summary conviction•. How then can such a charge appear in an indictment, presented after a preliminary inquiry before a Magistrate? Historically, lam told, this has been done and often. That does not make it correct. The one possible way for this Court to have jurisdiction in such a summary matter, it was argued before me, was through the provisions of sec.5 of the Supreme Collfl Act (Cap.10) which provides that this Court "shall have power to.....exerciseall the powers of the Magistrate's Court .....". Ihave some doubtastowhetherthat provision couldorshould givethisCourtjurisdiction insummary criminal matters. However because of the stance taken by the Crown the matter was not fully argued before me and I do not purport to make any definitive ruling on it.

I can alsosay at thisjun cture that another of the counts, count 2 - the indecent assault - was effectively disposed of at the time of counsels' final submissions. That count was founded on subsects 1& 2 of sect. 124. Subsect. 1 creates an offence of indecent assault on a female; and subsect. 2 provides that a girl under 16years of age "cannot in law give any consent which would prevent an act be ingan indecent assault for the purposes of this section".

Thecomplainant's agewas proved as being 14, she being born on the 19September 1989. Mr. Niu, in closing, conceded that there was, and could be, nodefence to this charge in the circumstances here involving, factually, the Accused touching and licking the complainant's vaginal area. Both the complainant and the Accused agreed that this occurred. I propose entering a verdict of guilty on this count and then to say no more about it until 1 get to the narrative of the facts later in this judgment.

T)1at leaves the detention and the rape counts for detennination.

I say at the outset that I am well aware of both (i) the onus of proof being on the Crown throughout this trial (and unchanging despite the Accused giving evidencehimself and calling other witnesses) and (ii) the standard of proof required of the Crown on each count, and on every constituent element, or essential ingredient of each count, being an

unchanging beyond reasonable doubt. If that standard is not met by the Crown then the charge to which such failure relates must also fail. If I am left \Vith a reasonable doubt in relation to a count or a constituent element of a count then the Accused must be given the benefit of such doubt, and an acquittal must result. Whenever in thisjudgment I refer to a matter having been found proved that has been done by me on the basis of both the onus and the standard as just discussed.

In some instances I have been asked by the Crown, and indeed on behalf of the Accused, to draw inferences. If in this judgment I do draw an inference it is done on the basis of it being a reasonable and fair deduction which I am satisfied follows logically from other facts which I have found satisfactorily established before me. If I do draw an inference I am not indulging in guess work or speculation.

Amongst the evidence which I have heard from the Crown has been evidence which falls within the category of being evidenceof recent complaint, by the complainant. I will refer tosuch evidence in the narrative of events and may make comment on it. But I will not be using that type of complaint evidence as being in any way corroborative of the alleged occurrence or as being evidence that the alleged occurrence happened, or as to how it happened. The only relevanceof the complaint evidence, and this is how I wit1 treat it, is that it may show that the complainant's conduct after the alleged events was consistent with her evidence about the events.

I have also had placed in front of me evidence as to oral and written statetements by the Accused. Those are part of the materials for me to consider and I will comment on my view of the truthfulnes . accuracy and weight of those statements in due course.

In particular I will do soin relation to theevidence which I heard from the Accused. As I have said, by his giving evidence he does not undertake anything. I will discuss his evidence, my view of it and the effects (if any) of it when I come to the narrative.

Another general matter before I commence that narrative. Reference was made by Mr Niu to intoxication - not as a defence (i.e.a complete absence of intent,) in itself, but as to the effect which intoxication may have on a persons state of mind, and in particular here, whether the Accused had the necessary guilty intent at the time of these 2 alleged offences. The onus of proof of intent lies on the Crown. When I come to states of mind and intent I will take into account, as appropriate, the evidence which I have heard as to drinking and intoxication (on the part, I add, not only of the Accused but also the complainant and various other prosecution and defence witnesses).

I have given myself these general reminders before I go on to consider the facts, as I am sitting and deciding the facts in this case instead of a jury; and it is cautionary to remind myself of matters such as these, as a jury would be. I also will look to see, when giving consideration to the facts, ifthereis any evidence, independent of the complainant, which might support her account of events. Although not necessary as a matter of law, I would be reluctant to act on the complainant's account if it were not supported in some independent way.

I turn to the first of the 2counts i.e. the rapecharge. In this case the essential elements for proof by the Crown in the way the evidence has been presented, are that -

(i) the Accused carnally knew thecomplainant(-complete on proof of penetration)
(ii) against her will
(iii) the Accused knowing at thetime of the sexual intercourse that the complainant did not consent; or

(iv) the Accused being reckless at the time of the sexual intercourse as to whether the complainant consented to that intercourse or not.

As to that matter of consent or not, or recklessness as to consent or not, 1am aware of the provisions of subsect 4 of sect. 118which provides that on a rape trial if the jury (here, in fact myself, in lieu of thejury) has to consider whether an Accused believed the complainant was consenting tosexual intercourse, the presence or absence of reasonable grounds for such belief is a matter for which I am to have regard in conjunction with any other relevant matters in considering whether the Accused so believed. I will bear that matter in mind, and apply it as necessary, when I come to that relevant part of this judgment. 1add that the real issue on the rape charge is the matterof consent orotherwise and/or recklessness. The proof of lack of consent, (or recklessness) is with the Crown.

As to the second count for my consideration i.e. the detention charge, the essential elements for proof by the Crown are the following:-

(i) the Accused by force detaining a woman
(ii) with intent to carnally know her

The real issue on the detention charge is the question of intent. Again the proof lies on the Crown.

As to the facts. First a general remark or two. Undoubtedly both the complainant and the Accused acted foolishly on this night of 9 and lOJune 1995. Both, undoubtedly, were under the influence of liquor to some extent.

Between the accounts of the complainant and of the Accused as to the generality of events there is very little difference or conflict, except essentially as at the actual time of the acts of alleged detention, indecency and intercourse; and even as to the alleged detention there is very little difference in essence between the two accounts.

(fhe Court then considered the evidence in detail, made findings of fact and continued as follows):

I conclude therefore, and find proved that the Accused knew full well that what he had done had been done without the consent of the complainant i.e. that he had not only held her back, struggled with her, touched her, partially unclothed and licked her against her will but also that he had sexual intercourse (carnal knowledge) with her against her will. He was not only reek.less at the time of sexual intercourse (as he had been at earlier times of holding her back and indecent assault, and as I have already commented on) as to whether she consented or not (and I find that recklessness proved beyond reasonable doubt) but he also knew that she was not consenting (and I find that proved beyond reasonable doubt). I therefore find the charge of rape, count l, proved beyond reasonable doubt and enter a verdict of guilty to that count, accordingly.

Which then leaves thedetention count, count3. In view of the factual findings I have made along the way I find, beyond reasonable doubt, that the Accused did detain the complainant by using physical force. He admits as much. As to the question of intent I find, again relying on the factual findings I have already made, that such detention of her was for the purpose or with the intent of carnally knowing her. No other logical deduction can properly be drawn, in my view, from the facts which I have found proved. The Accused's explanation in evidence is neither credible nor consistent with all that had preceded the detention, the detention itself, or all that succeeded the detention. Beyond reasonable doubt, I find count 3 proved and enter a verdict of guilty accordingly.

Verdicts Count 1 guilty

Count 2 guilty
Count 3 guilty
Count 4 not guilty.

Kula v R

Court of Appeal
Burchett, Tompkins, Neaves JJ
App.2/96

23 & 27 May 1996

Appeal - criminal trial - incompetence of cow1sel
Criminal law ·incompetence of counsel

This is the appeal (against conviction and sentence of 5 years .. ,1ris0nrnent) from the mailer reported immediately above. The appeal against sentenc.: was •vithdrawn and dismissed. Against conviction complaint was made as to the 1nann<:r in which counsel al trial, conducted the trial.

Held:

1. Appellate courts will normall y :iw allegations of counsel incompetence sceptically. The Court of A Ucal has to be on guard against any tendency by accused persons, whoha ve been properly and deservedly convicted, lo put the result down, not to lie crime committed, but to the incompetence of counsel.
2. But rare cases do arise in which it becomes necessary to hold that, in the conduct of thedefence, there have been mistakes soradical that theground has been made out. It is not a question whether ornot counsel has been negligent. Mis calculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised.
3. A new trial will be ordered only if the court is satisfied that the incompetence of counsel (in the conduct of trial) has been so serious that there is a real likelihood that a miscarriage of justice has occurred. But cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional.
4. Where incompetence of counsel is relied upon it isessential that the appellant provide to the Crown a waiver of privilege. This will enable the Crown to interview the counsel against whom the allegations are made, and obtain and put before the appellate c0urt counsel's version of the events that have occurred. Only in this way can an appellate court judge whether the manner in which counsel conducted the defence has been explained, i f indeed au explanation was called for.
5. That course was not adopted in this case; nor did the appellant fi le an affidavit describing the instructions he gave his counsel.
6. The court was satisfied that there were no valid grounds for criticising the conduct of counsel attrial. Itfoilowed thatthere wasno basis on which it could

find that there had been a miscarriage of justice.

7. The appeal was dismissed.

Cases considered R v Pointon [1985] lNZLR 109
R v Clifton [1993] 2 All ER 998

Counsel for appellant Mr W. Edwards
Counsel for respondent Mrs Taumoepeau

Judgment

The appellant was charged with rape, indecent assault, detention with the intention of carally owing tecomplainant, and common assault. Hewas tried before Hampton CJ, s1ttmg without a JUry, on 8, 9, lO and 11January 1996. In the course of the trial, the Crownelected nottoseeka verdict ontheassault charge. Alsoduringthehearing, counsel then appearing for the appearing for theappellant acknowledged that there was nodefence to the indecent assault charge.

By verdicts delivered on 15January 1996 the appellant was found guilty of rape, indecent assault and detention. He was found not guilty of common assault.

. _on that day he was sentenced to 5 years imprisonment on the rape count, 2 years 1mpnsonment on the abduction count, and 1year imprison ment on the indecent assault count, all these sentences to be concurrent.

He appealed against his conviction on the rape and detention counts, and -against sentence. He has, through his present counsel, applied for leave to amend that notice of appeal as it relates to the appeal against conviction. That application is granted. Cow1sel for the Crown submitted that, in accordance with s 16(a) of the Court of Appeal Act (ap.9), this being an appeal where the grounds of appeal •nvolve questions of fact, or mixed questions of law and fact, any appeal must be with the leave of the court. Accordingly, the application is further amended to be an application for leave to appeal.

At the hearing in this court, counsel for the appellant withdrew the appeal against sentence. It is dismissed.

Facts as found by the Chief Justice

The events to which the charges relate occurred on the night of 9 and 10June 1995. The then 14year old complainant and her then 13year old friend, Mele Tu'ivai came to thecentre of Nuku'alofa on the evening of Friday 9June, in a van with a young man they knew. They were drinking alcohol. They visited a night club. The appellant, who was then aged 31, and 4and 5 others in two vans came in to Nuku'alofa that same evening. They too, had been consuming alcohol.

In the early hours of the morning of Saturday 10 June 1995, the two girls and the appellant met. Sometime later, the two girls entered the van beingdriven by theappellant. They werejoined by an old friend of the appellant, Faolui Taulanga. Taulanga said that he and the appellant were drunk. Further beer was drunk in the van by all four. The appellant drove the van toa beach. It becamestuck in the mud. Their attempt toextricate the van failed. Faolui Taulanga and Mele Tu'ivai left to see if they could find another vehicle to tow the van out. By that time dawn was breaking. As those two were leaving, the complainant went to join them. The Chief Justice found that the appellant forcibly restrained her. The Chief Justice accepted the complainant's evidence that the appellant asked her twice to get in the van. She refused. The appellant said he would force her, she tried fo break clear, a struggle ensued, she was screaming, hethreatened herwith violence, she broke away, slipped and fell, he fell on top of her. The complainant said, and the appellant accepied, that he removed her clothes, and licked her vagina. She said, and the Chief Justice found, that it was then that the appellant had sexual intercourse with her without her consent. The appellant in hisstatement to the police officer acknowledged that he "put my penis inside and we had intercourse ahd I ejaculated inside ...".

The appellant at all stages acknowledged that intercourse had taken place. The central issue at the trial,vas whether the Crown had proved beyond reasonable doubt that theappellant knew thecomplainant was not consenting tothat intercourse, orwas reckless whether she consented to it.

The Chief Justice held that the appellant knew that hehad held thecomplaiant back, struggled with her, partly unclothed and licked her against her will and that he had sexual intercourse with her also against her will. He found proved beyond reasonable do4bt that the appellant knew that she was not consenting. The charge of rape in count 1 was therefore proved.

He found also that the appellant had detained the complainant against her will for the purpose or with the intent of carnally knowing her. Count 3, the charge of detention, was also therefore proved.

The grounds of the appeal:

The grounds of appeal in the application for leave to apal are all based on the manner in which counsel for the appellant al the trial (who was not counsel for the appellant on the appeal) conducted the trial. Before we refer tothe specific aspects relied upon, we make two comments on this ground of appeal.

First, appellate courts will normally view allegations of counsel incompetence sceptically. This court has to be on guard against any tendency by accused persons, who have been properly and deservedly convicted, to put the result down, not to the crime committed, but to the incompetence of counsel: *R v Poi11to11 [1985]* 1NZLR 109, Cooke P.at 114. But rare cases doarise in which it becomes necessary tohold that, in theconduct of the defence, there have been mistakes so radical that the ground has t>een made out. It is not a question whether or not counsel has been negligent. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised ; R v Pointon (supra at 114). A new trial will be•ordered if, but only if, the court is satisfied that the incompetence of counsel, in the manner in which he or she conducted the trial, has been so serious that there is a real likelihood that a miscarriage of justice has occurred. But we emphasise that cases where the conduct of counsel can affort a basis for appeal must be regarded as wholly exceptional: R v Clifton [1993) 2 All ER 998, 1004. That will be all the more so where, as here, the accused was represented by counsel with a deserved reputation asan experienced and competent criminal counsel.

Secondly, where incompetence of cow1sel is relied upon as a ground for appealing, it is essential that the appellant provide to the Crown a waiver of privilege. This will enable the Crown to interview the counsel against whom the allegations are made, and obtain and put before theappellate court his or her version of theevents that haveoccurred. Only in this way can an appellate court judge whether the allegations made by th appellant areju stified, or whether the manner in which counsel conducted the defence has been explained, if indeed an explanation is called for. Thatcourse was not adopted in this

: -·'·· 1••t-'><:1 lh · r·filed an affidavit by U1e appellant describing U1e instrnctions he gave ' • J:i rc1m1sel.

'JJe now ·011sider the three respects in which Mr Edwar$is submitted that couO)>el at il.: trial hied adequately or proper Jy to represent tlle appellant

·'n> 1-f:1ru11l1l1ation **of the Police QlDcer**

M1 Fdwards submitted that counsel failed effectively to cross-examine tlle police officer • oneeming tlle written and signed statement made by the appellant to Police •.orpom.1 Lat\.\.

1(10 The Chief Justice said that t.he police officer was not challenged concerning thal interview the manner in which he conductedit, hi record of it, orany claimed divergence be1ween fue accused's answers as recorded nd the accused's evidnce at the trial. He concluded, for reasons he set out in detail, U1at m: could rely more on the record or interviw than on the·account of the events as given by the accused in evidence.

In his evidence tlle appellant claimed tllat the police officer had not accurately recorded his answers, and that because of a lack of sufficient food and sleep before the interview, he felt he was not quite thinking right at the time of the interview. Mr Edwards submitted that counsel at the tria l should have challenged the admissibility of the statement of these grounds. No suchchallenge was made. There are nosurftcient grounds 170 to support this submission. The claim by the appellant that answers were not accurately recorded had no prospect of success for two principa l reasons.

First, as the Chief Justice noted in his reasons for verdict, the appellant's signature appears at the end of every answer recorded in the statement The appellant made a material change to one of thoseanswers. He must have had the document in front or him for a sigllificant time to sign arter each answer. He is experienced and educated. This cautious approach adopted by the police officer has resulted in the appellant individually acknowledging by hissignature thecorrectnessofeach answerasrecorded. Unsurprisingly, the Chief Justice concluded that the appellant's claim that his answers were not accurately 180 recorded itselt reflected on the appellant's credibility.

Secondly, there is nothing before the court to show the nature of the appellant's instructions to his counsel before trial. As any experienced criminal counsel is only too well aware, it is by no mean s unusual for an accused to give evidence significantly at varian.;e to the account given to counsel before trial. Had there been evidence ihat the accused told his counsel, before the police officer gave his evidence, that the statement had not reconed his answers correctly in mater .l respects, and had counsel confirmed thal he had 'eceived these instructions, that may have provided some basis for the criticism. But ev.;11 'f H1at werr. so, counsel may well have taken the ju stified tactical 100 decision that a challenge to the accuracy of the answers, when the appellant had acknowledged the correctness of each answer by signing his name beside it, could only be cow1terproductive.

Mr Edwards raised another respect in which he submitted that counsel at the trial had failed adequately to cross-examine the police officer. The complainant and the appeUant each said in evidence that the appellant ejaculated after, not during, penetration. The doctor who examined the complainant following her complaint to the police, produced as his evidence in chief the report that he made at the time of his examination. This recorded tha t two vaginal swabs did not reveal the presence of spermatozoa. In the ?.00 record of interview in the passage we have cited above, the appellant is recorded as saying

that he "ɡ aculated inside". Mr Edwards submitted that thepolice officer should haveb•: 11 cross-examined on this apparent inconsistency with a view to demonstrating that tLe police officer must have recorded the appellant's answers inaccurately.

We do not accept his submission. Again, counsel was faced with the obvivus difficulty ihat the appellant had signed his na!Jle beside the answer. But apart from this, we do not know whether the instructions given to counsel accorded with the evidence he gave at trial, or with his statement as recorded.

There was a further difficulty that counsel would have faced had he attemµ1e<l to 210 challenge the accuracy of the answers in the written record of the interview. After tht: interview was completed, the appellant signed a further short statement, a part of which reads,

> "My statements toall thecharges against meare that in theanswers toyour questions and nothing else that I want to add to my answers and I am aware of its contents"

For the reason s we have expressed, we are satisfied that there arc no grounds for criticisingtheconduct of counsel in relation tothe cross-examinatiOn of the police officer.

Cross-Examinlation of Other Witnesses

Fatui Taulanga was one of the persons in the van when it became stuck in the mud near the beach. Hesaid in his evidence in chief that, when he and Mele Tu'ivai left to look 220 for a vehicle to tow the van out, the appellant and the complainant "were standing". Mr Edwards submitted that this witness should have been cross-examined on whether hesaw any pulling or pushing, to confirm the appellant's claim that there was no struggle. This submission is misconceived. The wi tness had given an answer favoura ble to the accused. To cross-examine on a favourable answer is to invite a qualification or alteration to that answer which could only be adverse to the accused. Fa r from criticising counsel, i t is our view that counsel demonstrated sound jttd gment in leaving that evidence alone.

Mr Edwards further submitted that this witness should have been cross-examined about whether the complainant had made any adverse comment about the appellant when 230 they were in the taxi before they reported the incident to the police. This submission is also misconceived. Any conversation between witnesses in the absence of the accused would be inadmissible hearsay. The onl y basis on w hich i t could be admitted would be if in some respect it could be shown that any statement she made then was inconsistent with what she had said in thewitness box, such an inconsistency going tocredibil ity. But there is no evidence that there was any such inconsistency.

Mr Edwards' submission that MrTaul anga should have been cross-examined about whether Mele Tu'ivai had complained to MrTaulanga about the appellant is a lsounsound . lf there had been any such complaint, it would clearly have been inadmissible hearsay.

240 Next, Mr Edwards criticised the cross-examination of Mele Tu'ivai. First, he pointed toan inconsistency between MissTu'ivai's evidence and the complain ant's, Miss Tu'ivai stating that the liquor they were drinking was mixed wi th fanta, where the complainant had said that it was mixed wi th coke. Quite a part from the trivia l nature or this discrepancy, the inconsistency was there. Further cross-examination on it was unnecesary, and may have lessened the inconsistency.

Miss Tu'ivai in herevidence said nothing about a struggle. On thecontrary, she said that when she saw the complainant the last time, the appellant was holding her hand. She said nothing about thecomplainant screaming or shouting. This evidence was favourable 250 to the accused. In this case also, any experienced counsel wou ld know that where

favourable evidence had been given, it could be dangerous loquestion the witness further about it, because of the real risk that the witnessmayqualifyoralter herevidence in a way that would make it less fa,ourable. In our view, counsel at the trial was correct lo lea\'c this evidence unchallenged.

The medical evidence

Mr Edwards submitted that counsel failed to have the evidence of the medical officer admitted. That is factually incorrect. The doctor gave evidence, during which he produced the report he had prepared at the time. As we have already pointed out, the evidence in the report was favourable to the appellant, to the extent that it was consistent with the absenceof ejaculation within the complainant. Mr Edwards' submission that the doctor should have been cross-examined on this evidence is unsound. As with the other instances, counsel was wise to leave this favourable evidence as it was.

Councluslon

We are satisfied that there are novalid grounds for criticising theconduct of counsel at the trial. It follows that there is no basis on which we can find that there has been a .miscarriage of ju stice.

The appellant was entitled to have his apppeal considered by this court. The application for leave to appeal is granted. The appeal is dismissed.

Kilifi & Kilifi v Heimuli, Minister of Lands & Kilifi

Land Court, Nuku'alofa
Hampton CJ
L.193/95 and 575/95

29, 30 & 31January 1996

Land - setting aside grant - mistake
Land - ladder of succession

Tax and town allotments had been registered in the name of the first respondent, on the basis of his claim to be the heir of the deceased holder.

Held:

1. The Minister acted on a mistaken basis namely that the first respondent was enti tl ed to claim as heir (as stated in the affidavit before him) when the law (s.82(b) and (d) Land Act) made it clear that that could not be so.
2. The Minister made an honest mistake and it may be that he was not given all relevant information. The court has long recognised that, in cases of mistake, there isjuri sdiction to rectify matters and, if necessary, set aside registration.
3. The registration of the first respondent should be cancelled and a direclion made that the matter be referred back to the Minister for him to consider (a) whethers there are any heirs, and if so which should succeed; and (b) if there are no heirs then to apply his discretion and make grants of the allotments.
4. (Obiter) Only a son or grandson of a deceased holder can succeed as heir to an allotment of the same kind as he already holds, if he soelects. No other person holding allotment (s) shall be permitted to succeed as heir to an allotment of the same kind as he already holds. Such a person cannot elecl
5. (Obiter) Ifa father already hold allotments, at the relevant time, which barred him from taking or succeeding to other allotments, his son likewise would not succeed. The son did not have any better or further claim to succeed to the allotments than this father.
6. (Obiter) discussion of the claim of succession in s.82(e) Land Act; and if there is no succession under s.82(e) and (f) then the land would revert, if Crown land, to the Crown and it would be for the Minister, in his wide discretion, having heard representations from all claimants, to decide to whom the allotments should go. Itwould be wrong for the court to try and substitute or impose it's views .

Cases considered Ma'afu v Minister of Lands (1959) 2 Tongan LR 119

Statutes considered Land Act s.82, s.84

Counsel for first plaintiff	Ms Tonga
Counsel for second plaintiff	Mr 'Etika
Counsel for first respondent	Mrs Vaihu
Counsel for second respondent	Ms Bloomfield

Judgment

I intend to give an oral judgment now, in relation to these matters because I have a clear view as to what should occur. I say at the outset that I intend making an order cancelling the registration of both allotments which havebeen placed inthe nameof Sione Mapumeihengalu Heimuli, and secondly I am going to direct that the matter be referred back to the Minister of Lands for him to consider two aspects: (1) in the light of what I am going to say whether there are any heirs and if so which of them should succeed; and (2) if there are no heirs then to apply his discretion, having been given all necessary information, and make grants of the town and tax allotments here.

As to the first aspect then. I will make an order at the outset, so I do not forget the fornal part later, that the registration of Mapu (as I will call Sione Mapumeihengalu Heimuli in thisjudgment) as holder of both allotments should be cancelled. The town allotment, (and I will not give the full description) is the land that is comprised in Book 125 folio 27 and is known as "Nalililili • and the tax allotment is in Book 8 folio 32 and is described as "Konga 'o Nualei".

I have reached a conclusion, which is very clear, namely that the Minister of Lands, when registering Mapu as the holder of both allotments, acted on a mistaken basis. The mistaken basis was that the Minister seemed to accept that Mele Vea Yake Uikilifi or as she is know 'Ani Heimuli and her son, i.e. her second son Mapu, were entitled to claim as heirs of the holder 'Olive (full name Siosiua Makafana Kilifi, commonly lmown as 'Olive Uikilifi).

On the evidence of the Registrar of Lands, and on the documents which have been produced, it would seem that the Minister acted on the affidavit of heir sworn by 'Ani, Exhibit P.12, and on the accompanying application by her which was contained withi n, Instruction Book 37 at page 138, Exhibit P.13. In particular the Registrar's evidence was clear about that; especially in his answers to the Land Court Assessor. It seems that the Minister did not act on theother application, an application for grant of allotment, which was put in evidence as Exhibit P. 18.

'Ani and through her, the second son Mapu, could not claim as heirs as a matter of law. That is clear having regard to the provisions of section 82 of the Land Act (Chapter 132) particularly paragraph (b) which provides that only persons born in wedlock may inherit ('Ani was not born in wedlock) and parargraph (d) which provides that only if there is no son or heir male of the body of a son surviving the deceased holder then any unmarried daughter of the holder shall inherit for life. There were no sons or heir male of the body of a son here but 'Ani was married. - In any event, (d) only allows for a life interest On the materials before me, and reviewing all the evidence, I have reached the conclusion that the Minister has made an honest mistake. Itmay be that hewas not given all relevant information.

This Court has long recognised that, in cases of mistake, there is juri sdiction to rectify matters and if necessary to set asideregistration. Itis on that basis that I have made the Order I have referred to.

The second of the Orders I make is to direct that the matter be referred back to the Minister of Lands for him to reconsider the whole position and in particular two matters.

The first is for him to consider all the information about this famil y and decide on that whether there is, within the mcan,ing of section 82, an heir of 'Olive who can take either or both the tax and town allotments.

On the evidence I have heard, 1have some clear views about the matter and I will express those views becau setheymay be helpful to the parties and the Minister, but I am not prepared to go so far as to make formal declarations ororders in relation to this aspect, given the arrival before this Court today of a fresh writ in relation to the same two pieces off and. That writ, under the No.I...82/%, may yet come to some sort of hearing before the Court and it is for that reason that I will not go further, as I have said.

As I have said I do have some views however, and the first of those views is that , on the evidence before me, there would seem to be no such heir. entitl ed under section 82, to take or succeed to those allotments. 'Olive, on the evidence before me, married twice but did not have any sonsof those marriages. From what I have heard it would seem that for the reasons already expressed in relation to section 82 paragraph (b) and (d), the one daughter of the first marriage, 'Ani, could not be an heir; and that the four daughters of the second relationship, it would seem, were born before the marriage and, from what I have heard, would probably be similarl y disqualified under section 82 (b) and (d).

If I am correct in that then the next para graph to be looked at in the ladder of succession, is paragraph (e). That paragraph relates to the brothers of a deceased holder and it is in this paragraph that the two actions before me at present are founded, that is the actions 575/95 and 193/95. There were three younger brothers of 'Olive, namel y Viliami, Mesui and Vaine. Only Vaine is still alive.

Viliami was the next eldest, after 'Olive. On the evidence before me i t seems clear that he, V iliami, had town and tax allotments in 1la'apai and that hi s son,the plaintiff i n 575/95 who I will call Le'ota in this jud gment, has succeeded to, and holds, those town and tax allotments.

That being so, Le'ota cannot take the town and ta;r; allotments in question here because of the provisions of section 84 of the Land A ct. That section provides that no person, other than a son or grandson of a deceased holder, holding town or taxallotments shall be permitted to succeed as heir to an allotment of the same kind as he already holds. It is clear that such a person is not able to elect between the allotments he already holds and ones which he might succeed to as heir.

The proviso to section 84 applying only to a son or grandson of a deceased holder, does not apply to such a person as a brother of a deceased holder, and does not appl y to Le'ota in these circumstances. I find that his claim under 575/95 cannot succeed and nor do I find any support for the argument made by Mr. 'Etika on his behalf in relation to the proviso to section 82. Itseems to me that submi ssion is quite misconceived and ignores the plain words of the section and indeed of what "holder' means in terms of section 2 of the Act. Vi liami died long before he would ever have been entitled even to beccnsidered at all as a possible successor to these allotments.

Furthermore and in any event, Le'ota 's father V iliami, as I have already said, did hold tax and town allotments which would made him (Viliami) ineligible under section 84 as well.

The other action before me, 193/95, is brought by Sifimeta Kilifi , the elder son of

Mesui. I accept the submission made on beha lf of the Crown, and indeed on behalf of Mapu as well, that Sifimeta's claim is governed by the position of his father, Mesui.

The submission is based on the judgm ent of this Court by Hunter J. in the case of V itikami Ma'afu v Minister of Lands (1959) 2 Tongan LR 119. There, in effect, it was held that, because a father already held allotments at the relevant fime, which barred him from taking or succeeding toother allotments, his son likewise could not succeed. The son did not have any better or further claim to succeed to the allotments than his father.

Here the evidence is clear that Mesui held town and tax allotments and indeed that was the family land. The fact is that those holdings, pursuant to section 84, would have prevented him taking and therefore his son, Sifimeta, is prevented as well.

In addition, there is this feature in relation to section 82(e) which has, I believe, som force. Paragaraph (e) reads that "an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body of such brother. If the deceased holder' s eldest brother be dead without leaving any male heir of his body then theholder's next eldest brother shall succeed" and soon. If.I apply that tothe situation here that would mean that the allotments here should descend to, in order, Viliami as the eldest brother but as he was deceased then to the eldest male heir of Viliami. That eldest male heir is Le'ota. As I read the clear words of this paragraph, the chain within paragraph (e) down toother brothers can only continue if that eldest brother, V il iami does not leave any male hei r of his body; then the succession would go on to the next brother. That of course would be Mesui in this case. But here the eldest brother, V iliami , did leave a male heir of his body. The scheme or the chain stops there. The fact that Viliami's son, Le'ota, is disqualified under section 84does not make a difference to the operation of paagraph (e).

Therefore, for that second reason, I am of view that Sifimeta, claiming through Mesui, cannot be an heirunder paragraph (e). Li kewise that affects thenext brothe r down, Vaine, although he has not been a party to the proceedings. He was a witness. but he did not seem toexpress any interest in taking theseallotments. and indeed he does have a town allotment of his own.

That being the case on paragraph (e) of section 82, I look then at paragraph (f). It seems to me, from the evidence I have heard, that there is no one survivi ng who could fall within the categories in paragraph (f).

Which brings me then to paragraph (g) which says in default of all that chain then the a llotment, if situated on Crown lands, shall revert to the Crown. And that of course has the same affect as section 83. In this case it seems to me that these two allotments indeed will revert to the CPJwn. I have expressed that conditionally because, as I said earlier, I leave the decision about heirs to the Minister, in view of the thi rd writ, L82/96 which has just come into this Court today.

But if I am right and if the Minister sees i t in the same way, then I move to the second part of what the Mi nister would have to consider. That is the question of who should be gran ted the tax allotment and/or th e town allotment in question. It docs not necessarily foll ow tha t, and it is for the Mi nister to decide w hether, both allotments should go to the one person. The Minister has, and no doubt will exercise, his wide discretion and certainly i t seems to me that he should see and hear representations from all of the three claimants I have heard in these two cases, and indeed the fourth clai mant in the pendi ng case 82196.

There may be others that he should sec and hear as well wi thin this family. Itwould be wrong!believe for thisCourt to try and substitute or impose its views, astowhoshould be granted either or both these allotments. It is properly a m atter. for the Minister *v1ith* all the information pu_t in front of him.

Those are the orders I propose making on both of these actions. On the 193195 action, I refuse the plaintifrs prayers (a) (b) and (d) which are the subGtantive pmyers by that plaintiff , apart from seeking the cancellation. In relation to the *575195* action I similarly decline to make the orders sought in the prayers (c) and (d) which aff the substantive applications there, seeking registration in that plaintifrs name.

In all the circumstances, and in relation to the facts to which I have referred, I make an order that each party should bear their own costs. I am not prepared to make any other orders in relation to costs other than that.

R v Fa'aoso

Supreme Court
Hampton CJ
CrNo.520/95

12 & 13 February, 1996

Criminal law - rape - complainant not give evide11ce
Criminal law - grievous harm
Criminal law - co11ession - suffi cient in itself
Evidence - crime - confession sujficiency.

The accused was charged with rape and grievous bodily harm. The complainant was not called as a witness.

Held:

1. An offence of causing harm is necessarily included in a charge of causing grievous harm.
2. A wound is an injury which severs the continuity of the whole skin.
3. A confession in itself may be sufficient evidence to justify a conviction. And indeed helto be sufficient even if retracted on oath by the accused and there is no other evidence at all of the commission of the offence.
4. A court may convict of any crime (including murder) on a confession alone provided that that is free and voluntary, direct and positive, and properly proved. Where effectively the only evidence is of something the accused has said, that something must be convincingly proved and it itself must be cogent and satisfactory evidence. This is a stringent tesl A judge should consider the reliability of the confession anxiously before deciding whether such a case should go to a jury.
5. The statements of the accused here in interview and subsequently, had been satisfactorily proved, convincingly proved, and were cogent and satisfactory evidence. The confession could be relied on and had real proba tive value and worth and weighl And therewere indications from otherevidence, outside of the confession, which supported it.
6. The rape charge was found proved; but the bodily ham1 charge (whether reduced from grievous harm or not) was not proved as to the element of wilfully and without lawful justifica tion causing the harm.

[Note: An appeal was taken against conviction and sentence; and the report of that appeal follows immedidately)

Statutes considered : Criminal Offences Act

Counsel for prosecution Ms Weigall
Counsel for defence Mr Tonga

Judgment

The accused here faced an indictment containing two counts, one of rape and one of grievousbodily harm. At the commencement of the trial the indictment was amended by consent correcting the spelling of the accused's name.

The count of rape is an allegation that contrary to section 118 of the Criminal Offences Act he did on or about the 29th of November, rape (named). The Crown rely on the following sub-sections of section 118 namely l(a) and/or l(b) and I will give consideration as well to sub-sections 3 and 4.

I will read thoseprovisions soit isevident U1at the essential ingredients of the charge of rape are before me and in my mind.

Sub-section 1 provides: Any person committing rape that is to say any person who carnally knows any female (a) against her will or (b) being aware that she is in a state of insensibility (whether due to sleep, intoxication or any other cause) shall be liable to penalty.

Sub-section 3 provides: for the purposes of sub-section 1 a man commits rape if at tile time of sexual intercourse with the woman, he knows that she docs not consent to the intercourse, or he is reckless as to whether she consents to it

Sub-section 4 provides: that at a trial for a rape offence, if the jury (and I substitute myself here because the accused has elected trial by judge alone), if the judge hs to consider whether a man believ<;_d that the woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter for which the judge is to have regard in conjunction with any other relevant mallers in considering whether he so believes.

Perhaps while I have that part of the Act in front of me, I go on lo refer lo section 119. and in the circumstances here under sub-section 1 I make the following order:

> "It is an order directing that the identity of the complainant shall not be published in the Kingdom in a written publica tion available to the public or be broadcast in the Kingdom."

The second count is an allegation of grievous bodily hann founded on section 106 of the Act and alleging that the accused on about 29th Novembe r '94 caused the complainant grievous bodily harm. Section 106 sub-section I creates an offence of a person who wilfull y and without lawful justification causes grievous ham1 to any person in any manner or by any means what 3o<:ver, and grievous harm is defined in sub-section 2.

1 refer at this stage also to section 107 which is in identical terms to 106 except it refers to causing ham1 rather than grievous hann. Harm is likewise defined in sub-section 2 of that ection. I refer to section 1(1'7 because I take the view that that offence is necessary included in an alleged offence under section 106, having regard to tile provision of section 42 sub-section 3 of the Criminal Offences A ct.

As this is a judge alone trial I remind myself of several fundamental matters. The most important of which is. of course, lhe fact the onus of proof lies on the Crown at all

times and it is to the standard of proof beyond reasonable doubt in relation to the charges and every constituent element of the charges. There is no obli°gation on the accused to proved anything, nor is there any obligation of any sort for him to call evidence or give evidence himself. Here he chose not to give evidence but there is no significance in relation to that. The onus and the standard are unchanging and rest on the Crown throughout. Iremind myself that I mustjudge the matter only on the evidence which I have heard in this Court; if the Crown chooses not to call all its potential witnesses then so be it. On the basis of the onus and standard I have already mentioned, they stand or fall on the evidence which they choose to call before me.

Here, as Ihave already said, the accused has not given evidence, but Ihave before me as part of the prosecution's case, the notes of interview of the accused conducted by the police. And on two separate days the accused replied to two separate sets of charges that were put tohim; together with theaccused's conduct the day after the interview when hewent tothe sceneof theallegedcrimewith the police officerin chargeand otherofficers including a photographer.

Iwill come back tothose matters of interview, of reply and of pointing out of scene in due course. They are matters that form part of the evidence and the weight that Iput on them, the reliance that Iam able or not toput on them, is a matter which must be looked at and ju dged in the light of all the surroundin g circumstances. Sitting in ajud ge alone trial the probative valueultimately is a matter for me; whether I believe all or part of those interviews and replies as being true or not.

I have gone into those matters in some detail because the interviews are of importance here, the Crown relying on them as showing alleged confessions by the accused to the crime charged. Those matters take on special significance in a case such as the present one where the Crown has chosen not to call the complainant to give evidence. From what I was told at the Bar she is out of the Country.

That is unusual but not unique; unfortunately it is not unheard of for trials to take place, forexamplein murder and rapecases, whereobviously nocomplainant isavailable. So it comes back to the bas ic matter of what evidence has been called in front of me, the weight I can put on that evidence and whether that evidence is sufficient to satisfy the reqquirement of proof, as I have already explained it, that is on the Crown at all times. I have listened carefully to the submissions of Mr. Tonga for the accused and have considered them with care.

I have heard evidence from 7 prosecution witnesses. Those witnesses included the following (thejudge then reviewed the evidence, and then went on).

Grievous harm, as I have said is defined in s.106 sub-section 2. The Crown has chosen to rely on paragraph (c) of sub-section 2, 'any severe wound", and point to that severe wound being the broken jaw . I take the view that wound bears the meanin g that it has borne for many a year in this ju risdiction, and in the common law juri sdictions generally, namely an injury that carries with it the severanceof thecontinuity of thewhole skin. There certainly was such for the lips, the laceration of the lips, that has been described by a number of witnesses; but there iscertainly noevidence to indicate that that was a severe wound. That broken jaw, on the evidence before me, cannot fall within the definition of 'any severe wound". It may be that the Crown is in difficulty on this ingredient and cannot prove it in my view in any event because they have not called the doctor whocould possibly give the appropriate evidence.

Itseems tomehowever that the Crown's evidence can establish, nota grievousharm but, harm within section 107(2) as it is there defined, and I will return to that aspect when 1cometoconsider count 2. (Thejudge then went back toa consideration of theevidence).

So, it seemstomethat, this interview and the recordof the interview isunchallenged. Indeed Mr. Tonga in submissions, in answer to me, said he did not dispute any of it. It has long been established in the United Kingdom, and followed in Australia and in New Zealand, that a confession in itself may be sufficient evidence tojus tify conviction. And indeed held to be sufficient even if that confession is retracted by the accused on oath (which has not happened here) and there is noother evidence at all of the commission of the offence. For some timejuri es in thosejurisd ictions I have mentioned,have been told that they may convict of any crime (including the most serious of all, murder) on a confessionalone provided that that is free and voluntary, direct and positive, and properly proved.

Jn referringtothesematters of law I am referring tothe authorities in, and taking the propositions from, a New Zealand text, Adams on Criminal Law, Volume 2, pages 2.22 and 2.23. And I remind myself of the stringent test that Courts are enjoined to apply in such a situation which is namely this:

> That where effectively, "the only evidence Is ofsomething the accused hassaid, that something must be conviclngly proved and In Itself must be cogent and satisfactory evidence."

Injud ge and jury cases, judges are told that they should consider the reliability of the confession anxiously before deciding whether the case should go to thejury. I bear those cautionary words in mind but I go on to say, (i) given what I have heard; (ii) given the lack of challenge; (iii) given the care with which the questions and answers were recorded and signed; (iv) togetherwith features such as a lack of cross-examination in the type of questions that were put in the interview; (v) plus the statements in reply to the charges on two distinctly separate days over a month apart; (vi) plus the directions and pointing out by the accused on a separate day when the photographs were taken; that all of those matters, and all the other matters which I have already mentioned in relation to the interview, lead me to the conclusion that the statements of the accused in interview and subsequently have indeed being satisfactorily, convincingly proved, and are "cogent and satisfactory evidence". The burden and standard of proof are clearly in my mind at all times but especially here, when the prosecution must of necessity rely on the confession to prove the crime of rape in particular.

So, I have approached the interview and its reliability or otherwise very anx.iouly and very cautiously. If this were ajury case then I have no doubt in my mind, given the circumstances outlined and the evidence, that I would let the case go to theju ry. And I go on to say, as I will find, that the confession in my view can be relied on; it has real probative value and worth and weight. And there are indications from other evidence, outside of the confession, which support it.

The clearest possible admissionsof sexual intercourse in my view are contained in those answers, and of full sexual intercourse with penetration of the vagina of the complainant by the accused's penis. That sexual intercourse without her consent. she possibly being unconscious with no question of the accused believing that she was consenting, let aloneany possiblequestion of reasonablebelief, in thecircumstances, that shemight be consenting. It is ridiculous to suggest such a possibility given thedescription

the accused himself gave to the police officers.

Ridiculous also to suggest given for example, his actions thereafter. As soon as he realised that she might be regaining consciousness and that she might recognise him, he tried to knock her out so she could not identify him.

I find I can rely on the record of interview, the questions and answers.

I find it to be a true account and a confession in all senses of the word. It has very considerable probative value and worth indeed. Answer 39, I find puts any question or consent, or rather lack of consent or alternatively a belief in consent, beyond any doubt at all: There was no consent, there was no belief in consent and I find the charge, count 1, proved beyond reasonable doubt.

It seems to me in the circumstances as described in the confession that either or both paragraphs (a) and (b) of sub-section 1 of 118 applied. That is, it was against her will or she was in a state of insensibility, and that the accused, I find proved, knew that that was the position.

I find all the elements of rape as contained within section 118 made out beyond reasonable doubt and that notwithstanding the cautions which I gave myself earlier on in this judgment.

Perhaps I can add to that, the fact that when the accused was charged with rape and assault on the 6th of December, the accused's reply is not insignificant. The two charges, but especially the rape were put to him in full and his reply was 'yes, I committed the crime". And, as I have already said, in addition, the next day he pointed out the area where this event had taken place.

I turn to the second count, that is the count of grievous bodily harm. I do not find that as clear cut and nor do I find it as clear cut even if I were to amend it to the lesser charge, which is included, that is the bodily harm charge. It is clear that the complainant suffered a broken jaw and other injuries and I can infer from all the evidence I heard (and it would be a rational and proper conclusion, sufficient to allow proof beyond reasonable doubt) that those injuries occurred at some stage during this evening, after the complainant left her cousin and before she went to the neighbouring place where she awakened the other young woman.

Leaving aside then the issue of whether this was grievous bodily harm or just bodily harm, I tum to the real issue that is inherent in both the two charges under ss.106 and 107, namely proof of wilfully and without lawful justification causing the harm. I have already read out the significant question and answer from the interview No.14, where the accused described riding his cycle straight in to the containers and the girl's side of her forehead hitting the container.

On that account, and that is the only account because the Crown is forced to rely on the confession, can it be said to be proved that the accused wilfully and without lawful justification caused the harm? That is intentionally, riding into the container with the intent that the complainant would thereby be injured. I could not find, whether under ss.106 or 107, that element proved beyond reasonable doubt based on that question and answer in that interview. The Crown as I understand it however rely, over and above that question and answer; on what was said by the accused on the 5th of January 1995 when he was charged with charges under 106 and 107. There, as I understand it, he said this in answer "yes, I did hit her. The seriousness of that will be finalised in the doctor's opinion after exaining the girl. I think this happened while we were still on the bike and I pushed

the girl's head with my hand against the container on the right. I did not mean for it, to be this serious, this was before we had sex." I stress the words, "I think this happened" which are used in that answer. In my view that answer does not do away with the doubt which I have already expressed in relation to this charge. I cannot, on the evidence, find proved an intentional causing of harm and I have doubts in relation to whether the harm that has been proved could have been caused in the collision of that bike with the container, rather than a blow from the accused to the complainant.

I accept that it seems he deliberately rode into the container really to make her fall off, so that he could then try to have his way with her. But I do not, and cannot, find it proved that he did that deliberately to knock her out and injure her, as it were, so that he could then have sex with her.

So whether I deal with the matter under ss.106 or 107 I have reached the same conclusion that the Crown cannot prove either of those charges, one necessarily contained within the other, beyond reasonable doubt. Nor do I find it appropriate that I should contemplate amending to a simple common assault. I have reservations in any event, as I have previously expressed, whether a charge of common assault, being a summary offence, is applicable or appropriate in this Court.

The accused's statement leaves me in a state of some equivocality. He must be given the benefit of the doubt. That count will be dismissed; he will be found not guilty of it. There is, of course, quite clearly a subsequent assault, that is after the rape when he tried to knock her out again, but that is not and never has been (in this Court) the subject of a count.

Fa'aoso v R

Court of Appeal
Burchett, Tompkins & Neaves JJ
A pp.8/%

28 & 31 May 1996

Criminal law - confession sufficielll
Criminal law - se11tence - rape
Evidence - criminal law - confession - sufficiency
Sentencing - rape - fa ctors - tariff

The facts are reported in the case immediately above. On appea l against conviction and sentence.

Held:

L A ll the evidence relati ng to the event was not hearsay, as submitted.

2. There is no requirement that a confession must be corrobora ted. A confession alone can be sufficient to ju stify a conviction, where the judge or jury is satisfied that the confession is reliable and cogent evidence.

3. The appeal against conviction was dismissed.

4. In sentencing ajudg emust have regard to such factors as the seriousness of the crime, the maximum sentence prescribed, the need to deter others, sentences imposed inothersimilarcasestoachieveconsistency, any sentencingguidelines given by an appellate court, the desirability of encouraging rehabilitation, the need to show society's rejection of the conduct, and any aggravating features such as theaccused's previous criminal history, the effect on a victim, the age of the victim, the degree of any violence, and the use of a weapon. Mitigating factors may include the age of the accused, an early plea of guil ty, genuine expressionsof remorse, any relevant medical, psychological orother condition, the accused's standing in the community and his family and personal circumstances. There wi ll often be other factors to be taken into account in aggravation or mitigation.

5. The appropriate starting point for a rape sentence in Tonga should be five years.

6. Clearly the5yearstartingpointshould beincreased herebecause of aggravating factors, particularly the violence. But when regard was had to the mitigating factors the sentence of 8years was excessive and reduced to6 112years.

Cases con sidered R v Clark [1987] 1 NZLR 380
R *v* A (CA *51319'3)* [1994] 2 NZLR 129

Counsel for ppellant Mr Veikoso
Counsel for respondent Ms Weigall

Judgment

The appellant wascharged with rape, andcausing grievous bodily harm. Following a trial on 12 and 13 February 19% before the Chief Justice sitting without ajury, he was convicted on.the charge o rape and acquitted on the charge of causing grievous bodily harm. He was sentenced to a‡errn of imprisonment of eight years. He ha sappealed against the conviction on the rape charge, and the sentence.

The facts as found by the trial

on' 29 November 1994 the complainant went to the Elite Night Club with her cousin, Lisa Leger. The appellant was a security officer at that night club. Itappears - the complainant did not give evidenceas she had departed the Kingdom after these events but before trial - that the complainant and Lisa Leger left together, arriving at Lisa Lege(s home at about 2 am. Shortly after, the complainant left to see her boyfriend, apparently on foot

Fron1 the statement of the appellant, he picked her up on his bicycle. The complainant asked him to take'her to the boyfriend's place. When they were on the bike on aroad in Ngele'ia, the appellantdecided that he was •going todosomething tothe girl". sohesteered the bike into a container beside the road. Shefell, losing consciousness. The appellantdismounted, and after forcibly removing some of her clothing, he raped her. As sherecovered consciousness, hepunched her in an attempt tomake her loseconsciousness, then made off on his bicycle.

The complainant went to a nearby house. The occupant was woken between 4 am and 5 am by the complainant She was crying; her face was swollen, she was barely able to speak, she had lacetions to her lips and a black eye, and she had clothing only on the top part of her body. She returned to her cousin's place at about 8am, whodescribed her condition in similar terrns. They went to the police. Later shewas examined by adentist, who described her injuries. He found s e had a fracture of the mandible.

This and the other injuries were consistent with falling down, or with being hit on the mouth with a hard object

The appellant was interviewed by the police. He made a full statement that amounted toa confession of the crime of rape. He described how he met up with her, how she asked him.to take herto theplace of her boyfriend, how he 'thought of doing it toher', how heremoved her clothes and had sexual intercourse with her, how she started toregain consciousness, and how he punched her to make her lose consciousness so he could get away. The appellant signed his initials besideeach answer as well assigning thestatement at the end. No challenge was made to the admissibility of the statement.

The appellant did not give evidence. The trial judge found that he could rely on the answers in the statement, and that that evidence, together wi th the evidence from other witnesses, proved the charge of rape beyond reasonable doubt.

The appeal against conviction

Mr Veikoso based the appeal against conviction on a submission that the conviction could not stand becausethecomplainant had not given evidence. As heput it, "[her] voice was not heard in court". She was not available for cross-exam ination. The Cr9wn, he submitted, had a duty to apply, pursuant to s44 of the Magistrates' Courts Act (Cap 11)

to have her evidence taken before a magistrate, before she left the country.

The result, h submitted, was, for reasons we are still not able to understan_d, that all the evidence relating to the event was hearsay. This is otiviously wrong. He also submitted that, in the absence of the complainant, the appellant was not bound by his statement"because there was no evidence to corroborate it. This submission also is obviously wrong. There is no requirement that a confession must be corroborated. A confession alone can be sufficient to justify a conviction, where the judge or thejury is satisfied that the confession is reliable and cogent evidence. In this case, the correctness of theconfession was unchallenged . The appellant, as we have said, did not giveevidence. Counsel for the accused at the trial told the trial jl!dge that he did not dispute any of it. Further, what the appellant said.in the statement is consistent with the evidence of Lisa Leger and of the person to whose house the complainant went immediately afterwards. The appellant himself provided some corroboration when he took police officers to the scene to point out where the events had occurred.

No grounds forchallenging the conviction have been made out. The appeal against conviction is dismissed.

The appeal against sentence

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

Itcan be helpful in assessing the length of a sentence to adopt an appropriate starting point, then adjust the sentence up or down to allow for aggrava ting or mitigating circumstances. For rape, the maximum sentence is fifteen years. That is to be imposed for only the very "worst case imaginable. In our view, the appropriate starting point for a rape sentence in Tonga should be five years. This accords with that adopted in New Zealand, when the maximum sentence was fourteen years; *R v Clark* [1987] 1NZLR380. In that case, the Court of Appeal adopted that starting point after a review of guideline cases in New Zealand and in England. When in New Zealand the maximum penalty for rape was increased to twenty years, the Court of Appeal there adjusted the starting point to eight years, to reflect the sentencing policy indicated by the legislative change: *R v A* (CA513/93) 2 NZLR 129. In Tonga, when the Legislative Assembly increased the maximum sentences for some categories of sexual offending, it made no change to the maximum sentence for rape.

In this case, we do not have the advantage of the comments made by the trial judge when imposing sentence. But the aggravating and mitigating factors are clear.

The principal aggravating factor was the violence innicted 011 the complainant by the appellant, in addition to the violence inherent in the act of rape itself. This violence was substantial, resulting in her suffering a fractured jaw, as well as other less serious injuries. The complainant was a virtual stranger, he knew her only by sight. The decision to drive her into the container with the intention of raping her, was deliberate. There is no victim impact report. But we assume that the rape had the serious effect on the vitim that is usual in a case of rape.

There are several mitigating factors. The appellant made a full confession to the police shortly afterwards, andco-operated tothe extent of taking them tothe scene toshow them where the offence had occurred . Why, after making thi s confession and co-operating in this way, he pleaded not guilty, and appealed against the conviction, remains a mystery. It may have been due to erroneous advice by counsel. But at least his confession saved the Crown the cost of bri nging the complainant back to Tonga, and the complainant the agony of reliving her experience in the witness box.

On the advice of the probation officer, a report was obtained from Dr Puloka, the medical officer in charge of the psychiatric _unit al the Vaiola Hospital. "For reasons he details in the report, he concludes that the appellant suffers from the recognised psychiatric conditions known as anit-social personality disorder and very mild post-traumatic demetia, the latter probably due to head trauma resulting from his past activ ities as an amateur boxer. These conditions have a number of symptoms. The fantasies associated with them are not particularly relevant. But they do result in a characteristic that has been recognised in the appellant by others, namely frequent episodes of explosive. uncontrolled. short-lived outbursts. These are instances of loss of impulse control. He is aware of what is happening but cannot control himself, and usually experiences regret afterwards.

These psychiatric conditions do not excuse his conduct in raping the complainant. But they can be taken into account when considering the level of his culpability.

He has no recent relevant previous convictions. Eleven years ago, in 1985, he was convicted of two charges of causing grievous bodily hann, but these could not have been seriqus, as he was fined $50, and ordered to pa¥ $100 compensation. I n that same year, he was convicted of housebreaking, theft and common assault. These offences are consistent with his psychiatric conditions. He has no consistent with hi s psychiatric conditions. He has no convictions for sexual offences.

The appellant js aged 31, married with five dependant children , and a dependant mother-i n-law who suffers from senile dementia . The probation officer observes that overuse of alcohol has contributed to aggressive behaviour. His wife has confirmed that he has ceased drinking beer since April 1995.

We have weighed up these considerations. Clearly, the five year starting point should be increased because of tht: aggravating factors, particularly the violence. But we have concluded that, when regard is had to the mitigating factors to which we have referred , a sentence of eight years is excessive. A n appropriate sentence i s six and a half years imprisonment.

The appeal against sentence is allowed. The sentence i mposed in the Supreme Court is quashed. In i Is place, he issentenced to imprisonment for a term of six and a half years.

We make a firm recommenda '.ion to the prison authorities. Dr Puloka has said in his report that the appellant needs time in the hospital psych iatric uni t for psychotherapy in the form of insight oriented therapy while he is in custody. 11is essential that the prison

authorities implement this recommendation, not only in the interest of the appellant, but also in the interests of the community. This treatment may well lessen the risk of re-offen<ling after his release.

Seluini v Faletau & Trident Heavy Engineering

Supreme Court, Nuku'alofa
Hampton CJ
C.1020/95

19 & 20 February 1996

Co11tract - u11certai11ty - e11forceable or not
Dejamatio11 - statements - i11 Court - privilege
/11ju11ctio11 - misleadi11g court - discharge

The plaintiff sued the defendant alleging a breach of contract over a shipment of paint. The defendants counter claimed for defamation.

Held:

1. On the plaintiffs own evidence therewas a considerable degreeof uncertainty lack of clarity, lack of precise definition as to what it was that the plaintiff alleged was contained within, and the subject of, the contract.
2. There was not sufficient certainty in any of the discussions of the parties to enable the court to spell out what thecontract was. And even if a contract was found, it would be so uncertain as to be unenforceable. On the evidence the court could not find a contract had been formed.
3. The plaintiff had misled the court quite markedly when hesought andobtained interm injunction, and later had its terms varied.
4. The claim should be dismissed, and the injunction discharged.
5. The conterclaim was in defamation, but it could not succeed because the alleged defamation was founded on what had been said in the court, and that must be privileged. There was no evidence called as to loss or damage. The counterclaim was dismissed

Counsel for plaintiff Mr W. Edwards
Counsel for defendants Mr Talanoa

Judgment

I havelistened carefully to all the evidence which has been given, and I have regard to all that evidence and to all the exhibits which have been produced, and there are a considerable number of them.

I took the option the other night to refresh my memory as to the exhibits and go through them.all, and to look through the notes that I had taken of the first day's hearing. I have listened with care to the submissions ju st made and if I do not deal with all the submissions that have been made to me in the course of this jud gment, that is not a reflection on thesubmission. Itis a reflection on the fact that I am giving an oral judgmen t now because of the importance of the matter to all the parties and the significance of a container of paints sitting on the wharf at Queen Salote, something waiting tobe done to it.

I also add as a general comment that I can only judge the matter on the evidence which is placed before me, making that comment, in the light of two aspects. The first: it seems to me that some of the documents which have been presented are not necessarily all that relevant but a lot of others that have been mentioned may well have been more relevant but have not been produced. I will deal with someof those as I go along and that touches on both sides I believe. The second aspect being that I have not heard any evidence from Taubmans in Fiji, whether from Mr. Martin or otherwise, which may have cast some light into some of the murky waters.

I say at the start, that this is not an action for wrongful dismissal, that is the dismissal of the plaintiff, from the employment of the second defendant. The second defendant allegesorclaims that the plaintiff was employed by the Company as Managerof the Paint Division. Ang the second defendant says that he, the plaintiff, was dismissed from that employment at the end of November 1995. ..

The claim is an action for breach of contract in effect. The plaintiff says that there was a verbal contract oramingement betweenhim and the defendants;(the first defen9ant named being the Managing Director of the second defendant) as to the importing, mixing, and intended distribution and sale of a container of paints purchased from Taubmans in Fiji. Itisjust one container of paint, that came on the Forum Samoa - some $32,36.03 of paint - which is the subject of these proceedings. And it is the shipment that arrived on the Forum Samoa from Fiji, Voyage No.257, as is referred to in the various documentary exhibits, particularly the Bills of Lading and the Invoices that have been produced.

The plaintiff alleges a contract. The defendants deny such. The plaintiff in general terms says that there was a contract between him and the second defendant and that in effect the importing of this container of paint was to be ajoint venture between him and the second defendant The defendantson the other hand say that that isnot the case, there was no such contract. The only contract was that the defendantswere going to import this themselves (this container of paint) from Taubmans and set up a Paint Division and employ the plaintiff as the Manager of that Paint Division.

On the balanceof probabilities the plaintiff hasto establish there was acontract such as he alleges. I turn to his brief of evidence itself.and that was put in, in written form. I look at that brief of evidence and when I look at it I find that, as I will come to it, there is contained within that brief of evidenceitself a considerable degree of uncertainity, lack of clarity, lack of precise definition as to what it was that the plaintiff alleges was contained within, and the subject of, this contract.

So if I were to find that even if there were some sort of discussions of ajoint venture nature between plaintiff and defendants, I could not see sufficient certainty in any of those terms to enable me to spell out exactly what their contract was. And it seems to me that even if I were to find (which as I will go on to find, I do not on the evidence) but even if I were to findthere was a contract, it would be so uncertain as to be unenforceable.

As I have said, first, there was a lack of clarity in the terms and the conditions which are claimed to exist in this contract or arran gement. Secondly, given the onus on the plaintiff on the balance of probabil ities, I cannot find on theevidence that there was indeed a contract formed.

The defendant, as I have said, alleges that there was an employment, by the second defendant of the plaintiff, as its Paint Division Manager; and a later dismissal of him, on the 29th of November, for some sort of impropriety, and the suggestion even that that may have been a matter of theft given what is on the face of the documents and what is to be seen on the invoice D.19 at page 4 and in the letter from Taubmans of Fiji to the second defendant of 14 February 1996, Exhibit D.22.

The documents which have been produced, or all the ones that are particularly relevant, seem to me to indicate that this container of paints was shipped to and for the second defendant. There is support to be found, as I say, in those documents parti cularly in the invoices and in the bill of lading. Both of those documents I accept have the plaintiff s name on them, but only as a poi nt of reference as the ordering person , that and no more. They quite clearly state that the consignment of paints is for Trident Heavy Engineering. So you have documents such as those invoices, the bill of lading, the customs entry forms, the sale tax forms, the tenancy agreement, the receipts forrental and bond, all of which indicate that this container of paints was being imported into Tonga from Fiji by the second defendant and that the second defendant was setting up a shop in Railway Road from which to sell those paints.

Itis perhaps true that the defendants have not helped themselves, to some extent, by not producing some of theotherdocuments that must obviously bewithin their possession or at least, on the evidence of Mr. Faletau Jr.. must have been in their possession such as (a) the reference he made in his evidence to letters from customers or potential customers when the market survey was done; (b) the pay records referred to by him and again by a subsequent witness Mr. Kumar. One would have thought they should have been produced; (c) the minutes of the company meetings that were referred to by Mr. Faletall Jr.; and so on.

Nevertheless on the documents which I do have, I make the finding that I have indicated namely that on the evidence the balance of probabili ties comes down in favour of the plaintiff being employed as the Manager of the Paint Division by the second defendant.

The plaintiff , as I have already indicated, cannot show on the evidence that there was a contract. I find on the other hand, on thebalanceof probabilities, that he was employed as the Managerof the Paint Division. A ll these actionswhich I have heard about, it seems to me quite appropriately, fit within the duties of the Manager of that Paint Division. There is some support in the oral evidence for that position as well as the documentary materia ls which I have briefly referred to. The plaintiffs third witness, Tevita Taufa, in cross-examination, was asked if heknew whether Koloti worked for the second defendant and h said yes, he did know that.

Several of the defendants' witnesses, over and about the Faletau's themselves, i.e. Junior and Senior, gave evidence which was supportive of that position as well. The Assistant Manager of Tonga Timber referred to the fact that he was told by the plaintiff himself that he, the plaintiff, was the Salesman for the Company, that is the second defendant company andof courseit was thatwitness whoproduced the letter Exhibit D.23 which I have already referred to, and which makes it clear that that approach in late October 1995, to see whether the Tonga Timber Company was interested in buying pain was an approach made on behalf of T.H.E. Paint Division. Another defence witness, Mr. Kumar, who is an acknowledged part of the second defendant's organisation, said this is an affidavit which he confirmed on oath before me.

"Whilst in Fiji, I met in aboutJuly 1995 with one Mr. Vincent who happens to be a Salesman of Taubmans Paint Fiji Limited, who asked me, Mr. Kumar to meet a Company in Tonga, re Taubmans Paint Fiji Limited to market their products. I was the initial contact. This meeting with Mr. V incent eventuated into my meeting Ian Martin, the General Manager of Taubmans Paint Fiji Limited. The rest of the negotiation was handled by Trident Heavy·Engineering Paints Division. I know one Koloti whose post in the Company Trident Heavy Engineering was Manager Paint Division under Trident Heavy Engineering Co. Limited at Nuku'alofa.•

I find confinnation alsofroin the evidence of Mr. 'Aho from Tela, the landlord, who gave evidence that the first approach about taking the shop premises in Rail way Road came from the plaintiff. But Mr. 'Aho said that the plaintiff told him that he was working for the second defendant. And I have already commented on the fact that it was *Mi.* 'Aho who .gave evidence as to the payments of rental bond and the signing of the rental agreement.

Through that evidence, and other evidence I have heard, I have come to the firm view that I have indicated, namely that on the balance of probabilities, the plaintiff was an employee of the second defendant and it was in that capacity that he acted in relation to the shop and in relation to the negotiation s to import this one container of paint which is at issue.

If I tum then to the statement of claim, paragraph 1alleges the verbal agreementand the claimed conditions. I have already commented sufficientl y I believe on the alleged agreement and the conditions of it, except to add a comment on (1) (e) which is an allegation "that the plaintiff and thefirst defendant would set upa shop at Taufa'ahau Road and that the plaintiff would run the shop." That of all the allegation s was central to the claim that was made on 8 December 1995, on the issue of the statement of claim on the same day, for an interim injunction. Itis significant that theinterim injunction was sought on the basis that there should be restraint placed on the defendants in relation to the business and shop premises in Taufa'ahau Road Nuku'alofa known as Danny'J Paint Company. As it transpired, on the evidence I have heard, there was never any such shop in Taufa'ahau Road. There was a shop in Rail way Road. On December the 12th the plaintiff came back to this Court and sought a variation of the interim injunction which had been made, by changing the address of the shop, Danny's Paint Co. to substitute Railway Road. That was done. As it tums out, there never was, and nobody else who gave evidence has ever heard of, a Danny's Paint Co.

Perhaps (l)(g) should be commented on. It was the subject of a late amendment on the opening day of this hearing. (l)(g), as originally cast, said this: "that all monies

received from sales would be banked under the account of Danny's Paint Co.• That was amended to read "under a separate account". Yet it is significant that thie unamended statement of clim was sworn to J>y the plaintiff and was used as the basis of an urgent interim injunction application and on which the interim injunction was made.

It seems to me that the Court was misled quite markedly \lS to those malters.

Paragraph of the statement of claim I have alady sufficiently commented on about the lease of premises; as with paragraph 4 about rent.

Paragraph 6 is an allegation that the plail)tiff obtained an "agency fro'm Taubmans Paint Fiji Lirni ted in the name of the second defendant" That I have already commented on. It sems to me that the correspondence I have referred to fn particular D. l, D.18and D.20, makes it clear that the agency was with the second defendru1t.

Paragraph 8, fore.xample, I comment on. There it is claimed that it was a "condition of payment of the shipment of container thai a site draft would be presented before the release of the paints from the wharf.• ·There was no evidence before me as to that whatsoever.

Paragraph 1O; "partsof the goods werereleased tothe shop, Danny's Paint Co. which was operated by the defendan.tsand sales of the paints commenced.• There is noevidenc that there was such a shop as Danny's Paini Co.. let alone that goods were released to such an entity.

There was a claim that monies collected from sales of the paints that were released should Qe accounted for to the plaintiff. On the findings I have made as to his allegation of contract, as opposed to the defendants' allegation C?f employment; there was no substance to that claim.

I therefore find that, in terms of the st;itement of claim and the prayers in that statement of claim, the first prayer, that is, seeking "an Order restraining the defendants from removing any paint from the containers and or selling any of the stock" should be dismissed.

Along with that, I intend discharging the interim injunctions which were made iri similar terms, that is restraining the defendants. I intend discharging the interim injunction of the 8th December 1995and the amended Orderof the 12th December 1995.

Itseems tome, on theevidence that! have heard and theconclusions I havereached those interim injunctions cannot stand.

The second prayer for •judgment against the defendants in the sum of $11,000" that is for monies allegedly collected from salesof paints, as I have already concluded, cannot stand.

'(c) An Order restraining the defendants from collecting any unpaid accounts for paints sold from the shop.' I dismiss that application. Again the interim injunctions had some effect in terms of restraining the defendants from collecting unpaid accounts. In so .far as those interim injunctions affected that aspect, as I have already said, those injunctions are discharged in their totality.

To the same effect is the 4th prayer '(d) restraining the defendants from entering and interfering wi th the business operated as Trident shop situated at Taufa'ahau Road.• Again that application, that prayer, is dismissed.

I tum to the counter-claim that has been made. It has been twice amended. I find it still ill conceived insofar as I am as uncertain, as Mr. Edwards was in his submissions as toeltactly what isalleged. Is itjust defamation allegations or something more than that?

Even if is simply defamation, then it cannot posibly succeed because the alleged defamation is foul)ded on what has been said in this Court It seems to me that that must be privileged in any event

If I look at the counter-claim as originally filed, paragraph 1 is a claim of "deliberate defamation" by the "allegations" of the plaintiff.

Paragraph 2 alleges a "loss of business to the first and the second defendants by his false allegations. I take that to relate back to the alleged defamation.

Paragraph 3 - "That all monies paid to the plaintiff must be paid back to the first and second defendants as they lire the sole distributors and sellers of the Taubmans Paints Fiji Ltd". There is no evidence as to monies being paid to the plaintiff at all.

4: "That all stocks ust be returned and/or paid to the second defendant". There is no evidence of this i.e. the plaintiff having any stock.

There have been amendments to the counter-claim and that now reads, as per the document of the 9ih February of 1996. Paragraph (1) "the plaintiff has deliberately defamed the names of the first and the second defendants by (a) his allegations published in hi's affidavit made on the 12th December 19'15.• I pause there; that was for the purposes of these proceedings, it cannot be any foundation for this claim, "(b) saying to one Mr. Siamu, that the defendants are untrustworthy.• There being no evidence as to that, whatsoever, that must fail.

"2. That the plaintiff has caused loss of business to the first and second defendants by his false allegations. The first and second defendants cannot sell the paints lo their customers nor could they check the remainder of the paints at the container kept at Queen Salote Wharf or open the second defendant's paint shop at Railway Road Nuku'alofa .• As I said that relates back, it seems to me, to the claim of defamation based on claimed false allegations in the affidavit used in the obtaining of the injunctions. It related to Court proceedings; it cannot succeed.

"3. That the first and second defendants through the allegations made by the plaintiff" - that seems to connect back, and I interpose these words, it seems to connect back to paragraph 1,-"have lost the following customers, (a) Oregon Pacific International (b) Franker Industrial Ltd (c) Tonga Timber Limited (d) Jewett Cameron." A witness was called from Oregon Pacific. There was no evidence adduced from him that any business had been lost as such to the defendants in any event; nobody was called from Franker, there was no mention of Franker in evidence whatsoever. There was a witness from Tonga Timber, but there was no evidence from that witness of loss of business or loss of customers to the defendants. There was no evidence as to Jewett Cameron.

"4. The loss of business suffered by the defendants through the withdrawal of the above customers are in the vicinity of tens of thousands.• One is tempted to say "tens of thousands of what". There is no evidence called as to what loss, if any, was suffered by the defendants.

On the basis of the evidence before me I can find no support for the statement of counter-claim and it will be dismissed in all respects.

The position as to this container of paints has not being helped by somewhat contradictory letters which, seem to me, to have been written by Taubmans. You have on,ly got to look at the Exhibits that were produced on beha lf of the plaintiff as Exhibits F, H, I and J and compare them with the defendants' Exhibits at D.18, D.20 and D.21. Taubmans are saying contradictory things to the different parties. It seems clear to me,

on the evidence I have heard, that indeed the arrangement over this particular container, which is the subject of these proceedings, that the contracts or arrangements were between Taubmans in Fiji and with the second defendant. It means that that container, in my view, is the property of the second defendant or rather the contents of that container, on the evidence I have heard and the findings I have made, are the property of the second defendant It means, of course, the secoQd defendant is responsible for the payment of the duties, taxes and so on and it means, of course, as well, that the second defendant is responsible to Taubmans for payment for the contents of the container (the 32,000 odd pa'anga worth of paints which is contained within it). The original terms seem to have been payment within 60 days. That ebt has run over and it is that which has caused Taubmans now, as they have purportedly done, on the 29th of January 1996, to revoke or withdraw the distributorship from the second defendant.

It is of course over to the parties here and with Taubmans in Fiji, as to who Taubmans contract with in the future. That is not part of the role of this Court. The parties are free to contract with whom they wish.

The counter-claim will be dismissed. It seems to me, given the commencement of these proceedings by the plaintiff ahd the interim injunctions that followed, that the costs of these proceedings should be borne by the plaintiff and I will make an order for cots, either as agreed or as taxed, against the plaintiff and in favour of the defendants.

Just to complete the formalities, so everybody is aware the interim injunction of 8th December 1995 as amended by Order of 12 Deceber 1995 is absolutely discharged. The application for committal for contempt is dismissed.

Lindsay-Smith v South Pacific Alliance for Family Health, Duve & Commonwealth of Australia

Supreme Court, Nuku'alofa
Hampton CJ
C.885/95

21 February 1996

Practice & proced ure - leave to serve without the j urisdiction
. Sovereign immunity - commerica/ tra11Sactio11S - restrictive theory

The plaintiff sued the first defendant for wrongful dismissa l; the second defendant for wrongful interference in the contract of employment ; and the third defendant as the funder of the first defendant. The third defendant disputed the juri sdiction and, in argument, raised questions as to service of the third defendant.

Held:

1. Service out of the juri sdiction can be done only with leave of the court.
2. The third defendant had not been properly served.
3. Leave to serve would be allowed, given the plaintiffs argument and the effect of the English State Immunity Act 1978.
4. Matters of soverign immuni ty could be looked at when considering a matter of granting leave to serve out of the juri sdiction.
5. The modem restrictive theory of Soverign immunity applies in Tonga and as the English State Immunity Act 1978 applies a state in not immune as to a commercial transaction entered into by it and a commercial transaction includes any loan or other transaction for the provision of finance. A claim therefore to that exception to sovereign immunity was arguable here.
6. Leave to serve would be allowed, but the procedure to be followed would be ba sed on s12 State Immunity Act 1978 as modified so it complied as best it could with the Tongan circumstances.
7. None of the documents filed on behalf of the third defendant could be seen as being any sort of waiver of dispute as to the jurisdiction, or of acceptance of the jurisdiction.

Cases considered : Marine Steel v Marshall Islands [1981) 2 NZLR 1
Tu'itavake v Porter & C/wealth of A ustralia [1989) Tonga LR 14

Statutes considered Civil Law Act
State Immunity Act 1978 (UK)

Regulations considered 07, 0.12 Supreme Court Rules 1991

Counsel for plaintiff Mr Macdonald
Counsel for defendant Mr W. Edwards

Judgment

I do not intend reviewing this action or the argument which I have heard this morning and again this afternoon in any detail. Suffice to say that the plaintiff has brought action in the Supreme Court in Tonga against three defendants alleging in effect a wrongful termination of his employment. That employment was with the first named defendant

There are allegations of interference in that contract, leading to the dismissal, in relation to the second defenda nt and there are claims made that the third named defendant, the Commonwealth of A ustralia, is responsible as well in terms of an Australian Aid initiati ve which is at least in part responsible for funding the first defendant and a particula r project; those funds as well being, at least partly responsible for the ability to engage the plaintiff as an employee of the first defendant.

The proceedings were initially brought in some haste because of the particular circumstances of the plaintiff. It may be that the plaintiff 'sadvisors, and indeed this Court, at the relevant time did not turn their minds to the question of the joinder of the Commonwealth of Austra lia as a defendant and what might be involved in relation to that

From what is before me it is evident that the Writ and Statement of Claim, in relation to the third defendant, has been purportedly served by leaving or serving a copy on the High Commissioner for Australia in the Kingdom.

The third defendant, through Mr. Edwards, has disputed the juri sdiction and has applied to strike out the action against the third defendant. One of the initial subll)issions made by Mr. Edward s today, before he got on to the issue of a Sovereign State's Immunity, was as to the naming and the service of the third defendant. It seems to me, having listened to the argument, that the Commonwealth of A ustralia is the party, or rather the Govemment of the Commonwealth of Australia is the party, who is intended to be served and intended to be named in the writ.

In the ordinary course of events service on a party who is obviously outside of the jurisd iction should be done by leave of this Court pursuant to Order 12 of the Supreme Court Rules of 1991. I note in passing that in one of the cases referred to me in the course of argument on another aspect, this morning, that is the case of Marine Steel v. Government of Marshall Islands, [1981) 2 NZLR 1, the issue of Sovereign Immunity and the application of the doctrine in the particular cirumstances there were discussed by Mr. Justice Barker of the High Court of New Zealand on an ex parte application for leave to serve out of New Zealand.

In the circumstances and having heard argument, it seems to me that the third defendant here has not been properly served at all in relation to these proceedings. I am not prepared in those circumstances to embark on a full consideration of, let alone give a decision on, the matter of Sovereign Immunity from ju risdiction, and as to the other matters raised by Mr. Edwards as to why the action should be struck out

Order 12 provides that an application for leave shall be made ex parte to a Judge with an affidavit setting out certain matters as to the cause of action, the grounds on which the application is made and the address at which it is desired to effect service.

I am satisfied in the circumstances, particularly with the materials on oath from the plaintiff himself in theaffidavi already filed, that the material s necessary under Order 12 Rule 2 are in front of me.

Such an application as I have said may be made ex parte. Mr. Macdonald in nial;ing the application now for service out of jurisdiction has referred under Order 12 Rule I to the following three provisions :

A Writ may with leave be served without thejurisdi ction if :-

1. The first is in (iii) and is this: "theclaim is brought against a person within the jurisdiction and a person out of the jurisdic iton is a necessary or proper party thereto.• In relation to that Mr. Macdonald, says that the first two defendants are people within the juri sdiction, and the claim is properly brought against them. The third defendant, is outof thejurisdiction but isa necessary orproper party thereto in terms of the argument which he has, at least, partially advanced before me today.
2. The second is contained in (iv) "the claim is brought in contract" and there are certain other conditions set out which I will not read in full . That seems to me to be not as clear, in terms of the documents in front of me, but Mr. Macdonald maintains there is an argument there that can be made.
3. The third alternative he here relies on is (v) "the claim is brought in Tort and the tortious act was committed or the damage was sustained within the jurisdiction" . Herc he says the tortiou s act that is the unlawful dismissal and the alleged interference and the damage flowing there from, all occurred within the jurisdiction of Tonga.

I am prepared in the circumstances to allow leave to serve out of thejurisdi ction. I do so primarily on the argument which has been made earlier by Mr. Macdonald, in relation to the effect of the Englis h State Immunity Act of 1978.

My first reaction as to the question of Sovereign Immunity, which I would be entitled lo look at, (as Barker J did in the Marine Steel case at this stage of the proceedings), was that applying the doctrine as a lnatterof Common Law, the acts complainedof by the plaintiff against the third defendant could properly be seen as falling within the concept of Sovereign Immunity in the classic sense and that would prevent proceedings being brought against the Foreign Stale, for acts which might be described as being done jure imperii. Further that the acts complained of did not relate to an exception in the Common Law which has become more recently established, that is relating to ordinary trading transactions, (the so-called restrictive theory). It did not seem to me that the type of transaction under discussion here could be described as an ordinary trading transaction.

Mr. Macdonald has drawn my attention to the decision of this Court in Case 2A of '89, the decision of Mr. Justice Webster, Tu'itavak c and Others v Porter and the Government of Australia (1989) Tonga LR 14 where that Judge, after a comprehensive review of various matters including the Laws of Sovereign Immunity, concluded that the modem restrictive theory of Sovereign Immunity applies in Tonga, and went on to find that, under sections 3 and 4 of the Civil Law Act (Cap.25),t he U.K. State Immunity Act 1978applied in Tonga. In the circumstances, although I am not bound to so do, I follow that decision.

That U.K Act contains, as Mr. Macdonald pointed out, a provision in section 3, subsection 1, which provides that •A State is not immune as respect proceedings relating

toa commercial transaction, entered into by the State". I read only part of the sub-section. Likewise I only read part of the definition in section 3 sub-section 3 (b): "I n th is section, 'commerica l transaction' means, any loan orothertransaction for the provision of finance" and I read no further.

At least on the face of it, as Mr. Macdona ld points out, the agreement which he relics on and which has been exhibited to the pla intifrs affidavit clearly involves the provision of finance and the making of fi nancial grants from the Commonwealth of A ustralia to the first defendant. It seems to me arguable, therefore, that there is an exception to the doctrine of State Immunity in these circumstances here. I stress arguable. I do not make any concluded finding in relation to it, and I am only dealing with the matter in a very preliminary way on an applicati on for leave to serve out of the juri sdiction.

It is that aspect which persuades me that leave should be granted and that service should be effected properly on the third defendant.

As to the format that service should take, I am guided by a number of matters. The first is that our own Order 12 Rule 4 provides that service of the writ pursuant to an Order allowing service out of the juri sdiction, "shall be deemed effective if it is served persona lly or in compliance with an Order for substituted service in accordance with the law of the country in which service is effected."

Mr. Macdonald has helpfull y provided me with the copy of the Austra lian Judiciary Act 1903- 1973, section 63 of which states that where the Commonwea lth is a party any process in the suit required to be served upon that party shall be served upon the Attorney General of the Commonwealt h or upon some person appointed by him to receive it. Thal seems to be the position applicable in Australia itself.

I am minded in these circumstances however to be guided by (and I will make it a condition of the Order for allowing leave to serve out of the jurisdic tion, that service should be effect 011 the third defendant in tcnns of) another provision of the State Immunity Act of 1978. That provision is section 12and it seems to me it provides a quite appropriate and proper procedure for service as follows.

Sub-section 1, in its applicable parts, reads this way: "Any writ required to beserved for instituting proceedings against a Stale, shall be served by being transm itted through the Foreign and Commonwealth Office to the Ministry of Foreign A ffairsof theState and service shall be deemed to have be.en effected when the writ is received at the Ministry". If, i n terms of our Civil Law Act, that is modified so it complies as best as it can with our circumstances, that would provide that any writ should be served by being transmitted through the Ministry of Foreign Affairs in Tonga to the Ministry of Foreign Affair s in A ustralia, and service shall be deemed to have effected when the writ is recei ved at that Ministry of Forei gn Affairs in Australia.

Sub-sectin 2 of section 12 also provides that "Any time for entering an appearance shall begin to run 2 months after the date on which the writ is received as aforesaid."

It seems to me that, given the lack of any guidance in our Supreme Court Rules or in any other legislation, subsidiary or otherwise, in Tonga, as to service of processes on Foreign Sovereign States, that I should be guided, in terms of our Civil Law Act by those provisions of the State Immunity Act in the U.K. As I have stated that Act is applicable in Tonga.

I will therefore grant leave to serve the Government of the Commonwealth of Australia, such being service out of theju risdiction. Service will be effected in the way

I have described that is pursuant to section 12sub-section 1as appropriately amended for Tongan conditions, (that is section 12 of the State Immunity Act of the United Kingdom) and time will be the 2 months period mentioned in sub-section 2 of section 12. I should also add that, in 'my view, none of the documents thus far filed 011 behalf of t.;e third defendant (which are the notice of motion disputing the juri sdiction and applying tostrike out, and the affidavit of the Auiitralian High Commissioner, Mr. Mullin) nor the argument today should be seen, and cannot be seen, as being any sort of waiver of dispute as to the jurisdiction or of acceptance of the jurisdiction of this Court.

It seems to me that the steps taken (leaving aside the question of the validity or otherwise of service) to dispute the jurisdiction were quite appropriately taken within the provisions of Order 7 of our Supreme Court Rules. Rule 6 of Order 7 provides that a defendant who makes such an application to dispute the juri sdiction "shall not be treated as having submitted tothejurisdiction of the Court by reason of having taken a step in the action.• All the steps taken thus farby the third defendant, orby Mr. Edwards on its behalf, have been in pursuance of the application to dispute the jurisdiction and cannot be seen as being a submission to the juri sdiction.

This ruling means that it is probable that this Court will be faced at some later time with hearing full argument as to the matters of jurisdiction and as to the application to strike out, if that dispute as to the juris diction is found against the Commonwealth. To some extent that is regrettable, and somemight say that this can be seen as this Court going round in a circle, but given thesignificance of theattempted joinder of a Sovereign State, it seems to be entirely appropriate that that Sovereign State must be properly served. On the basis of the materials before me at the present time, it has not been so served.

Last I suppose is the question of costs in this matter. I reserve the issue of costs at the present time; if either party wants to raise the matter for argument, then they can file a memorandum setting out the basi s of their claims forcosts and I would then see Counsel and hear argument on the issue.

This Court Orders:-

1. Plaintiff granted leave to serve the third defendant out of thejurisdiction .
2. Service to be effected by the Writ and Statement of Claim, and other originati ng documents, being transmitted throu gh the Ministry of Foreign Affairs in the Kingdom of Tonga lo the Ministry of Foreign Affairs in the Commonwealth of Australia .
3. Service shall be deemed lo have been effected when the Wri t and the other documentsarereceived at theMinistry of Foreign Affairs in theCommonweal th of Australia.
4. The time for the third defendant to enter an appearance, dispute juri sdiction, filea defence, or takeany other stepshall begin to run two months after the date on which the Wri t is received as in (3) above.
5. All questions of costs are reserved.

Tonga Development Bank v 'Ailkamea & others

Supreme Court, Nuku'alofa

Lewis J
C.326/94 ·

26 February, 1 March 1996

Limitation - when liability incurs
Co11tract - limitation - whe11 liability i11curs

The plaintiff sued the defendant on a loan agreement. Only one repayment was made on 2 March 1989. In June 1989 the plaintiff wrote a letter of demand to pay all the balance. In April 1994 a writ was issued. The defendants pleaded the claim was statute barred • (Le.outside the 5year period).

Held:

1. Pursuant tos.16(l) Supreme Court Act the date on which liability was incurred was 15June 1989.
2. A default by thedefendants in paying monthly instalments created aconstructive default of all payments by virtue of the provisions of the loan agreement..
3. That default created an obligation in the defendan\ to pay the balance of the loan and interest, but that obligation only arose if the plaintiff elected to impose demand upon the defendants.
4. The plaintiff did not make demand until 15June 1989, the proceedings were issued within the statutory limitation of 5 years and were not statute barred. There should be judgment for the plaintiff.

Cases considered: Lakshonjt v Shetani [1973]3 All ER 737; Reeves v Butcher (1891) 20 B *509*; Harry Smi th v Craig (1938) 8C 620

Statutes considered: Supreme Court Act s.16

Counsel for plaintiff: Mrs Vaihu
Counsel for defendant: Mr W. Edwards

Judgment

The scope of this action is not broad. The Plaintiff sues the Defendants jointly and severally for breach of a loan agreement (Exh,ibit Pl) executed 'between the parties on-21 November. 1988.

Under the terms and conditions of the Agreem\\nt the Plaintiff lender agreed tolend and the Defendants agreed toborrow TOP$3oo0:00. Interest was variable at the instance of the Banlc. initially 10per centum per annum.

It was a condition of the loan agreement Pl that·

> ".repayments of the loan and interest shall be made as follows:-
> payments shall be made at the rate.of $148:00per month. The first repayment shall be made in December 19881! final repayment of the balance of the loan and interest. then owing shall be made in November 1990."

From the documents placed in evidence I find that the Defendants made only one repayment Itwas made on 2 March 1989. Itwas for the sum of $300:00. Mr. Edwards submitted that it was in response to a demand from the Plaintiff in writing. There is no evidence of a demand I disregard the submission.

On 15June 1989 the manager of the Plaintiff Bank at 'Ohonua 'Eua wrote a letter of demand for TOP $4085 to Foueti and Katalina Taungahihifo at their address in Tauranga New Zealand The Defendants do not refute receipt of the letter.

On 13 April 1994the Plaintiff issued a Writ and statement of claim. It relies on the allegatipns in !he Writ in this action. The writ and statement of claim were served on the Latus and on Katalina Taungahihifo. I find that there was proper service of proceedings.

On 19April Solicitors for the Defendant filed a Defence pleading that the Plaintifrs claim is statute barred.

S.16(1) of the Supreme Court Act 1988 as amended Cap.10makes provision for limitation of Actions for debt. Itprovides:-

> "16 (1) It shall not be lawful to sue any person for debt or damages after the expiration of 5 years from the date on which such liability was incurred nor to sue for property which has been in the undisputed possession of any person for more th.an 5 years. But if any part of such liability or claim has been paid within such time or the claim or liability has been admitted in writing within such time the years shall commence to run from the time of such payment or admission and if there be anydeed ordocument between the parties covering a period of time the 5 years shall commence to run from the expiration of such period of lime.
> (2) (Not relevant to this Action).

The defendant argue that on any view of the Section, the proceedings alleging debt were instituted on 13 April 1994.

In my opinion the breach, (i.e. the moment liability was incurred,) while appearing to have been from the very outset must be determined with reference to the actions of the Plaintiff namely, its giving notice of demand for payment of $4069.00by letter dated 15 June '89 (EXH.P4). The breach or incurring of liability complained about by the Plaintiff in P4, is non payment since 2 March 1989.

The Defencesubmits that even if the Court were to find that the incurring of liability occurred as late as 2 March 1989, 5 years had passed by 2 March 1994 and the issue of a Writ on 13 April 1994is 42 days later than the provisions of S. 16(1) allow, the claim is statute barred.

Onits part, the Plaintiff Bankargues that the claim of the Bank is saved by the clause in the schedule at page one which provides.

> •A final repayment of the balance ofloan and interest then owingshall be made in November 1990."

As I uderstand the Plaintiffs argument ii is that

> the Defendant's account was always in arrears
> the Plaintiff need not and does not rely on the proviso to S.16(1).
> the right to sue in this action derives from the fact that the calculation of limitation date and time does not commence until November 1990 given the phraseology of the clause in the schedule (supra).

With respect to Counsel for the Bank, the argument is flawed. The clause in the schedule is {apart from anything else), inconsistent with the companion provision in the schedule that repayments shall be made at the rate of TOP $148 per month montly , and inconsistent with clauses (a) and (g) appearing on page 2.

> 'The borrower agrees ..... (a) to make.the said repayments on or bCfore time.' (ie Monthly) and "(g) topromptlyand faithfully with any direction .... that may be given .... by the Bank ....."

More importantly, it is evident from P4that the Banker Plaintiff identified and acted upon a breach, by sending P4 to the Defendants - it could not be plainer. P4 demands repayment and complainsof breach 'June isnearly overand $4069is demanded including the arrears of this month'.

The Bank purported to act on the breach and to demand payment of arrears by P4. Implic_it in the clause in the schedule is the proposition that:-

> 'If the argreemenl is still on foot in November 1990 then the final payment must be made in November 1990'

Counsel for the Defendants referred me to the decision of the Privy Council (UK) in Lakshonijt v Shetani [1973) 3 ALL ER 737. The case is distinguishable on its facts. It relates to an action for breach or an agreement for sale and possession of land. The simiiarly it bears to the present case rests in clauses which are in conflict being incorporated in the same agreement. In its Judgment, the Privy Council (UK) considered the decisions

> Reeves v Butcher (1891) 20 B 509
> Harry Smith v Craig (1938) SC 620. Both were cases concerning loan agreements ...• In each case the courts held that the Plaintiff's right of action accrued as soon as the Defendant made default in payment of an instalment and was barred after 6 years from that event. They were not treated as cases in which the Plaintiff could elect between inconsistent remedies but as cases in which each contract imposed an obligation on the Defendant to pay the principal but as soon as the interest fell into arrears' .....
> As was said by Lord Aitchison in Harry Smith at 626 ..." The contract as I read it simply means that on default of any payment there is a constructive default of all payment.'

The Loan agreement in this action stipulates that the payments were directed as ... 'ke totongi fakafoki 'a e $148he mf,hina" ..... "pay back $148.00 per month," and when the Defendants became in default of any payment there was a constructive default of all payments by virtue of the operation of clause (a) of the Loan agreement Pi.

The default in my view only creates an obligation in the Defendants to pay the

balance of Loan and interest under the agreement. The obligation only arises if the lender elects to impose demand upon them which it did by virtue of Exhibit P4, which demand was made I found was on 15June 1989.

Five years from 15June 1989 is 15 June 1994. These proceedings were instituted (ie the Plaintiff sued the Defendant's by issuing a Writ alleging breach of agreement) on 13 April 1994, i.e. within the statutory limitation of 5 years.

Accordingly l find that this action is not statute barred and there will be Judgment for the Plaintiff against the Defendants jointly and severally in the sum of $4,687.91plus interest thereon at the rate of 10% per annum from the 31.3.1994.

BPT Tonga Ltd v Tohi

Supreme Court, Nuku'alofa
Hampton CJ
C.968195

22, 23 February & 4 March 1996

Contract - warranty or condition
Tort - negligent advice
Negligence - advice - servant

The plaintiff sued for a balance of purchase price of a van and subsequent servicing and repairs. The defendant counterclaimed alleging breach of conditions or warranties of purchase, or misrepresentation: and/or negligence by the plaintiff in certain repair work and advice subsequent to the purchase.

Held:

1. The claimed figures of the plaintiff (excluding a $20 lawyers fee for a letter of demand) had been proved.
2. Theconversation of the plaintifrs salesman did not amount to representations sufficient to form a condition or wan-anty of the contract, or a collateral contract; and nor was there any misrepresentation.
3. There was negligent advice tothe defendant however bya mechanicemployed by the plaintiff to keep driving the van notwithstanding a warning light still kept coming on. The defendant relied on that negligent advice. Damage to the engine of the van followed. Many of the repair accounts sued for by the plaintiff followed from that. That work was not the responsibility of the defendant but rather of the plaintiff. It Oowed from, and was a direct consequence of, the negligence of the plaintiff s servant.
4. The defendant had not proved his claim for loss of use of the van, while it was off the road.
5. From the proved claim the proved amounts at\ributable to the plaintif rs own negligence should be deducted.
6. In the circumstances the parties should bear their own costs.

Counsel for plaintiff Mrs Vaihu
Counsel for defendant Mr W. Edwards

Judgment

I intend giving ajudgment now on the claim and the counter-claim . l l is important that I do so as soon as possible bearing in mind that the first of the evidence in this case was heard on the 22nd and 23rd of February of this year. I want to give ajud gment while certain matters are still present in mind in relation to the evidence and in particular as lo w itnesses - what they said and the way they said certain things.

I bear in mind at all limes that so far as the claim is concerned the burden of proof is on the plaintiff on the balance of probabilities and so far as the counterclaim is concerned there is likewise the burden of proof on the defendant on the balance of probabilities.

I tum first to the claim which I deal with on a simple and straight forward basis. Notwithstanding the vagaries of modem computerised accounting the palintiff has proved that there is an outstanding balance of $4,455.68 being a balance on the purchase price of this Toyota van (the purchase going back to November 1993); and a balance on repairs and servicing subsequently carried out on that van, less a certain credit and payments made by the defendant. I say that amount rather than the $4,475.68 which is sought because I have a very clear view that the extra $20 sought for the lawyer's letter costs is not appropriately included in the claim; but is something that, if ultimately the plaintiff succeeds, will be renected in the costs that arc awarded lo a successful plainlif.

So, I find the figure established as correct by the plaintiff al $4,455-68 but that IS subject to what I now go on to consider in terms of the defence and the counter-claim that has been lodged on behalf of the defendant.

The first part of that defence and counter-claim alleges in paragraph 7, that there were presentations made by the plaintifrs agents or employees lo the defendant prior lo the purchase, namely that the van was a good bargain, it was in excellent condition and I.he engine in good running-0rder.

From all evidence I have heard, I do not find that those things, such as that it was a good bargain and with an engine in good running order, did amount to such representations sufficient to form a condition or conditions of the contract or indeed a condition of a collateral contract.

It seems to me that those things said were no more than the mere conversation of a salesman and even if they could be converted into being some sort of condition or warranty of thecontract (which I find they are not) there is not sufficient evidence in front of me to prove that there has been, or that there was, a breach of such a representation or condition or warranty.

I find that thedefendant was not misled in any way as to this van. I take into account such factors as the evidence of the previous owner of the van who brought it in from Hawaii, who had it for some time and who had then sold it as a trade in, in effect, to the plaintiff, ASCO MOTORS. Hisevidence, uncontradicted in effect, was that the van for him ran well and was trouble-free. He sold it on lo ASCO and they sold it then to the defendant, in a very short time.

On that basis there was not ground for the plaintiff lo believe that the van was nol in good order. They were not the servicing agent for the vehicle whilst it was in.the hands of the previous owner. It was a vehicle that was secondhand when purchased 111 Hawan. {I was purchased there for some 7,500 US dollars. It had done some 85,000 kilometres, 'It least, before it was sold on in Tonga. From the evidence I have heard it had done some

considerable miles in Hawaii before it came to Tonga.

I take into account, also, the fact that the defendant was given, and look, the opportunity to test-drive the vehicle. He had the opportunity for someone else lo look al it if he thought that necessary. He was satisfied enough to buy the vehicle as he found it. It seems to me that there is no basis made out on that first allegation in the statement of claim i.e. to set aside the purchase agreement as sought.

Nor is there any basis, on the evidence before me, lo find that there was in fact a fraudulent mis-representation as to the state of this van; it being claimed by the defendant that the previous owner had sold that van to ASCO MOTORS because the van "was troublesome and regularly required engine repairs". Thal "the engine was not in good nmning order" and that there were problems, in effect, with the cooling system of the engine.

The allegation on behalf of the defendant is that the plaintiff knew these things from the previous owner but, without taking care and without taking responsibility and being reckless, sold ii on to the defendant without telling him of those difficulti es. On the evidence (particularly that of the previous owner) I cannot find those allegations made out; and so, likewise, I do not see any basis on lhe evidence I have heard to cancel this agreement lo purchase the vehicle.

That is not the end of the matter from the defendant's point of view because the statement of counter-claim goes on to deal, in paragraphs 13 and following, with an allegation that the plaintiff was any effect negligent in terms of certain work lhal i t did or did not do on this van for the defendant at an early stage of the defendant's ownership of the van.

I accept on the evidence that the plaintiff knew that the defendant was using the van as a taxi. I accept on theevidence that it is true that the defendant became concerned when a warning light on the dashboard panel came on and being concerned as lo that, went in to the plaintiff, to seek the plaintifrs advice.

On the balance of probabilities, I am satisfied that the defendant, havin g sought that advice from the Motor Engineers to whom he usually went and on whom he relied and from whom he had bought this van, was told to keep driving the van, notwithstanding that the warning light was still keeping coming on. In effect he was told loignore the light and to keep on driving the van.

I prefer the evidence of the defendant to that of lhe plaintiff 's witnesses in relation to this and in particular I prefer the evidence of the defenda nt to that of the plainti frs mechanic Manase Tu'ungafasi. I made particular note of what the mechanic said in his evidence. Initially that witness said in his evidence in chief thal when thevan was brought in, the light was on on the dashboard. He said he fixed the radiator. something to do with a cap amongst other things, ran the vehicle as a test, and the light was still on. But nonetheless he gave the van back to the defendant. He later changed that evidence by saying that once he had done his work, the overheating wasfixed and the light wasoff but I find it significant that initally he said that after he had done his work the light was still on. I found him an unimpressive witness; he was hesitant, he was evasive and it seemed to me that he was an unreliable witness.

As I have said I prefer the evidence of the defendant in rela tion to this issue and I find, on the balance of probabilities, that as he claimed he was told to ignore the warning light and to keep on driving the van.

I find that that was indeed negligent advice on the part of the mechanic employed by the plaintiff. Ilwas irresponsibleadvice. On the evidencewhich I have heard it seems clear that if a motor is allowed tocontinue to run and overheat, it can cause a cylinderhead tocrack. Itseems from what! have heard that theproblems, ora very considerable number of the probl ems, which this vans engine subsequenUy encountered relate to overheating issues and damage done to the cylinderhead of the van.

I find on the balance of probabilities that the defendant relied on the negligent advice, he continued to drive the van. Initially the light would be off a11d then once the engine heated up the light.would come on. He would continue to drive it in accordance with the advice. The engine overheated and damage to the cylinderhea'd resulted.

It seems to me that subsequent problems concerning the cylinderhead, and many of the repair accounts which are part of the claim against the defendant, follow from that advice. He was not properly advised, he drove the van, thework followed from that. That work, it seems to me, is not, and should not be, his responsibili ty but rather that.of the plaintiff.. It flows from, and is a direct consequence of, the negligence of the plaintiffs servant.

1 have looked at all the accounts that have been presented on behalf of the plaintiff and indeed some of them are copied in the documents of the defendant. The only ones that seem to me to be relevant to the findings I have made on the evidence, are some four and they are as follows, (detail s and amountswere then given. Thejudge then continued):

That is from the $4,455-68 should be deducted the sum $2,775-47 which would leave a balance of $1,680-21.

On the evidence which I have heard noneof the other accounts charged are relevant to, or now from, the negligent advice; or on the evidence before me are the subject of separate negligent advice. In the statement of counter-claim, claim is a lso made for other losses by the defendant flowing it i s claimed as a result of the plaintifrs negli gence_. In particular there is a claim that he lost i ncome from the non-use of the van as a taxi for certain periods of time whilst it was being repaired.

I do not accept, on the evidence, that an y loss of use or loss of i ncome from the van has been properly proved. The defendant accepts in evidence that the plaintiff made another vehicle available to him while the van was off the road. He says it was smaller than the van i.e. the vehicle which was made available lo him. It was only a car. He does not seem tohave complained of that, and he still had another vehicle. his previous vehicle, available to him. There was no actual firm evidence provided lo me that would show that he in fact suffered any lessening of income, any loss of income, du1ing the period of time when the van was off the road. There would have had to have been demonst rated lo me, to my satisfaction on the balance of probabi l i ti es, that the use of the alternati ve vehicle prov ided by the plaintiff company, as well as the defend nts own additional vehicle, and the income that those vehicles generated, the net income they generated, was less than what wou ld have been generated by the van. That has not been shown.

On the evidence w hich I have heard, it seems that the van was used ;is a taxi through until A ugust of 1995, when it then broke clown as a resul t, from what I have been told, of electrical problems. II has not been used since; a l though frnm w hat 1 have hea rd from the defendan t in evidence, he has not tri ed to get anyone to repai r the vehicle since then; let alone retu1 necl i t to the plai ntiff. ASCO, for them lo lool a t, to see wlrn l i s w ron g. As al A ugust 1995 the defendant had had the vehiclr. for somethin g like one and three qua rter years.

On the evidence I have heard I am not prepared lo hold, nor is there any basis on which.I could hold, that the plainff was in some way responsible for these electrical prol!lems. For example, no evidence of any further negligent advice by the plaintiff to the defendant in relation to those difficulties.

Overall then, I have come to the view, as I have expressed, that the plaintiff has proved the figures to establish, on its face, a debt of S4,455-68. From that should be deducted the amount of $2,775-47 being figures which are included in the plaintifrs accounts and which are, on my findings on the evidence, amounts directly attributable to and floring from the negligence of the plaintiff or the negligent adviceof the plaintiff lo lht- defendant. If that amount is deducted, then the amount properly owing in my judgment to lhe plaintiff by the defendant is $1,680-21.

There will be ju dgment for that sum. It has been a long and costly hearing over comparatively small amounts. The defendant has been substantially successful but ends up still owing an amount to the plaintiff. In all those circumstances I have reached a clear view thatju stice would be served by an Order being made that each party bear their own costs in relation to the matter.

Fasi v Fifita & others

Land Court, Nuku'alofa
Lewis J
L305/93

1 & 8March 1996

umd .equity • estoppel
&toppel - not create an interest in land ·a defence

The plaintiff , on behalf of his parents, who had lived on and cared for a town allotment for49or more years on the basis of promises made to then by successive holders, claimed an interest in the land.

Held:

1. Although, with the exception of leasehold interests after they have been validly granted, equitable principles do not apply to any other title, claim or interest in any other Tongan interest in land, nonetheless an equitable defence such as estoppel which does not create an interest in land, can be used as a defence.
2. Even if the promises alleged were made out the plaintiff could not succeed· he was not entitled to the orders sought.

Cases considered: Veikune v Toa [1981-88) Tonga LR 138; Sanft v Tonga Tourist & Devj?t. Co [1981-88) Tonga LR 26

Counsel for plaintiff: Mr L Foliaki
Counsel for first and second defendants: Mr 'Etika
Counsel for third defendant: Ms Tapueluelu

Judgment

This claim proceeds to Judgment on the basis of agreed facts which are com i11etl in a memorandum prepared and signed by Counsel and their clients.

The statement of claim wasamended by the order of this court dated 21 April 19S'5. Amended defences have been filed. The facts as I find them to be having regard t.ithe productions of evidence which have been filed by the parties and the agreed facts anct lht? submissions of counsel, are as set out in the following narrative.

The allotment the subject of this dispute is a town allotment (being pa1t oi the hereditary estate of the Crown) known as 'Napulo' in Fatafehi Road Kolofo'ou. The allotment was originally registered in the name of one Siont: Faiva. He died in 1961

Of their 12children Sione Faiva and his wife Lu'ulofia had a daughter Nau . Maka, their eldest male child left the family home in the 1950s and has lived and remained in Navutoka ever since.

Nau married Semisi Fasi. Nau and Semisi are the parents of. the plaintiff Tevita Manu . The plaintiff alleges that Nau was told by the her father that she was to remai'1 on the allotment and to care for her mother Lu'ulofia and himself and than in return for •he care she would be given a portion of the allotment for herself and her childrr.n. The promi se by Sione to Nau was communicated to each of her brothers and sisters The defendants deny the promise and the communication.

When Sionc died in 1%1 the allotment passed to Lu'ulofia who held it in widol interest until she died in June 1981. Upon her death there being no heir's claim, 1h" defendant Funaki Faiva applied for and obtained registration as the holder of the allotment.

In 1987 the Plaintiff Fasi and the defenpant Funaki Faiva entered intoan agreement concerning the allotment and by letter dated 14 August 1987 (81) Funaki Faiva surrendered his interest in the part allbtmenl in question to the plaintiff Tevita Fasi. The letter recites that the surrender was done in order to give recognition to the fact that Funaki's Aunt (Nau) her husband and their childen lived on and cared for the allotment for '43 years'.

The plaintiff Tevita Fasi took the letter Pl to the Minister and made application *to* have the land surrendered tothe Crown. The Mini sterexplained that the provisions oflhe Land Act made it necessary by operation of law to have the land which can devolve uron heirs, be not claimed and then application for grant would be open to the plainti ff

The plaintiff was informed by an officerof the Ministry that he should obtain f rnm the brothers Tevita Finau Faiva and Sione Faiva, (the former al that lime li ving in New Zealand, the latter living in Australia,) that they had no objection to the surrender. Te"ila was of unsound mind and gave no approdt. The brother in Auslralia did so approve.

The letter containing the information was sent 10 the Ministry of Land and tl1e plaintiff was given an assurance that ii would be placed before Cabinet. A long delay followed to Cabinet decision was taken.

Funaki Faiva wrote lo the Minisry of Lands on 24 A ugust 1992 requesting t hat his application for surrender of his allotment to the plaintiff be cancelled. No reason for Funaki's change of heart is given.

The next step in the process raisEs some difficulty. In a slalement of agreed ra 1 there is included a statement of dispute. The defendant Funaki Faiva denies lhal a documenl dated lOOctober 1992bears his signature. Thedocument purports 10be a lrllo 1

dated 10 October 1992 from Funaki Faiva to the Minister of Lands cancelling the surrender of F1maki's allotment to Manoa Fifi ta. The plaintiff seeks to tender it and the third defendant acknowledges that the letter was 1cceived from the plaintiff.

What is the Courttodoin such circurnstauces? Thecases of all the parties areclosed. The letter is prima facie admissible as a public document. It is relevant. The Evidence Act however requires that it be formally proved if iiis objected to. The only proper course in the presence of objection is exclude the letter as evidence. I do so.

As tothe letter of 24 August 1992, the document bears certain handwritten notes. The parties agree that insofar as the note may be significant they are:-

Note dated 8 September 1992.

An instruction from the Minister of Lands to the Ministry of Lands Surveyor Paula Moala to check the surrender.

Note dated 18 September 1992

The surveyor's reply to the Minister reporting that the surrender has not been submitted to Cabinet.

Note dated 18 September 1992.

Minis ter to surveyor directing the surveyor's acceptance of the surrender.

Note dated 23 September 1992.

Surveyor to the Minister informing that the applicant seeks to cancel his surrender since it is not before Cabinet.

On a ll sides the plaintiff called at the Ministry of Lands in late 1992 and early 1993 enquirin g about the surrender which he understood had been lodged, but was not able to obtain any clear information.

On 6 January 1993 Cabinet approved an exchange of allotments between the defendant Faiva and the defendant Fifita effectively bringing to an end to the quiet enjoyment Nau had and terminatin g any rights Nau's children may have acquired.

Itis common ground that the plaintiff has lived on the allotment in question for49 years, cared for ii, planted fruit trees and built a family house on ii.

Nau for her part was born on the allotment was raised on it was married and lived with her husband, cared for her parents. It is equally clear that the defendant Faiva has neither lived on the place nor cared for it.

The plaintiff seeks orders that-

The exchange of town allotment between defendant Faiva and defendant Fifita be set aside and cancelled.

The Ministerof Land submit to Cabinet the application of the defendant Faiva of 14 August 1987 to surrender U1e allotment and allow the Plaintiff Fasi to apply for it.

Costs.

Granting other relief.

The law of Tonga presently is as Martin CJ succinctly put it in Latu Popi Veikune v_S ione Katai na Toa [1981-88] Tonga LR 138 [1988] S.P.L.R. 384 @ 386. Having referred to the decision of the Privy Council in Veikune v Toa which referred the matter back to the Trial Judge to determine findings and having referred to O.G. Sanft and Sons Ltd. v Tonga Tourist and Development Co. Limited [I981-88J Tonga LR 26 Martin CJ. considered the notion of the application of equitable pri nciples to the Land Act Cap. 132.

He referred at p.140 to the oft quoted dictum or the *Privy* Council in Sanft:

> "In respect of Tongan Land, the Land Act is a complete code which ... rigidly controls l>y its express terms all titles and claims to any interest in Tongan land except in respectofleasehold interets once they have been created ...with that exception there is noroom for the application of any rule of equity. A ll claims and titles must be strictl y deal with under the Act."

And later:

> "... Equitable principles can only apply to leasehold interests after they have been validly granted. Such principles have no application to any other title, claim or interest in any other Tongan interest in Land."

If found to exist, the promise to Na u and her children by her father is accepted as being in the natureof a licence in a mannersimilar tothatin Veik un e. Martin CJ continues at p.140 and observes that what Sanft does not say is "That the Defendant cannot avail himself ofan equitabledefencewhich does not create an interest in land, 'lnoke'spromises cannot be enforced by way of a contructive trust. The Defendant cannot be given a grant of land. But the Defence of estoppel is open to the Defendant.•

I agree with Martin CJ in thecircumstances as he was considering them in Veikune. However, those circumstances are different to thecircumstances of thepresent case. The party asserting the promise toallow Na u and herchildren tooccupy the land is the plaintiff because he appears to have been by-passed in the transactions leading to the registration of Funaki leaving Fasi with the task of setting aside events which may displace Nau and her children.

Mr. Foliaki for the plaintiff submits that if the defendant in Veikune (Supra) could be granted a li fe estate as a defendant the reverse can occur. By that I understand him to mean that a plaintiff may be able to assert a right to occupy by showing that in the particu lar circumstances the Defendant is estopped from denying the existence of an agreement between the earlier holder and the occupier whom the defendant seeks to remove from a life occupancy for herself and that of her children.

Mr. 'Etika of counsel for the first and second defendants argues that the acquisition of the subject land by Funaki and theexchange thereafter with Fifita were done lawfully, i.e. according to the Land Act which rigidly controls such transactions [Sanft, (Supra)]. Moreover he argues that the doctrine of Iaches applies to the Plaintiff.

As has been made clear, the defendants deny the existence of any argreement or promise from Funaki Fai va's grandfather that the land would be available to Nau and to her children as alleged in paragraph 8 of the statement of claim.

From the whole of the evidence I suspect that Nau's father made her the promise alleged in the statement of claim paragraph 8. II is the sort of arrangement that people make in life. The agreed facts and the exhibi ts all point to it. But how am I able to make any finding about it? At the moment there is only the bare assertion in the statement of claim and inferences which may be drawn from the surrounding circumstances, eg, the fact of Nau having lived on the place all her life having quite enjoyment of the land consistent with her father's wish until the arrival on the scene of Funaki.

Ifone assumes for the purposes of the resolution of this case that the plaintiff isable to succeed on every allegation, (leaving aside the application of the equitabledoctrine of laches), in the statement of claim, in light of the decision in Sanft but bearing in mind the reasoning of Martin CJ in Veikw1e (a case plainly distinguishable from the present,) the plaintiff simply cannot succeed. He seeks from the Court (standing as he does as the

descendantof a mere licencee, not the descendant of a holder by lease, not the descendant of a holder by grant) declarations and orders to which the Privy Council have made it as plain as can be, he is not enti lied.

The case not only cries out for a more just result but is only one of many which are brought before this court. Itmay be that a necessity for legislative intervention may arise enabling the parties to agreements or promises such as the one under consideration to resort to the registration of the agreement with Ministry administration so that there will in the future be no time consuming and costly litigation like the present.

190 The plaintiff must inevitably fail in this case. My concern is that counsel have presented thecourt with some agreed facts. However the major issue is in dispute and that can only be resolved by hearing from Nau and anyone else who may have been placed on notice about the wishes and the promise Nau's father is said to have given her.

The defence of laches may be dealt with quickly. From the evidence before this court there was no delay in bringing proceedings. The action evolved after Funaki commenced by applying for a surrender in favour of the Plaintiff and then withdrawing it. There is much to be explained about Funaki's behavour. The plaintiff was then faced with the fact of the registration of the land. He was thereby forced to sue.

200 How this came about when one considers the earlier altruism of Funaki, remains a mystery. The defence of laches cannot be said to be appropriate in the circumstances of this case.

I am of the opinion thatthis matter cannot be properly determined as tothe real issues given the state of the so - called agreed facts. However if the facts were to be detem1ined at a full hearing the plaintiff must fail for the reasons I have given.

I will hear Counsel further as to the course which the court should take.

Muller v Manu, Minister of Police, Kingdom of Tonga

Supreme Court, Nuku'alofa
10 Lewis J
C.168/93

12, 13 October 1995, 12, 13, 14, 15, 18, 19, 20 & 27 March 1996

Tort - assault - wrongful arrest - false imprisonment
Damages - police officer - assault - exemplary
Evidence - failure put case

20 The plaintiff sued an individual police officer, the Minister and the Kingdom for assault wrongful arrest and false imprisonment allegedly committed in February 1993; the first defendant for his own alleged actions; the second defendant for negligence in failing to properly supervise the first defendant; the third defendant for vicarious liability for the first defendant.

Held:

1. There was noevidence before the court of the effects of alcohol on the human system.
30 2. The plaintiff, carrying both the probative and the evidentary burdens must demonstrate that what the police did was unlawful on 2 bases namely:
   (a) that there existed no belief on the part of the police officer purporting to arrest the plaintiff, that the plaintiff was drunk;
   (b) that belief if held was not a reasonable one in all the circumstances.
3. One side must put its case to the other - to put differences affecting the other party. A ny matter in which is proposed to contradict evidence in chief of a witness must normally be put to him/her and failure to do this may be held to imply acceptance of the evidence in chief.
40 4. Todrink intoxicating liquor without a permit was no longer anoffence, having been repealed in 1989 and the first defendant had no right to act and purportedly arrest on that basis.
5. The powers of the police to keep order, to arrest without warrant any person breaching the peace, or to arrest to prevent the commission of a public nuisance do not empower police to commit offences against members of the public in the name of duty.
6. The first defendant was liable as was the third defendant (vicariously liable) for assault wrongful arrest and false imprisonment.
50 7. But there was no evidence to support the claim of negligence against the second defendant and that claim must fail.

8. The plaintiff was entitled to proved special damages, general damages of $10,000 given in particular a permanent residual disability to his left knee, and exemplary damages of $1500 given the duty of the first defendant to look to the safety of citizens and not to cause injury and humiliation to them. He was to prevent breaches of the peace, not cause them.

(Note: an appeal from this judgment is reported as Manu v Muller (1997) Tonga LR).

Cases considered — Brown v Dunn (1893) 6 R 67 (HL); Karidis v GM (Holden) Ltd [1971] SASR 427

Statutes considered — Order in Public Places Act ss.3 & 4; Intoxicating Liquor Act

Counsel for plaintiff : Mr Niu

Counse for defendant : Ms Weigall

Judgment

This is a claim for damages for assault, wrongful arrest, and false imprisonment, torts which the plaintiff alleges were committed against him by the first defendant Kelepi Manu, a police officer, at or about 5.30 pm on Friday 12 February 1993 and thereafter.

The plaintiff, a former rigger by trade, also claims damages for loss of earnings, damages for pain and suffering, loss of enjoyment of life and punitive or exemplary damages. He alleges that the second defendant is negligent in having failed to supervise the first defendant and alleges the vicarious liability of the third defendant.

The plaintiff includes in his claims the allegation that he has been unable to recover a cash sum of $1207 which had been in his shirt pocket at the beginning of the incidents of which he makes complaint but which he discovered was missing on the following morning thereafter reporting the loss to police.

The plaintiff last worked as a rigger in 1992. He had lived in Tonga for some years and had worked as a dump truck driver. At the time of the incident of which he makes complaint he was working on the construction of a dwelling house with his brother Hendrik and driving the dump truck earning $20.00 per day 6days a week for the driving. He was supervising the building of his brother's house "for love".

On the 13 February 1993, a Friday, the plaintiff drove his truck to Nuku'alofa from his brother's house site. It was his intention to purchase building materials and transport them to the site.

The defence case has always been that the plaintiff was at all material times "drunk" when first seen by the first defendant. There is no direct independent evidence, (i.e. independent of the police officers) of the sobriety or otherwise of the plaintiff. There are pieces of evidence. On all sides the plaintiff has consumed alcohol. He says so himself, he says three bottles of Royal Beer and I accept that it was consumed at between at the earliest shortly after 4.00 pm and at the latest shortly after 5.00 pm. The last alcohol was consumed by the plaintiff on his own account at the earliest 5.00 pm and at the latest 6.00 pm.

The plaintiff carries the obligation M proving that at the material time Constable Manu had no reasonable grounds for arresting the plaintiff or alternatively that the material witnesses to the grounds are either mistaken or not worthy of credit upon their oath concerning the grounds.

There is no evidence before this court of the effects of alcohol on the human system. There is no evidence of the volume of liquid which is contained in the kind of bottle referred to by the principle antagonists and there is no reference to the ratio of alcohol per unit volume of a bottle of "Royal Beer". There is no evidence of the effect of alcohol on the person of Mr. Muller therefore I am not assisted by reference to "three bottles of royal beer" made by the plaintiff in explanation of his sobriety. There is therefore a ea(need in this case to consider carefully the assessment of the police officers of the sobriety of the plaintiff at all material times forafter all they were about tod«privе him of his freedom on the basis that at least one of them, Manu, had formed the belief that he was drunk, (if one is to accept Manu.)

Until counsel were pressed to lead it there was no evidence of the criteria which Mam1 or indeed Piutau used to determine sobriety and drunke1rness in a member of the public as a prelude to forming the belief that an offence was being committed by that person. Ilis as Mr. Niu p111it in his address, for the officer to give evidence of the criteria

he applies in detenning to arrest and it is for the court to say whether those criteria are reasonable in all the circumstances. The right to arrest is of course a conditional statutory ght In the present case the situation is governed as to the offence of public drunke1U1ess by section 3(K) of the Order in Public Places Act 1988 Cap 37 as amended which pi;ovides:-

"3. Any person who shall commit any of the foflowing acts, shall be liable on conviction .....that is to say every person Y(ho-.....(K) in any public place is drunk and inapable, or is drunk and behaves in a disorderly manner therein.•

S_ection 4 of the act creates 'the right in ihe constable to effect an arrest

"4. Whoever is found con'lmitting any of the offences specified in section 3.... (K) ..... may be arrested without a wan:ant by any constable ..."

Both the probative and the evidenciary burden in this trials is that of the plaintiff. He must demonstrate on the probablities to the satisfaction of this court that what the police did here was unlawful on two bases:

That there existed no belief on the part of the police officer purporting to effect the arrest of the plaintiff that the plaintiff was drunk or alternatively,

Ifthe Police Officer held such a belief then in all the circumstances of the case the belief was not a reasonable belief.

The evidence of Manu is that he has arrested more than 30 people for the offence of drunkenness in the 9years during which he has been a Police Officer, all of whom were convicted of the offence of drunkenness. The criteria which he uses generally to de\errnine whether a person is drunk and which he says he used in the case of the plaintiff are that he would look for.-

A reddish face,

A smell of liquor when talking,

An inability lo "control themselves when they walk" and,

Noisiness.

In the case of the plaintiff and in the circumstances of the arrest of the plaintiff he agreed with Mr. Niu of counsel for the plaintiff that only two of his criteria were present namely, red eyes and a smell of alcohol. Assuming Manu's account to be true there was of course the added word "arsehole" which Const. Manu says had been directed ai him by the plaintiff before he reached him - before he left the police vehicle.

The evidence of Constable Piutau is that he heard the word "arsehole" used by the plaintiff and having heard it told Manu to tum into the car-park. Piutau says that he was a Police Officer for 14 years and had arrested over 100 people for the offence of drunkenness. He told the court that his criteria for believing a person to be drunk were:-

swearing by that person and,

staggering when walking.

Piutau concluded - "My feeling was that he was dnmk but not very drunk". He gave no classifications of drunkenness, nor did Manu. Neither witness referred to any classifications used to determine the degree to which their suspect was affected.

Useful classifications widely used by Police Officers have included reference to the fact that a suspect was:-

Mildly affected by alcohol,

Modera tely affected by alcohol,

Grossly affected and/or

Unconscious.

I conclude that Piutau meant to say that the plaintiff was in his opinion in the first category - mildly affected by alcohol.

These two witnesses were experienced Police Officers. I accept that if believed then their opinions as to whether the plaintiff was drunk are acceptable and in all the circumstances admissible of the fact of drunkennessand assuming them to be telling the court the truth, the grounds they gave, even though in the case of Manu only two criteria existed, his statement of having had cause to believe in the drunkenness of the plaintiff was objectively a reasonable one.

The real question in this case is whether I believe that the two are truthful witnesses. Frankly I do not believe either of them about this matter. I am sure that they lied about a good many things. There is much about their evidence which I find unsatisfactory.

It is an appropriate point in this judgment to consider the need for one side to have put its case to the other. The defence did not merely fail to put its case to the plaintiff on just one occasion, there were many matters not put by the defence to the plaintiff. Conversely there were also matters which the plaintiff failed to put to defence witnesses.

Some examples the failures of the defence to put matters to the plaintiff include:-

The conflicting accounts of the vehicle positions.

The fact that Manu and Piutau say that the plaintiff was drinking beer from a bottle when police arri ved.

The fact that Manu says that he struck the plaintiff from the police vehicle.

The law and good sense requires that one party put totheother, differences affecting the other party, it is fair and right to do so, moreover the common law calls for it - Browri *v* Dunn (1893) 6 R 67 H.L. Any matter in hich it is proposed to contradict the evidence in chief given by the witness must normally be put to him and failure to do this may be held to imply acceptance of the evidence in chief. It may be that in juri sdictions which permi.t evidence in rebuttal liberally, this rule will be applied less strictly:- Karidis *v* Genera l Motors Holdens lli_ Ltd. (1971] SASR 422. There is no doubt that the jurisdiction of this court allows of liberal rebuttal eviden ce, however i n this case no attempt was made by the defence to i ntroduce any contradictory rebuttal evidence.

I conclude that Manu and Piutau were inventing evidence to suit the case of the defence as they went along. In every respect where issues arise between the plaintiff and defendants I prefer the evidence of the plaintiff and his witnesses. I fi nd that there was no first close exchange as Manu has said there was between himself and the plaintiff.

I fi nd that the plaintiff was supervising his son who had been urinating as Manu approached him. I find that Manu said words to the effect 'When I tell you there is no drinking ... There is no drinking." Thereupon Manu struck a blow to the face of the plaintiff which contacted in the vicinity of the mouth of the plaintiff on the right side.

The finding requires comment. In her address, Ms. Weigall of Counsel for the defendants submitted that the law i:•revai ling in February 1993 rendered unlawful any drinking in public or in priva te without a pem1i t and referred me to the Intoxicating Liquor Act Cap.84s.76. Ms.Weigall asked me to conclude therefore that todrink i n the car-park in this case was to offend.

The content of part II of the Intoxicating Liquor Act was repea led by Act No.6 of 1989. The permit provisions of the Intoxicatin g Liquor Act did not exist on 12.2.93 s.76

went with it. If one were to assume that the plaintiff was seen by police to have been consuming liquor in the car-park it certainly would not have rendered Manu's belief as to the stat<;: of the law right. Manu's initial belief was nawed as was so much of his inexcuseable behaviour following his approach to the plaintiff. Manu had no right at all to stop and require the plaintiff not to drink liquor in the car park on that ground alone.

Ms. Weigall suggested that Manu was empowed to keeporder pursuant to the Police Act and to arrest with warrant any person who commits ... any breach of the peace in his presence, to keep order in .... places of public resort and to prevent the commission or public nuisance. laccept the submission. Those provisions of the Police Act are sensible measures without which Police generally would be in considerabl edifficulty, howeveron the facts as J have found them to be his arrest was unlawful.

It must be understood by the public and police alike that those laws do not empower police tocommit offenceon membersof the public in the nameof duty. Theduty of police officers is to thoroughly know and understand the law which regulates their actions and to p.erform in accordance with those laws or suffer the consequences.

I find that the first blow delivered by Manu on the person of the plaintiff was delivered at a point at near the front left sideof thebedford truck in which the plaintiff had been travelling. I find that the blow was unjustified and unlawful. In the circumstances then prevailing, the plaintiff was quite justified resisting the efforts of the officer to take him into custody and entitled to make every effort to escape from the officer subject to the law. It must be added that, apart from the evidence of Manu, there is no suggestion that the plaintiff offered violence to the Police from the commencement of the arrest.

lam surethat the plaintiff was more than alarmed by thebehaviourof theofficer and resisted instinctively. I accept that the recollection of the plaintiff is blurred by the violence used against him. laccept that he was struck a number of blows. I accept and find that at least on one occasion hewent to the ground as a result of the force used against him by Manu.

J find that Manu delivered a kick to the right knee of the plaintiff thereby causing a subsequent development of a hemarthrosis in the plaintiff's left l<Jlee requiring lengthy investigation and treatment - (vide. exh. Pl2. Report of Dr Mcausland 28.6.9S). Manu admits a kick to the left buttock of the plaintiff. Iconsider his evidence to be un-reliable. It is more probable that the kick he delivered was to the plaintiff 's left knee.

J find that there were numerous other blows on the plaintiff by Manu which were associated with his unlawful detention of the plaintiff all of which were unlawful - the existence of which are supported by the injuries found by Dr. Puloka and recorded in exhibit PS including bruising on his right chest and back.

J find that at a point in the meting out of violenceby Manu against the plaintiff, Manu placed his arms beneath the arms of the plaintiff and then joined his hands in the manner described by the witnesses as a "Half-Nelson' and so holding the plaintiff drove his face into the side of the truck causing the lump in the vicinity of the plaintifr s forehead and the associated bruising. (vide exhs. PS & P6 Dr. Puloka). I find that the plaintiff s shirt was tom by Manu during the incident.

J am satisfied that the child Kar cried out no doubt in fear and alarm at what was happening to his father and that his father showing considerable presence of mind in taking him into the to the police vehicle and with him to the station.

J find that at the station the plaintiff was released without being charged. The

defence says by reason of his agreement not lo sue and beca useof the presence of his son. The plaintiff was under no obligation lo "be a man and to keep his word" in the way suggested to him by the duty officer.

From the mere fact that the police felt constrained to have such an agreement signed by the plaintiff gives rise to the inference that the officer knew that something wrong had taken place. However any agreement of that nature may be regarded as an illegal and unenforceableonesince theplaintiff had been unlawfully detained assaulted and arrested.

I find that the plaintiff had a sum of money which I find from his own evidence was a little less than $1207.00a t the time when he was first struck by Manu. I find that at some point between then and the following morning the money disappeared, probably during theslruggle oron theway tothe Police Station. The plaintiff reported the loss to thepolice on discovering it was gone next morning.

THE LIABILiTY OF THE SECOND AND THIRD DEFENDANT S

1. THE SECOND DEFENDANT

The plaintiffs claim against the second defendant is said to lie in a failure by the Minister of Police to supervise the first defendant and by that neglect thus breaching the duty of care the Kingdom of Tonga is said to owe to the plaintiff. There is no direct evidence of such failure. Any conclusions concerning such a failure must therefore necessarily be drawn from inferences.

Constable Manu wason duty, in unifonn, underorders to patrol - probably toPolice drinking on the foreshore area and patrolling with an officer higher in rank at the material time. I am simply unable to draw the inference of failure to supervise sought by the plaintiff.

In all probability and in the absence of evidence to the contrary there is and was nothing exceptional about the supervision constable Manu had and was being given. On that head of claim the plaintiff must fail.

2. THE THIRD DEFENDANT

The plaintiff claims that the liability of the third defendant sounds vicariously. Vicarious liability undoubtedly exists here. Manu was a Police Officer in the execution of his duty. I so find.

THE CLAIM FOR THE LOSS OF A SUM CASH BY THE PLAINTIFF IN THE INCIDENT

I find that the plaintiff had a sum of money which was a little less than $1207.00 at the time when he was first struck by Manu. From theevidence about it the sum was about $1200. Less about $100 spent on down pipes. For present purposes $1100.00

I find that at some point between encountering Manu and the following morning the money disappeared, probably during the struggle oron the way to the Police Station. The Plaintiff reported the loss to the Police on discovering it was gone next morning.

The causal connection between the unlawful detention and the loss is too remote for me toconclude that it was probably the fault of Constable Manu or the Minister or Police that the money was missing. The plaintiff fails on this head of claim.

SPECIAL DAMAGES

I allow the following items of special damage:-

Medical eltpenses incurred in New Zealand	$3,521.50
Loss of earnings	$1,560.00
	$5,081.50

WITNESS FEES AND TRAVELLING EXPENSES

These expenses are conceded by the defendants as being payable in the event of the success of the plaintiff on the claim. The figure includes the air fares and expenses of the plaintiff associated in his travelling from and to New Zealand for trial and includes the costs of the attendance of Dr. Puloka $1975

GENERAL DAMAGES

Being satisfied that the plaintiff suffered wrongful arrest and false imprisonment and being satisfied that as a consequence of the violence used against him in taking him into_ custody the plaintiff sustained shock and associated pain and suffering from the punches blow s and kick delivered by the first defendant to his body, I am satisfied that the experience was an humiliating and distressing one.

I find that he, as a consequence of the kick to his left knee delivered by the first defendant, has suffered a perman ent residual disability in the nature of a 5% permanen t loss of function. I am satisfied that the plaintiff s left kneeis now more susceptible toearly onset of aching. (exh Pl2- 11.12.95) I find that the plaintiff will experience from time lo time a sensation of locking of the knee and the feeling that something is catching behind the knee cap. I assess general damages as a global award of $10,000.00.

It is appropriate to make an award of exemplary or punitive damages in this case. The first defendant was an officer entrusted with a duty of policing thearea of Nuku'alofa under consideration. His duty included looking to the safety of the citizens of the Kingdom not to cause injury and humiliation to them. He was to prevent breaches of the peace - not cause them. I award the plaintiff the sum of $1500.00 by way of exemplary damages.

'Jt is ordered that:-

1. Judgment be entered for the plaintiff in this action against the first and third defendants on the claim.
2. Damages be assessed as:-

General Damages	$10,000.00
Exemplary Damages	$1,500.00
Special Damages	$5,081.50
Witness Fees etc.	$1,975.00
	$18,556.50

3. The costs of these proceedings to be those of the plaintiff lo be taxed or agreed.

Bank of Tonga v Pekipaki & others

Supreme Court, Nuku'alofa
Lewis J
C. 175194

30, 31 August, 2, 5, 6 &7 September 1994, 10 April 1996

Banking - guarantees - service -fiduciary duties
Contract - defences - 11011 estf actum - misleading

The plaintiff sued the 3 defendants on their personal guarantees given in relation lo lending extended to an incorporated family company.

Held:

1. The giving of proper notice to the defendant in conformity with the guarantee had to be complied with.
2. There had not been proper service of all docume11ts on all three defendants.
3. The defence of a breach of the fiduciary rela tionship between plaintiff and defendants in that the Bank failed to allow or gi ve an opportuni ty to the defendants to have proper legal advice failed. No transaction should be set aside on the grounds of undue influence unless it was shown that the transaction was manifestly to the disadvantage of the person subjected to the dominating influence. The notion of undue influence will extend to the relationship of banker and customer but it is not based simply on an inequality of bargaining power. Thebasis of the principl eis not publicpolicy but the need lo prevent the victimnisation of one party by another.
4. There was no undue influence by the Bank exerted on the defendant. There was no obligation on the Bank, in the circumstances of the case, to give any adviceof a legal nature, or at all. In addition the defendants had the advantage of assistance from their accountant.
5. The defence of unconscionable dealing by the Bank, an equitable remedy, raised on the basis of a claimed false and misleading account to one defendant of the true nature of the dealing, failed. The plaintiff had not failed to exercise due care and reasonable dil igence towards the defendants in a situation where there was a need for the lender to exercise due care towards the defendants
6. The plea of non est factum failed (i.e. a claim of a material misleading as to the contents of the signed guarantees the mind not going with the pen).
7. There would be judg ment for the plaintiff against the defendants, on the guarantees for which proper notice had been given and served.

Cases considered National Westminisler Bank v Morgan [1985) 1 All ER 821

C.B.A. v Amadio (1982) 151CLR 447
Hamilton v Watson (1845) 12Cl. & F.109 (8 Feb 1339)
Curlisle & Cumberland Banking Co. *v* Bragg [1891] 1 KB 489

Statutes considered

GOocls & Services Act 1982 (UK)
Evidence Act s.8(n)
Civil Law Act s.4
Unfair Contracts Terms Act 1977 (UK)

Counsel for plainti ff — Mr Appleby
Counsel for defendants — Mr C. Edwards

Judgment

PREAMBLE

Thisaction is a sequel to ajudgment deli vered by Dalgety J. as he then was in action No.515/ 1992 which in a preliminary way dealt with the demand made by the Bank on guarantors (the defendants both in action 515/92 and in this action).

The plaintiff is a banker. The defendants, Kelepi Toutai Pekipaki until his death, 'Ofa his wife and Hale his son, were at all material timesafter 16May 1985, Directors and Shareholdersof an incorporated familycompany known asthe"O.K.TOUTA l COMPANY LIMITED"which conducted a business retailing (general) merchandise.

Th.e family business had arranged certain overdraft facilities and a letterof credit for stock purchasing purposes. The overdraft was extended by letter of credit arranged with the plaintiff by a tenn loan. After the business became incorporated the plaintiff.required that thedefendants enter personal guara ntees in order tosecurethe extended arrangements. The defendant executed the documents presented to them. It is from the execution and its circumstances from which the issues in the main arise in this case.

Later the tradingof the corporation did not enable it to pay its debts. A Receiver was appointed in 1992 by the plain)iff. The plaintiff thereafter instituted proceedings against the three defendants in actiori No.5 15/92. The action was based upon the personal liability of the defendants under the guarantees they gave to the plaintiff.

Action 515/92 failed before Dalgety J . for reasons which he published on 12 July 1993, leaving a counterclaim made by the three defendants still to be heard. The claim was struck on the technical ground that notices of demand made by the plaintiff banker were not properly signed.

The present action commenced by the plaintiff i n 1994 seeks to enforce the same guarantees this time alleging proper notice and service upon the guarantors. Counsel agreed that this trial may proceed on the basis of the law set out by Dalgety J . in hisreasons of 12July 1993 in action No.515/92. So i t has proceeded.

In the time between the conclusion of action 515/92 and the present, the third defendant died. This action is being defended by the administratrix of his estate. The issue are considerably narrowed in thsi action. Some are issues of fact.and some are of law.

NOTICE UNDER CLAUSE 20 OFTHE GUA RANTEE

Dalgety J concluded that before any action could be taken by the plaintiff bank to enforce the personal guarantees alleged to have been made by the defendants, an essential condition for the commencement of litigation, namely the giving of proper notice in conformity wi th the guarantee had not been complied with and dismissed that action giving leave to the plaintiff tocommence fresh proceed ingsafterthe necessary fonnali ties were completed i.e. notice in writing to the guarantors by the plaintiff .

The case for the plaintiff bank in thi s action is that i t has now properly-completed thegiving of notice under the guarantees, has effected proper serviceand seeksjudgment on the action on the guarantees.

Proper service of the notices is disputed by the defendants. As can be seen from the guarantee (Exhibi t Pl), proper service of notice pursuant lo the guarantees is crucial to the success of the plaintiff bank in these proceedings.

The clause of Exhi bit Pl which i s material to service i s clause 20and is as follows:-

"20. Tha t any demand to be made upon QLi!!!Y IlOtice lo be gi ven to the

guarantor or the debtor by or On behalf of the bank hereunder shall be deemed to be duly madeor given if the same be in writing and be signed by for or on behalf of any Manager Deputy Manager Assistant Manager or the Chief Cashier for the time being of the' Bank or any branch or any person forthe time being actinginany of those capacities and if the same be left or sent through the post in 3: pre-paid envelope or wrapper addressed to the guarantor or the debtors as the case may be at the usual place of abode or business or the registered office of the guarantor or" debtors as the case may be last known as such by the person signing such demand or notice or lo delievered personally to the guarantor or debtor as the case may be or advertised in the government gazette of the state country or place in which the guarantee is executed and any such niode of service shall in all respects bevalid andeffectual notwith standing that at the date of such service theguarantor or the debtor as thecase may be at the time when the envelope or wrapper containing such demand or notice would in the ordinary course of post have reached the address to which it was posted and notwithstanding that it may never do so or if advertised upon the date of publication of the said gazette.• - (my emphasis).

The evidence is that the Kingdom has no orderly system of attaching addresses to premises, especially in rural areas. The Bank often resorts tothe use of radio broadcasts to inform customers and presumably others of some fact about which the customer has a need io know. The guarantee ensures that proper service is not only done with care, but is a pre-requisite to any action based upon the guarantee.

Clause 20 of the guarantee is interpolated into the documents which comprises exhibit P2. The documents are entitled - "Certificate of indebtedness .... demand for paymenl" The demands are addressed to each defendant except in the case of the late Kelepi Toutai Pekipaki where it refers to him personally and not to his estate. Each Defendant is described as being of "Nuku'alofa Tonga.• The sum demanded in each notice is the same - namely, $48,383.79. Each notice is dated 10 August 1993.

What should be thesimplest task in this action has become one of the most difficult to resoive by reason of the confusion of the evidence of the Clerks concerning service. Then there is the puzzle of exhibit DI 1-The returns from service on 10 August endorsed by the Bank officers who effected service. In the exhibit there are only 5 documents. There should be 6 on any account of things.

On the balance of probabilities I am unable to conclude that there has been proper service of all documents on all three defendants. Even on the plaintifrs account, 'Ofa and Hale received only one notice each relating to the loan account if DI 1 is to be accepted and Kelepi got three notices of demand.

On the question of service of notices Pl is explicit and pedantic. The service must be done in respect of both guarantor and debtor - it does not discriminate - and it must accord with the prescribed (and agreed) mann erset out in Clause 20 of Pl. From the whole of the evidence I am unable to conclude that the demands have been properly served.

I find that Dl I suggests that the following service was effected:-

Kelepi - received 3 notices demanding T$167,051.30 and T$4S,383.79

'Ofa - received one notice for T$4S,383.79

Hale - received one notice for T$48,383.79

If one accepts theToutai Pekipaki's then proper serviceof only some documents was effected. If one accepts Mele everything was done in accord with the guarantee Clause 20. If one accepts Nora Fatai then she is quite uncertain about ju st which notices were served and on whom. I am prepared to find that there were indeed two visits by the Bank Officers which accords with the evidence of Nora and 'Ofa.

I find that on the first visit 'Ofa received the loan account demand for T$4S,383.79. I find that on the second visit no documents were handed out to each defendant by reason of theagitation of Kelepi. The documentswere simply left somewhere near Kelepi, which in my view amounts to compliance with clause 20of Pl of some documents - which ones? In my opinion those in exhibit Dl 1.

The Bank Officers took their leave. I accept that Kelepi saw Ms. Tonga his Solicitor and left exhibit Dl 1with her and that he le(t what had been taken tothe Toutai household by Mele and Nora, namely the five documents in Exh.Dl 1and no more.

FORMAL ANDINGS

I make the following preliminary formal findings. I am satisfied on the balance of probabilities from the whole of the evidence that at all material times:-

The first and third defendants and Kelepi Toutai Pekipaki weredirectors of the O.K. Toutai Company Limited ("The Company") duly incorporated under the laws of Tonga with its head office at Nuku'alofa .

On 28 November 1986 the plaintiff al the request of the company lent the company top $50,000 with interest at 10% for the purpose of business.

On 28 November 1986 the company received the load funds by way of overdraft facilities toa limit of $50,000 and on 15June 1987 theoverdraft limit was raised to $60,000 with interest chargeable at the current rate and again on 15July 1987overdraft limit was increased 10$100,000 with interest chargeable at the current rate.

On 17June i992 the balance of the loan account which was given the account No.0119101001012 was in arrears and the amount of $139,043.45 including all loan establishment and service fees remained due and unpaid.

On 3 November 1985 an equitable mortgage was duly executed by the company in favour of the plaintiff lo secure all monies then or thereafter becoming due and owing to the plaintiff by reason of the overdraft facility and on 27 January 1986 a certificate of document was issued by the registrar of companies certifying that the equitable mortgage was registered pursuant to rule 14 of the company rules.

On 3 December 1985 the defendants and each of them executed a personal guarantee with the pletintifl guaranteeing the repayment to the company pursuant to paragraph (A) of the guarantee which provided and provides as follows:-

"Jn consideration c•f the Bank of Tonga (hereinafter called "The Bank") al the request of tach of the persons undersigned (which request is testified respectively by their execution hereof) (sic) continuing at its discretion and duri.1g its pleasure or accommodation already granted ..... O.K. Toutai Company Limited (hereinafter called "The Debtor") ..... 'Ofa Toutai Pekipaki, Kelepi Tolllai Pekipaki. and Sione Hale

Pekipaki, all di rectors o(the said Company (hereinafter called "The Guarantor") hereby guarantees to the Bank the payment when demanded in writing from the guarantor of:

(A) A ll monies already advanced or paid or now or hereafter advanced or paid by the Bank to or for the accommodation or or on behalf of the debtor either alone or jointly."

Paragraph 5of the guarantee document provides that the guarantee isenforceable notwithstanding that any other instrument of security remains outstanding and is a principa l obligation and independent of any other security which the plaintiff may hold for any indebtedness of the debtor O.K. Toutai Company Limited.

Paragraph 7 of the guarantee document provides that the guarantee shall not affect or be affected by any other security held by the plaintiff.

On 16June 1987 the plaintiff at the request of the company lent the company $85,000 charging interest at 10% per annum for the purpose of the company purchasing the Bums Philp Company at Ha'apai.

On 16 June 1987 the company received the said $85,000 loan funds.

On 18 November 1988 a mortgage by wuy of lease was executed by the company in favour of the plaintiff to secure afl monies then or thereafter becoming owing to the plaintiff.

On 17June 1992 the balance of the loan account No.0 1101010 11011 was in arrears and the amount of $42,010.41 which included a 11u111bcr uf Joan and establishment fees remaining due and unpaid.

On 13 May 1992 the plaintiff caused a receiver to be appointed pursuant to the equitable mortgage in order to secure repayment of the total debt owed to the plaintiff in the amount of $181,053.86.

On 10 August 1993 the plaintiff sent a letter to the defendants making a demand for payment pursuant to the personal guarantee.

On 23 July 1992 an administration order was granted by the Supreme Court and an administrator was appointed to manage the affairs of the company pursuant to a petition for an administration order for the admitted purpose or achieving a better realisation of assets than would be available upon a winding up of the company.

Letters of administration were granted in respect of the estate of Kelepi Toutai Pekipaki on 9 December 1993.

THE DEFENCES WHICH ARE FOURFOLD

1. The defence of breached special fiduciary relationship between the plaintiff and the defendants in failing toprovide anopportunity forthe defendantstohave independent legal advice concerning their rights and obligations under the guarantee.
2. The defence of failure on the part of the plaintiff to exercise proper skill and care toward the defendants in that they had duty to do so arising from an implied term under the provisions of the supply of Goods and Services Act 1982 s. 13an English statute of general application.
3. A failure by the plaintiff to appl y the sum of $100,000 in reduction of amounts owed to the plaintiff by the company, being a sum which was the proceeds of the sale of leasehold property owned by th company at Ha'apai by the plaintiff in June 1993

and in so doing the plaintiff wrongl y relies on clauses of the guarantee referred to in 6 7 and 8 of the statement of claim namely that it can su 1nd claim from the def ndants on the deed of guaranteewithou t referenee to any instrument of security which the plaintiff may hold for the indebtedness of the company.

4. The defence of non est factum.

DEALING WITH THE DEFENCES IN TURN

1. THE DEFENCE OF FIDUCIARY RELATIONSHIP _ BETWEEN THE PLAINTIFF AND DEFENDANTS IN THIS CASE BREACHED BY THE PLAINTIFF IN THAT IT FAILED TO ALLOW OR FAILED TO GIVE AN OPPORTUNITY TOTHEDEFENDANTSTO HA VEPROPERLEGALADVICE .

In National Westminster Bank PLC v Morgan [1985) 1All ER (I-IL) 821the House of Lords held that no transactioncould be setaside on the grounds of undueinfluence unless it was shown that the transaction was manifestly to the disadvantage of the person subjected to the dominating influence. The noo of undue in uence will extend to the relationship of Banker and customer but 1t 1s not based simply on an inequality of bargaining power. The basis of the principle is not public policy but the need to prevent the victimisation of one party by another.

I find that there was no undue inOuence by the Bank exerted on the Defendants. There was nota suggestion incross examination that the Plaintiff even discussed the matter of legal adivce or representation. And in my opinion there was no obligation on the Plaintiff Banker in the circumstances of this case to give any adviceof a legal nature or at all.

1am satisfied that the documents were all explained briefly broadly but perhaps in adequately for any profound understanding on the part of the Toutai Pekipakis, by the Bank through its officer Tu'ipulotu and in the presence of the lending manager. I think it inherently improbable that the Toutai Pekipakis misunderstood what was told them.

'Ofa Tu'ipulotu had, just over a week later certified that the guarantee had been explained to them and they appeared to understand the nature of the document and they had signed it of their own free will.

There is nothing about the evidence in this case that would suggest that the lendmg Plaintiff Bank was engaging in anything but a needs based lending to a corporation which needed further advances a condition of which was that loans by way of an overdraft and a term loan would be guaranteed by the directors.

In the Commercial Bank of A ustralia Limited v Amad io(l982-1983) 151CLR 447 at 480 per Deane J. the Plaintiff was dealing with aged parents of he borrower. he aged parents were to a large extent relying upon the accuracy of mformatJon bemg supplied to them by the borrowe r on the one had and the lender Bank on the other. In the present case the people from whom the Bank was seeking surty, the Defendants, were the life and soul of the very company in respect of whom the Bank would lend and the Defendant sureties would guarantee. It was the decision of the Defendants themselves (on the advice of their accountant Kelepi Tupou) that they incorporate the family business. It may be that the language of he documets was not the native tongue of the sureties. Even if it had been m my opmton the Defenda nts cannot now be heard to complain of their lack of understanding by reason of the failure ormisstatement of the Plaintiff Bank to completely describe the

nature and extent of the legal liability created by the documents in the Defendants. In addition it is evident that, whenever they were·actually singed, the Defendants had the advantage of assistance from their accountant, Kelepi Tupou.

2. THE ALLEGED FAILURE BY THE PLAINTIFF TO FULAL THE DUTY TO EXERCISE PROPER CARE AND SKILL BY NOT EXPLAINING THE DEED OF GUARANTEE TO THE DEFENDANTS

I take the law to be as presently advised on this question that a contract of guarantee isnot *uberrimaejidei-* of theutmost good faith. The principles governing theextent J20 to which a creditor is bound to make disclosure to a surety were cited in Hamilton v Watson (1845) 12 CI. & F. 109 8 E.R. 1339

"Relief against unconscionable dealing is purely an equitable remedy. The concept underlying the juri sdiction to grant the relief is that equity intervenes to prevent the strongerparty toan unconscionable dealingacting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing ....• Commercial Bank of Australia Limited v Amadio [page IO.infra]

The defence raised here is plainly equitable. The complaint is that the only explanation of the true nature of the dealing proferred was to 'Ofa and that was false and misleading on the account given by both Hale and 'Ofa. 'Ofa says:-

> "I had to go and sign something at the Bank ...we were contacted to go....we met 'Ofa (Tu'ipulotu) we were given many documents to sign....'Ofa was by herself when we went there to the Bank....'Ofa gave us the documents .....! can't read English and the documents.....!can't read English and the document was explained as meaning that the loan would not be registered in my name.....it was never read to me.....!said what's it all about?.....She said its O.K. its a company to be registered.....conv erted to me to be registered to me.....Its a good document to sign.....I trusted the Bank.•

The witness 'Ofa Toutai then identified her signature on exhibits PI and P4 (both in J40 the English language) as bearing her signature and being her signature and being dated the 3 December 1985.

Some of the assei:tions 'Ofa Toutai says were made to her by 'Ofa Tu'ipulotu were put to the witness 'Ofa Tu'ipulotu by counsel for the Defendants. 'Ofa Tu'ipulotu's evidence is that the Bank policy of the day was that:-

> "We had to explain to customers about conditions attaching to the guarantee .....that they were responsible for the liabilities of thecompany that if the company fails to pay then the Bank can demand that they repay for the liabilities that guarantee was containin (sic)"

JS0 The witness 'Ofa Tu'ipulotu said in cross exalnination:-

> "I can't remember whether the document was explained to them ..... the diary note (D6) was shown tome one week later. .....it tookthat long toreach me".

The witness Tu'ipulotu agreed that there \Vas (and is) no Tongan word for the English word "guarantee". (Maiolo says that there is no exact word for guarantee but that itcan be translated as "Malu'i" - "providing protection orinsurance toprotect physically.") That prior to these.events she had not read the guarantee document; since that she has read it and concedes that it is a difficult document to read and 360 understand evn with a good education, that knowing 'Ofa Toutai the witness had

noidea if (at the material ti me) 'Ofa Toutai could read and understand the document exhibit Pl (the guarantee) and that she was unable at this distance in time from the events under consideration to remember whether the gua rantee and the equi table mortgage were executed at the Bank premises or at the offices of Kelepi Tupou, the accountant for the Toutai's.

I consider 'Ofa Tu'ipulotu to have been a truthful witness. Her evidence in part however is probably unreliably by virtue of the passage of time about some matters in respect of which she testified.

I find that 'Ofa Tu'ipulotu was bei ng truthful about the matters to which she deposed 370 in a positive way. Her evidence is that she is now unable to recall whether she 'Explained the document to them". A nd that it was a week later when she saw and signed the diary entry 06.

06among other things contains a "Certificate" which certified the following:-

> "11/ 12/85 O.K. TOUTAI & CO LTD.
>
> We certify that 'Ofa Toutai Pekipaki, Kelepi Toutai Pekipaki and Sione Hale Pekipaki signed a guaranteefor D & I in favour of O.K. Toutai and Company Ltd.
>
> The document was fully explained to them and they appeared to understand the nature of the document.
>
> They signed on (sic) their own free will.
>
> (Sgd.) 'O. Tu'ipulotu
> O. Tu'ipulotu

Just who was present at the execution of the documents and where did i t take place? 'Ofa Toutai Pekipak.i says at the Bank premises and 'Ofa was there. Hale says both 'Ofa Toutai Pekipaki and 'Ofa Tu'ipulotu and Kelepi Toutai were present and it was done at the Bank.

'Ofa Tu'ipulotu says that Pl was signed "In the bosses office" then in cross- 390 examination when it was suggested that Pl (the guarantee) was signed in the office of Kelepi Tupou the accountant, 'Ofa said 'I don't know". Later in cross-examination Mr Edwards put to 'Ofa Tu'ipulotu 'the Toutai Pekipak.i were in the Bank with you for less than ten minutes" - (which is seemingly and unexpla inedly at odds with his earlier suggestion that it was at Kelepi Tupou's office and utterly inconsistent with his clients' own evidence).

I find on the balance of probabilities that those present at the execution of exhibits Pl and P4 and indeed all the documents signed on the 3 Decembe r 1985 were 'Ofa Toutai Pek.ipaki, Kelepi Toutai Pekipak.i, Hale Toutai Pekipaki, the wit ness 'Ofa 400 Tu'ipulotu and the then Loans Manager of the Bank of Tonga. I find that the execution of the documents took place in the office of the Loans Manager of the Plaintiff Bank.

There is no evidence about the General Manager Treloar and his whereabouts now or in 1985orwhy the witness Matoto signed for him in D6on 11112/85. If there was a persisting objection to the admissibili ty of exhibit D6 it would be necessary to prove (pursuant to the provisions of the Evidence Act cap 15 section 89(n)(l)(ii) among other things that, the Manager Treloar was:-

> Dead or
> 410 Beyond the seas or unfi t .....

or cannot ..... be found.

Since the document D6 was admitted by and at the request of the defence and came from the possession of the plaintiff it is unecessary for such a finding to be made. D6 pers11ades me (that although the witness Tu'ipulotu cannot now remember whether she explained the documents Pl and P4 to the Toutai Pekipakis,) that she probably did so explain.the documents to them. What the nature and extent of her explanation was, cannot now be gauged at this distance from the event.

The evidence concerning this aspect of the claim must be understood against the background 'of the Defendants themselves. The guarantors, none of them, were inexperienced in b. siness. The family was relatively sophisticated in commerical matters. Matoto, the lending manager of the Plaintiff referred td the meetings and consultations he had with the defendants.

The tenor of the evidence is that the business grew up from small origins largely due to the acumen and hard work of the three guarantors. It was not as though they were young inexperienced first borrowers alone in the presence of an unconscionable lending institution. The Defendants each must have known that if the company was to secure further borrowings then they would be required to assume some responsibility themselves as individuals. I do not accept that from the whole of the evidence that the Plaintiff failed to exercise due diligence.

I find that although the relationship was one in which there is a need for the lender to exercise due care toward the borrower, there is nothing in the evidence which would lead this court to concl ude that the Banker did not act with due care and reasonable diligence toward the defendants. The ground fails.

3. FAILURE ON THE PART OF THE PLAINTIFF TO APPLY THE SUM OF $100,000 IN REDUCTION OF Tl-IE OVERALL DEBT.

The defence is not tenable. There is no counterclaim or set-off pleaded by the defendants. The applying of sums in reduction is a matter of set-off. The explanation gi ven by the plaintiff witness Matoto is that the sum of $100,000 received by the admi nistrator appointed by the Bank, being the proceeds of sale of the 1-Ia'apai asset of the defendant company, was held by and applied by the administrator of the company in discharge of indebtedness to preferential creditors of the company together with other sums from the realisation of other company assets.

The Defence seeks to rely on the provisions to the Unfair Contract Tem1s Act 1977 U.K . by vi rtue of the provisions of the Civil Law Act Cap25Section 4. The defence allege the conduct of the plaintiff amounts to unfair and/or unreasonable conduct by virt ue of the reliance of the plaintiff on the deed of guarantee and on paragraph 6, 7 and 8 of the statement of claim together with the fact that the Bank is wi thholding payment of the money already made by the purchasers of the Ha'apai property.

It seems that preferential creditors have been paid by the administrator, if one accepts the unchallenged evidence of the witness Matoto, using the $100,000 proceeds of the sale. The Bank has no control over the actions of the administrator -a Court controlled enti ty. After theconclusion of these proceedings theadministrator will no doubt seek di rections from this Court as to further distribution concerning theadmini stration. Bu t these proceedings arc not concerned wi th theadministration of the compa ny, theseproceeding s arcan action on the guarantees of the defendants.

Neither the administrator nor the company are privy to this claim which is brought by the·Bankon guaraniees made by U1e defendants. Thi.head of defence fails.

4. NON EST FACTUM

In general terms a peson wl)o signs a document is bound by its contents even though he did not read it or he did read it but did not understand it at the time. The law does not allow a person to deny the effect of a deed he or she has executed. However the law sensibly allows that where for example a blind person is induced to execute a document which is misleadingly read to that person so that the understanding the blind person is left with makes the document out to be somcCing which it is not, then he or she is not bound by signing it. It is a nullity. He or She may truly say it is not my deed 'non est factum".

In Carlisle and Cumberland Banking Co. *v* !1@gg (1891] 1 K.B. 489 C.A., Per Buckley L.J. at 495 Buckley L.J. said,

> 'The true \vay of ascertaining whether a deed is a man's deed is to seewhether he attached his signature with the intention that that which proceeded his signature should be taken to be his act and deed . It is not necessarily essential that he should know what the document contains; he may have been content to make it his act.and deed whatever it contained ..... if on the other hand, he is materially misled as to the contents of the documents, then his mind does not go with his pen. In that case it is not his deed".

The document may have been in Tongan but there is no evidence of misleading by the Bai*Officers in charge of the transactions. Itcannot be said that any of the defendants were misled in my opinion, materially or at all. The plt".a of non est factum fails.

CONCLUSION

From the whole of the evidence I am satisfied that the Plaintiff Bank has established that the Defendants are liable wider the guarantee in each case. But what of the service of notice requi rements under the provisions of exhibit Pl Clause 20?

In my opinion proper service was effected on the following Defendan ts in the following ways:-

The First Defendant	Proper service under the guarantee The Joan account $48,388.79
The Second Defendant	Proper service under the guarantee The loan account $48,388.79 and the The overdraft faility $167,051.30
The Third Defendant	Proper service under the guarantee The loan account $48,388.79.

Accordingly there will be Judgment for the Plaintiff on the claim against the First Second and Third Defendants in the sum of $48,388..79 plus interest at the rate of 13.5% per annum from the date of the guarantee namely the 3rdday of December 1985until paid.

In addition, there wil I be ju dgment for the Plaintiff on the claim againsithe Second Defendan t in the sum of $167,051.30 plus interest at the rate of 13.5% from the 3rd day of December 1985 until paid.

The costs of this actions to be those of the Plaintiff to be taxed or agreed.

'Uta'atu v Afeaki

Supreme Court, Nuku'alofa
Hampton CJ
C205195

6, 7, 8 March, 11 April 1996

Company - duties of a director - fraudulent trading
Fraud - proof - director of company
Company - unpaid calls on shares

The liquidator of a company sued the managing director, a shareholder, for damages for (a) acting in an unreasonable and/or reckless manner causing losses to the creditor of the company or (b) trading in a fraudulent, reckless or negligent way; and for the balance unpaid on shares.

Held:

1. The common law duties of directors are stated in s.214(4) - Insolvency Act 1986 (U.K.).
2. Defraud in s.213 connotes actual dishonesty involving real moral blame.
3. S.214 relates to wrongful trading and liability is incurred if the company has gone into insolvent liquiditation and the director, before the commencement of the winding-up, knew or ought to have known that there was no reasonable prospect that the company would have avoided going into insblvent liquidation and did not take the steps he ought to have taken to minimise the potential loss to the company's creditors.
4. In the circumstances the defendant allowing the secured chattels not to be prcseryed or be disposed of was not wrongful trading.
5. The test in s.214(4) is a compound (objective and subjecti ve states) and difficult one. And, in any event, the court had a discretion which would be exercised in favour of the defendant in view of the supine inactivity of the secured creditor.
6. All claims against the defendant, an director, were dismissed.
7. The balance claimed unpaid on shares was found proved however.

Case considered — re Purpoint Ltd (1991] BCC 121
D'Jan (1994] 1BCLC 561
re Patrick Lyon Ltd (1933] Ch 786
re William C Leitch Ltd (1932] 2 Ch 71
In re Produce Consortiun [1989] 1 WLR 745

Statutes considered — Evidence Act ss.104-6
Insolvency Ac(1986 (U.K.) ss213-215

Counsel for plaintiff — Mr Hogan
Counsel for defendant — Mr L. Foliak.i

Judgment

The Plaintiff as liquidator of Ha'alata Fisheries (Tonga) Limited ("the Company") sued the Defendant, a shareholder in, and the managing director of, the company for:

(a) damages of $10,000 and compounded interest thereon for either (I) using the company as a "front" for his own personal commercial activities and acting in an unreasonable and/or reckless manner causing losses to the Bank of Tonga ("the Bank"), the sole proven creditor of the company; or (U) trading in the company, or allowing the company to trade, and in particular in so far as such trading related to securing borrowings from the Bank or Tonga, in a fraudulent and/or reckless and ior negligent way; such as to entitle the liquidator to recover the losses of the Bank against the defendant personally and thereby compensate that sole proven creditor for the morally reprehensible activity of the managing director.
(b) payment of $2820 being the amount allegedly owing for the balance unpaid on 3000 $1.00 shares in the company.

At the completion of the hearing of evidence on 8 March 19961 had a clear view of factual issues and that view has not been altered by the written submissions subsequently received from both parties and which I have carefully considered. I add that the Defendant's submissions were filed a da)\ late. I find the explanation (on oath by Mr. Foliaki) acceptable and have allowed the submissions to be received.

That view of the facts is determinative of both claims which have been made.

FRAUDULENT/WRONGFUL TRADiNG

Five specific particulars were put forward by the Plaintiff. A II relate to the dealings of the company, and the Defendant, with the Bank, as to overdraft accommoda tion and/ or a term loan from the Bank to the Company and the security for such accommodation and/or loan.

Herc we now enter the real area of contention between the pa rties and what 1 express from now on are my findings of fact on the evidence which I heard and from the exhibits which I have studied. I judge the matter, and make my findings, on the balance of probabilities and guided by the burden of proof provisions of the Evidence Act (Cap.15) sects. 104-106. I also take heed (i) of the judgment of Vinelott J in re Purpoint Ltd [1991] BCC 121 insofar as it touches on Ilic evidcntiary burden of showing where payments went; and (ii) that the Plaintiff has elected to allege fraud.

The company, despite the defection of the Koreans, elected to carry on in business and turned to other projects one involving supply of fish to the local market (the fish to come from e.g. Ha'apai and from New Zealand - to be bought in cheaply in New Zealand and resold in the Kingdom) and the other involving collection and export to Korea (to a different company) of Black Lip mC<lher of Pearl shells.

From just before, and following, the departure of the 3 Korean boats (i.e. from I J

A pril 1987 on) there were no credits i nto the Bank account and by 10 November 1987 lhc credit balance was down to $1148.70 (Exh. 47v.10). I accept that the company was meeting legi timate accounts du ring that period in 1987. I accept that the company's records have been destroyed - not as it were at the hand of and by the design of the Defendant - and that does make for difficulties after a lapse of some 8 or more years, human memory being as imperfect as it undoubtedly is and suffering degradation from the passage of time.

The basis for the claim against the Defendant is put this way:

> "From May 1987 (the departure of the Korean fishing boats) the Defendant used the Ha'alata corporate shell as a "front" for his personal commercial activities.
>
> Alternatively: from May 1987 the Defendant's trading of the company in so far as it related to securing borrowings from the Bank of Tonga was either fraudulent or reckless or negli gent such as to entitle the liquidator to recover the Bank's losses against the Defendant personally and thereby compensate the sole proven creditor of the company. The claim is for compensation for the morally reprehensible activity of the managin g director."

I note that although e.g. (a) fraud has been alleged and (b) it was claimed that the subsequent venturesdid not exist (particularly the Black shell one) noevidence was called by the Plaintiff to contradict what the Defendant said in evidence. The lapse of time and loss of documents and records do not help, but some support for the Defendant's account can be seen in the Bank's records.

Thal is significant. On the evidence (given the deiay, the loss of records and the absence of any evidence to the contrary) I cannot find establi shed the claims of either personal trading or fraudulent and/or reckless and/or negligent trading (i.e. fraudulent or wrongful trading) of the company by the Defendant as at this stage (using the test, as to fraudulent and wrongful trading as set out below; and as well, i n relation to wrongful trading, referring to re Purpoint Ltd [1991] BCC 121at 127). As I say by then the debt to the Bank was $10,000 or thereabouts of borrowings, secured on the van.

Still no attempt was made by the Bank to further explore, let alone inspect and/or take possession of, the articles offered as security (see Exh.26: "In the event of failure by the borrower .... the Bank is entitled to take possession of the said articles pledged as security without further process of law ...."). Nothing has been done to date - whether by taking possession or suing for possession. Other actions were taken against the company - but nothing done concerning the chattels. Even on the 5 March 1993 there was no suggestion of seizure (let alone actual inspection).

The liquidator, in effect speaking for the Bank as the compwy's sole proved creditor, now complains vigorously about the failure by the Defendant to maintain and secure and not dispose of the goods secured (as has undoubtedly been done in relation to 2 of the open boats). The company was liquidated in April 1993. Why was not something done then to seize, take possession of, these chattels? They were recorded on the bank documents .

It would seem the 2 small boats disposed of were disposed of in mid 1990and early 1991. That is of concern. Despite the J ack of precision in description and the probable late inclusion in the loan document (Exh. 26) the company did sign thatdocument and the Defendant did know the position. He seems to have been somewhat cavalier in his

treatment of the boats and in his disregard for the Bank's rights. Perhaps he was inn uenced somewhat by the Bank's own rather casual attitude, as I have described.

Docs that behaviour by the Defendant make him liable asclaimed by the liquidator? It seems to me that that is the one, the only one, of the 5 particulars of the claim of fraudulent and/or wrongful trading which, on the factual findings as above, requires real scrutiny.

I tum to paragraph 9 of the Statement of Claim and the 5 parti culars given (2 in the Statement of Claim itself, the other 3 on notice before trial):

9.1 there it is claimed that the Defendant sought and secured moneys from the Bank forthe Company by falsely (andknowingly falsely)representing that the company owned the 3 large named Korean fishingvessels. I find that allegation to be not proved. There is no evidentiary basis for such an allegation of, in effect, fraud. A ny reference to vessels at all did not come until September 1988and the reference then, and from then on, in the Banks own record s was, consistently, to small boats. II i s also significant in my view, both here and generally, that by the time of the reference lo boats and lo a term Joan secured on boats and van the company indebtedness lo the Bank was already at about the $10,000 figure (and had been from March 1988).

9:2 thi s is a claim that the Defendant drew against the credit given the company by the Bank at a time and in such circumstances as he, the Defendant, knew or ought reasonably to have known that there was no reasonable prospect that the company could repay the Bank. Given the mailers I have traversed I do not find that establ ished in all the circumstances here.

9.3 there it is said that the Defendant's claim to the Bank of the company's proposal forexport of black shells was false and was known to him to be false (i.e. a fraud), and that representation Jed the Bank lo extend overdraft accommodation to the company. Again in view of my findings as set out above I do not find such a serious allegation proved. Exhs. l.7-21, inclusive, set out the position and I have detailed my findings above.

9.4 thi s is a claim that in October 1988 the Defendant induced the Bank lo convert the overdraft (of then $10,000 approx) to a term loan by pledging the van and 3 boats knowing the items to be worthless and/or rotting and, insofar as the boats, to not belong to the company: Again I find that not proved. I refer lo my findings above. The evidence shows quite clearly that it was the Bank who wanted the term loan and approached initially and later repeatedly - to sign - the Defendant about that. The bank loan concept suited, and better secured, the Bank. The concept was the Banks. So the Bank was not "induced" whether as claimed by the pledging of van and boats or in any other way. There is no satisfactory evidence before me that in October 1988 the van and boats were rotting and worthless; and on the evidence! heard the 3 boat£, i f it is the 3 small boats, although originally Korean owned, had been abandoned with the company by the Koreans some 18months before and wi th the Korean partner in debt to the company.

9.5 Here it is said that the Defendant failed to preserve carefully the van and boats and has sold or disposed of them to the detri ment of the Bank's secured interests. On my findings above 2 boats have been disposed of (in 1990-91). The van, 6 years after it was first offered as security, no longer goes. There is no detailed evidence before me as toits actual state or when it fell into a condition of non-useability. (Still the bank has not even tried to inspect it - for purposes of trial or otherwise). Exh. 32 indicates it was off the road by March 1993. I have already commented on the laxity of the Bank and the apparent lack of interest in the security (even e.g. in 1988 on the change to a tenn loan when there were very obvious!y financial difficulties forthe company- and the Defendant who was trying to meet what he saw as his moral obligation). The van was always his and his wife's personal property (as opposed to the company's property). I cannot make a find_ingof fraudulent and/or wrongful trading on the basis of this evidence. As to the boats - 1still sits awaiting the Bank and/or the liquidator - after 5 112 years. The other 2 have gone. Does that disposal found liability against the Defendant personally?

Accepti ng Mr. Hogan's arguments as to the law for the moment I then look for guidance, as he suggests I should, to sects. 2 13-215of the Insolvency Act 1986 (U.K.). (See re D'Jan [1994] 1 BCLC 561. 563 and the claim that sect. 214(4) accurately states the common law duties of directors).

Sect. 213 relates to "fraudulent trading". It provides that a court may declare a person, knowingly party to carrying on the business of a company with intent to defraud the creditors, "to be liable to make such contributions (if any) to the company's assets as the court thinks proper". The tenn "defraud" connotes actual dishonesty involving real moral blame (seere Patrick Lyon Ltd [1933]Ch.786, at 790-1) - a test of subjective moral blame (see re William C Leitch Ltd [1932] 2 Ch.'71at 77). I do not find such proved here whether as to van or boats (or indeed generally on all allegations). I have traversed the facts in detail earlier. I do not intend repeating them. I have looked at, and had regard to. the authorities provided by Mr. Hogan.

Sect. 214relates to "wrongful trading". A court maydeclarea directorliable tomake a contribution to theassets of the company if i t has traded wrongfull y. Liability is incurred if the company has gone into insolvent liquidation and the director, before the commencement of the winding-up, knew or ought to have known that there was no reasonable prospect that the company would haveavoided going intoinsolvent liquidation and did not take the steps he ought to have taken to minimise the potential loss to the company's creditors.

I am looking at the non-preservation and/or disposal of the van and boats in this context On the evidence I find that certainly from early 1989 on this company was insolvent and had no reaonable prospects of avoidance of liquidation. The Defendant must have known that. He sat; the Banlc sat; the chattels sat. No dne acted. But from late 1988 (if not slightly earlier) on the company was not operating - in ordinary parlance it was not trading so could not "trade wrongfully". And I so find. If I am wrong in that, I goon I find the Defndant to be naive and inexperienced insofar as business affairs, and companies, are concerned. He had not been actively involved in a company before. His letting the chattels sit I do not find would constitute wrongful trading in all these

circumstances (applying the tests in sect. 214). As to the disposal of 2 of the boats (in 1990-91 when the company had not been trading for 2-3 years), I do not find that that was done al the time with any sense of affecting adversely, or with the intent to affect adversely, the Bank. It was a combination of naivety (if not stupidity) and of lack of thought (perhaps aided by an effectively dead company) on the Defendant's part, in conjunction wi th a dormant and inactive Bank, that latter being a very - in fact the most - important factor in my view, lulling the Defendant into a false sense that the Bank had no interest in the securi ty and had lost interest generally. I am aware of the compound, and very difficult, test in sect. 214(4). I have applied that objective/subjective test as best I can in the above. (How a reasonably diligent person can have both states (a) and (b) in sect. 214(4)is very hard tocomprehend let alone apply. But given the facts as I havefound them even a person only in state (a) could have reached the view I have ju st described). I also have regard to the way the claim is framed in the Statement of Claim (para.8: 'the obtaini ngof credit'; para . 9:'in carrying out such duties') and as put forward in argument in opening. The emphasis was on the obtaining of credit from the Bank.

Overall then, for a number of reasons I conclude that there was no "wrongful trading". Even i f I am wrong in the above I view the law (as in sect.214 'may declare .... tobe liable') as giving me adiscretion; (see eg. In re Produce Consortium [1989] 1W.L.R. 745, 751-2 and Re D'Jan [1994] l B.C.L.C. 561 at564). In all the circumstances as! have found them, and in particular given the Bank's role (and it is the only creditor - the liquidator is in effect trying to recover for the Bank) and it's supine inactivity (and disinterest, i n any shape or fonn, in the so ca lled security) for so long I m not prepred to make a declaration of liability (for the full or any amount of the $10,000 Bank lending plus compounded interest - some $21,435 total now according to Exh.48) as sought. Justice is against that.

All claims under this head are dismissed.

Balance Unpaid on Shares

I tum now to the claim for the balance said to be unpaid on shares ($2820).

This is a very straight forward issue. Apart from the initial call, paid, of 6 seniti per share (as recorded at Exh. 8.2) the liquidator found no other evidence of payment for the balance - whether by the Defendant or the other 2 shareholders although, for reasons unknown to me, she has chosen to pursue only the Defendant.

She made formal demand on the Defendant, for payment of the balance, on 3 January 1995 (Exh.45). No payment has been made. The Defendant says the shares had been paid in fu ll prior to the winding-up.

A gain difficulties, from both parties point of view, are caused by the destruction of company record (in early 1993). (The judgment then traverses the facts).

Given that I have reached the view that it is indeed more probable than not that the Defendant has not paid the balance of his share commitment after the first 6% ca ll (which can be seen and confirmed in both Exh. 8.2 and 47.1- the bank account record - in contrast with any claimed subsequent payments on calls) the Plaintiff has accord ingly succeeded on the second cause of action; which means that there should bejudgmen t for the Plaintiff for $2820.

The Plaintiff having partially succeeded, for a comparatively minor part of the claims, 1 wish to have memoranda from counsel on the issue of costs: where they should fall and in what amount; particu larly given the failure of the fraud allegations made by the

Plaintiff in the circumstances as I have described and found them.

Vi v Mahe

Supreme Court, Nuku'alofa
Lewis *J*
App 497/95

2 & 18 April 1996

Paternity - corroboration
Evidence - corroboration - paternity

This was an appeal against a Magistrates Court paternity Order.

Held:

1. Corrobation of the evidence of the mother was required.
2. The Magistrate did not state, as he must, what he thought amounted to corroboration.
3. The Magistrate could not, as he did, use a claimed physical resemblance of child to appellant as a factor affecting his judgment.
4. The appeal was allowed and there being no evidence corroborative of the respondent the verdict of the Magistrate was set aside.

Statute considered — Maintenance of Illegitimate Children Act s.6
Magistrates' Courts Act ss. 74-5

Counsel for appellant — Mrs Vaihu
Counsel for respondent — Mr Tonga

Judgment

This Appeal is brought against the decision of a Magistrat delivered on 17 March 1995. The Appellant in this Court was alleged to have been the father of a child delivered of the Respondent on 17 April 1994.

The Magistrate found that the Appellant was the fatlierof thechild afterconsidering the evidence before him. The learned Magistratfound that the Appellant was not a credible witness. That is a matter for the Magistrate and it is rare that an Appellate Court will interfere with a Magistrate'sfindings of factconcerning credibility. In this case the(C is a need for this court to intervene since there is in my respectful view an error of law on the part of the Magistrate.

The error concerns the matter of the presence or absence of corroboration. The Magistrate adverte_d to the rule requiring corroboration - Maintenance of Illegitimate Children Act [1988) Cap.30 Section 6:-

> "6(2) No person shall beadjudged to be the fatherof an illegitimatechild upon the evidence of the mother or a woman who is with child as aforesaid unless her evidence is corroborated in some material particular to the satisfaction of the Magistrate.•

Itisunclear uponjustwhatevidence the Magistrate basedhisfindingof corroboration. He made no reference to just what he thought amounted ·to corroboration. Since the necessity for corroboration is a matter of law and there is at best no clarity in what the Magistrate says amounts to corroboration therefore the appeal must succeed on that ground.alone.

There are other grounds with which I shall deal for the sake of completeness.

GROUND 1. "The Magistrate's Judgment was in error with regards to the Plaintifrs claim that her baby's father is the Defendant. The only independent witness in the trial was Dr. Semisi Latu whose vidence much contradicted the Plaintifrs claim."

GROUND 2. "The Magistrate erred in finding thatthe "Baby'sFace take afterthe Defendant" (SIC)."

GROUNDS 3, 4 and 5 are grounds consequential upon the appeal fail ing and I therefore need not conider them.

GROUND 1. Itseems tome relates to the presence orabsence of corroboration with which I have already dealt.

GROUND 2. Implies that the Magistrate took into account a non relevant, indeed an inadmissible consideration namely resemblance or similar appearance of the child to the Defendant. Provided that he does not use the perception he holds of the resemblence of the child to thedefendant to be a factor in determining paternity he is of course allowed the observation. In this case I am left with the strongconviction that hearri ved at his final judgment by using resemblance as a factor affecting his judgment which of course is a proscribed use. This ground succeeds.

Lastly Mr. Tonga of counsel for the Respondent argued that although theappeal was lodged within the statutory period the recognisance which the act requires the appellant to enter was entered into out of time. The ground on any view of the law does not arise. This is not a criminal matter givin g rise to considerations of whether an appellant may be at large or not. It is a paternity dispute and in the the real sense a civil matter. The Magistrates' Courts Act cap. 11 sections 74 and 75 do not contemplate bail in civil cases.

The only circumstance where a bail recognisance may be relevant is where a Magistrate has properly judged the matter to be one which requires bail (i.e. a criminal matter). This is not such a matter.

I have considered whether this matter should be remitted to the learned Magistrate to enable him the opportunity of expressing his view on what part or parts of theevidence he considered amounted to corroboration. Having considered the evidence available to the learned Magistrate I am convinced that there is none capable of bearing the confirmatory charccter which supports the evidence of the respondent in a material particular.

The apJ)eal is allowed and the verdict of the learned Magistrate is set aside.

Fusitu'a v Ta'ofi & 'Aho

Supreme Court, Hihifo, Niuatoputapu
Hampton CJ
C. 174/96

16, 17, 18, 19, 22 April 1996

Election petition - proof - bribery and corruption
Evidence - proof - onus and standard

The plaintiff brought an election petition against the successful candidate in a general election and against the Supervisor of Elections to have the result of the election declared void on the basis of 6 specific charges of bribery (against the first respondent) and 2 charges of general corruption (against the second respondent, the Supervisor).

Held:

1. S.33 of the Electoral Act 1989 under which the general corruption charges were brought, relates to widespread and general malpractice.
2. S.35 provides that the Court shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities, a wise and sensible provision and very necessary in such an area as an election petition where the smallest of actions can tend to be put under the most powerful magnification.
3. Although hearsay evidence might be received (under s.35(b)) it should be scrutinized with some caution and care.
4. The burden of proof was on the petitioner but given the gravity of the allegations and the very significant consequences which could now the standard of proof, although on the balance of probabilities, is to a higher level than in an ordinary civil case.
5. There is however a reverse onus relating to the giving of a gift, within 3 months of an election, by or on behalf of a candidate. It is important to ascertain the intent of the donor at the time of the gift.
6. A gift by another person would only be sufficient under the Act if that other was an authorised canvasser and therefore an agent of the candidate.
7. To be an offence it must be proved that the gift was given to an elector.
8. All the allegations of offences of bribery were dismissed.
9. The claims of general corruption against the government representative were grave allegations for which no evidence was forthcoming. The claims were not just of dereliction of duty but claims of deliberate dishonesty - an attempt to distort improperly, a people's election.
10. There was a lack of voting cubicles, but voting did not take place in full view of others as alleged, although the perception of even a possibility or a lack of secrecy was a concern which must be addressed for the future. Secrecy is rightly regarded as sacrosant.
11. The allegations of general corruption were dismissed.
12. Recommendations were made for the conduct of future elections in Niuatoputapu.

Case considered: Fasi v Pohiva [1990] Tonga LR 79 and at 156

Statutes considered: Electoral Act 1989

Counsel for petitioner: Mr Niu
Counsel for first respondent: Mr Tu'utafaiva
Counsel for second respondent: Ms Weigall

Judgment

Thisjudgm ent relates toan election petition brought, under S.25of the Electoral Act 1989, by an unsuccessful candidate (the second placegetter, the Petitioner) against the successful candidate (the First Respondent) and the Supervisor of Elections (the Second Respondent). The petition seeks to have declared void the result of the 25th January 1996 election of a peoples representative for the district of Niuatoputapu and Niuafo'ou, tothe· Legislative Assembly.

The bases for the petition. as pleaded and argued are three - folcl:-

i. 6specific charges of allegations of bribery (referring to S.2l(l)(a) of the Act) any one of which, if proven, would result in automatic avoidance of the election ur.der S.32(1) "where a candidate ..... is proved tothe satisfaction of the Court to have been guilty of an offence against sections 21, 22, or 24 at the election," and I pause there, and wonder about the narrowness of those words "at the election" given the scopeof sections 21, 22 and 24; but the point is irrelevant to any judgment here today - and continue with s.32(1) "the Court shall declare the election of that candidate lo be void ....." with certain consequential ramifications - see e.g. the rest of s.32(1) itself, and S.40 (as inserted by the 1992 amendment).

ii. a general corruption charge levelled, under S.33 against the Second Respondent, (through his returning officers) alleging in effect the wrongful or unlawful use of motor vehicles on election day.

111. a further general corruption charge levelled, again under S.33, against the Second Respondent, alleging breach of claimed duties under the Act in:-

(a) not providing voting cubicles; and

(b) not replacing a named assistant returning officer; and/or

(c) not removing the same officer from the voting area (this very courtroom) during the actual voting.

As to those 2 general corruption charges lread the following relevant provisions of S.33:-

33 (1) "where ..... corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidate .....
havesoextensively prevailed that they may be reasonably supposed to have affected the result, his election shall be void ....."

(2) "Except under this section, an election shall not be liable to be avoided by reason of the general prevalance of corrupt or illegal practices".

I agree with the remarks of Martin C.J. in Fasi.v Pohiva (1990) Tonga L.R. 79 at 88 that s.33 deals with "widespread and general malpractice". (and I note that S.33 was not dealt with, or apparently argued, in the Court of Appeal in that case - see (1990) Tonga L.R. 156, which dealt only with bribery·under s.21).

I have had in mind at all times, as I do now, the provisions of s.35. S.35(a) provides that I "shall be guided by the substantial merits and ju stice of the case w ithout regard to legal form or technicalities". I comment: a wise and sensible provision and very

necessary in such an area as an election petition where the smallest of actions tend to be, or can tend to be, put under the most powerful magnification.

S.35(b) provides that the Court "may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible ...." Here I have heard and received certain hearsay evidence, not otherwise admissibleunder any exception known lome. I take that evidence intoaccount, as with all other evidence received but, because of it's nature and it's exceptional receipt, scrutinise it with some caution and care.

In deciding this matter lapproach it on the basis (as accepted by all parties in argument) that the petitioner must prove what she alleges and given the grav.ity of the allegations (i.e. of offences of bribery and general corruption) and of the very s1gmf1cant consequences which may flow from such a finding or findings the proof required, allhough on the balance of probabilities, is to a higher level than in an ordinary civil case -see Martin C.J.in Fasi (supra, 81): "strict proof .....before an allegation can be found proved the Court must be sure, or almost sure, that it is true" - a statement not resiled from or indeed commented on in the Court of Appeal.

There is one exception to that general burden of proof. It is in S.21(3): 'any money or valuable gift given or offered or agreed lo be given (in the absence of good consideration) to any person (except a person named in S.24(3)) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed tobe given for the purpose of influencing the vote, unless the contrary bc_Proved ", Ihave set this out in full because this subsection may have some affect here, as is argued by Mr Niu. A gainagree with Martin C.J. in Fasi (supra, 81) that "It is for the Respondent" (the First Respondent here) "to prove", on the balance of probabilities, "that a gift made withi n 3 months of the election was innocent; any other gift is presumed innocent until the petitioner prover otherwise'. Again no apparent argument against that, or any contrariwise comment, in the Court of Appeal. I have added the words 'on the balance of probabi lities" and that is using those words as meaning, and applyi ng when necessa ry, the ordinary civil standard; and no more.

Venue of Trial - Witnesses

I decided that this petition should be heard in Hihifo, Niuatoputapu. Nol only is it desirable that the parties have their case heard on lheir "home turf" i n front of friends, family and interested voters from the electorate itsel f (local issues should be heard, whereever possible, in a local Court); but it was desirable, from lhe Court's point of view, given the nature of (al least some of) the allegalions that the hearing. take place in Niuatoputapu. Thal has turned out to be invaluable. Not only are the physical layout and arrangements for the election itself now very transparent lo the Court but also the remoteness and isolation of this district; the lack of money, vehicles and olher resources and commodities on Niuatoputapu ; the closeness of the communities and lhe inter-relationship of the peoples; have become very clear and, far more readily, may be seen in lheir proper perspective.

Indeed the inter-relationship of persons on Niuatoputapu itself is such hat it is most unlikely - and extremely rare given the experience of the Court - that a witness born ard resident here would not be related by blood or marriage (or both) to one or other (or agam both, as did emerge here with at least 1witness) of the Petitioner or the First Respondent. Even if not related, anyone resident here is virtually bound to know and be aquainted with

eeryone else.After all on election day some 504 votersonly (and thus including not only Nrnatoputapu but also Tafahi; the near by island) voted. That smallness of the electorate of course enhances, as Mr Niu rightly said in his thoughtful submissions, the possibilit of even small transgressions: upsetting the fairness and balance of the voting. Ibear that important feature in mind at all times.

I have heard some 21 witnesses, over 4 days, and submissions on the 5th day. Itis important in my view, that a Judgment should be given, if at all possible, before the Court leaves Hihifo. In general terms, with the exception of Government officials, all witnesses are either related to and/or well acquainted with each other and the Petitioner and the First Respondent in the ways !'have mentioned.

The Bribery AJJegalioos

I first tum to the relevant portions of S.21 which read:

> (i) Eve'?' person commits the offence of bri bery who, directly or indirectly, by himself or by any other person on his beha lf (a) gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or toor for any other person, in order to induce any elector to vote or refrain from voting"
>
> '(2) In this section, a reference to givi ng money or valuable gift includes a r:eference to giving, lending, agreeng togive or lend, offering, promising or promis ing to procure or try to procure, any money or valuable gift".

S.21(3), I have already set out above. There are other preliminary matters as well. F1rs1 I re(cr to and adopt what Manin C.J. said in Fasi (supra, 88) as to the im portance of ascertaining the intent of the donor at the time the gift was made. Secondl y as to the affect of a findi11g of a bri bery offence I have set out S.32 (1) above.

I now deal with the 6 allega tions in tum each of them alleging the First Respondent 10 have been guilty under S.21 (1) (a) in that he committed or was a party to the aileged ac1s (referring to them by their paragraph numbers in the Peti tion).

fara.4: this alleges that the First Responden t in December 1995 and in January l996, on several occasions promised or offered to voters that i f elected he would share his parliamentary salary and allowances with them, "for the purpose of innuencing the voters ..... to vote for him". Specific words, or "words to that effect', were pleaded. The allega tion was denied (both in the Statement of Defence and in evidence by the First Respondent).

"Several occasions" were alleged. In evidence one person spoke of only one occasion. That witness claimed that, on an occasion towards the end of December 1995 outside the telephone office the First Respondent, i n answer to remarks add ressed to him' said lhat afterelection "I'll sit i n the chairand people will withdraw money from the pocke; of my shirt". Those words differ markedly from those pleaded. The witness I find unsatisfactory and unreliable; not ju st because of the closeness of her blood relationship to the pettt1oncr; but because of such as her inability to give any detail of any of the SUTTounding circumstances and persons (some 17 - 18there she claimed yet she could nol name one, even those others who spoke), her failure to record the remark in any way, her telli n g only the Peli ti oner, the failure to produce an y evidence confi nning even eg. her making a telephone call on that particular day although Mr. Ni u, in questions of the wi tness, had elicited details enabling that to be done.

I do not find those words, or words lo that effect, or to the effect as used i n para 4{a) have been proved to have been used. Even on the lesser ordinary d,il sl:lndard of pr00f I would not find such proved. Therefore I dismiss that allegation.

Para.4b: this is a claim that on or about 19th January 1996 the First Respondent g;1ve to one 'lsitolo K1valu some 200 concrete blocks "as a gift for the purpose of innuencing him to vote for him .....". In general terms the gift is admitted but the intent isdenied and the First Respondent'sversion of the transaction, which admittedly did take place over the concrete blocks between the 2 men, is set out in paras.' 4b, 15, 16 and 17 of the First Respondent's statement of defence.

To be an offence (underS.21(1) (a)) there would have to be proof that'lsitolo Kivalu was an elector. No such evidencewas offered by the Petitioner. Indeed theonly evidence offered by the Peti tioner on this issue was some vague hearsay accow1ts of conversa tions out of the presence of the First Respondent but involving 'Isitolo Ki valu. 1 had some reservations as to the weight of that evidence.

However any defects in proof (over and above the admission of a gift in the pleadings) were remedied by the First Respondent giving evidence himself and r.alli ng Mr Kivalu (e.g. Mr Kival u, i n cross examination said he voted in the election and from that I am prepared to infer and find proved that hewas an elector, although that is the only prooJ - the Roll is a public docume1it and available to be searched (refer S.4(10)).

In general tenns it is clear that on or about the date al leged (so within 3 months of the election) the First Respondent did give to Mr Kivalu some 200 or so blocks so that Mr Kivalu could start the foundations for a house. They were leftover blocks but blocks, up here, are a valuable commodity i ndeed (and a source of protection, when used in construction, from cyclones and the like). Much time was si)ent, in evidence, onthis issue. I find that this arrangement of giving the blocks had been the subject of discussion only between the 2 men from time to time over a number of years; but tha t no agreement as to the details or the tem1s or even the canying into effect of such proposed arrangement had been reached. Coincidental with the run-up to the election Mr Kival u and his wife (she down in, and/or on the way back from, Tongatapu with buildi ng materials) moved to start their house building.

Whether the blocks were a simple gift (and I th ink they were) or.to be replaced subsequentl y (and I have real doubts about that) is 1 find i rreleva nt to this judgment , and the First Respondent and Mr Kivalu in trying to dress the matter up as something more than a gift - i.e. as an exchange or for some good consideration were not helpful to themselves or to this Court. Notwithstanding that I find that the blocks were gi ven as part of a family transaction. In para. 17 of the Statement of Defence the First Respondent said that he "and Mr Kivalu are related and which relationship is strong, active and they are helping each other and their families".

On the evidence I have heard, accepting as applicable the reverse onus provision in S.21(3), I find that on the balance of probabiliti es il has been established that the purpose of the giv ing of the blocks, whatever the lenns of the arrangement, was not to innuence Mr Ki valu's vole (to induce him to vote) but to further the family relation ship and in pursuance of famil y interdepend ence in such a small and isolated community. I refer back to the passage at p.88 of Fasi in thejudgment of Mart i n CJ (para 13 above) - thequestion is the purpose or intent at the time and proof of that.

Given my findings of fact on the basis of the reverse onus this allegation is dismissed.

Para4c: This is a claimed promise, in January _1996, to give pandanus leaves to 2 named persons. Itisdenied in the First Respondent's Statement of Defence. No evidence was led as to it, atall. The allegation isdismissed (Mr Niu havingindicated during closing arguments that he abandoned this allegation).

Para4d: This is a claim that on or about 24th January 1996 'one Papilone Huhane who was well known by the ..... voters .....; to be a strong supporter of and campaigner for the First Respondent gave a sum of $100.00 as a gift at a kava club gathering ..... which was made indirectly on behalf of the First Respondent for the purposes of influencing the voters thereat to vote for the First Respondent .....'

On the evidence undoubtedly on or about the date alleged $100 was give'n by Mr Huharie at a Kava club gathering at Hihifo which was organised, and held, to raise funds to send a successful 5th Form High School student to Tongatapu for her 6th Form year.

On the evidence it isand was no more than that i.e. a gift by Mr Huhane in furtherance of sending this girl to Tongatapu. I find that there was and is no satisfactory evidence, for reasons I will come to, of any real connection, as claimed, between the First Respondent and Mr Huhane, let alone of the significant claim of Mr Huhane being a campaigner for the First Respondent. One witness for the Petitioner who claimed Mr Huhane was a campaigneronly knew of that by hearsay - from what the Petitioner herself had told her. The Petitioner herself did not give evidence as to this allegation; her husband did, indirectly, and I will come to that evidence shortly.

The Petitioner's other witness as to this $100 gift knew of no connection at all between the First Respondent and Mr Huhane. Thos° witnesses for the Petitioner accepted the return of MrHuhane, recently, from the U.S.A.; his relationship to the family of "the student concerned; and the bona fides of Mr Huhane's gift in those circumstances. The First Respondent denied any connection in any way with this gift. The organiser of this Kava gathering (Kalapu), the mother of the student, gave evidence which confinned the relationship to Mr Huhane, her invitation for him to at1end the Kalapu, his gift, and the lack of knowledge in her of any connection, Mr Huhane to the First Respondent. With the exeception of the Petitioners' husbands evidence, there is no evidence before me indicating that Mr Huhane was a campaigner for the First Respondent. The Petitioner's husband, on the same day as the Kalapu, said, that at a faikava at Falehau, Mr Huhane in the company of the First Respondent asked thosepresent to remeberthe First Resp0ndent on election day. This is the only evidence; and I would not, in the circumstances use it to found a findingof guilt of bribery. Even if it isaccepted in it's entirely I do not find that that event proves or has, any connectfon at all with the $100 gift at Hihifo. Nothing was said at tha_t Kalapu, apparently, about any tie to the First Respondent in any way or to his election campaign. Those therewho were called to give evidencedid notsee itin that way. So there is no evidence that a gift was made by Mr Huhane "indirectly on behalf of the First Respondent• Applying theauthorities referred toin Parker'sConductof Parliamentary Elections at para 19.11 (p.383) I hold that that evidence (even if accepted) of that one occasion at the Falehau faikava was not sufficient to enable a finding to be made that Mr Huhane was an authorised canvasser and therefore an agent for the First Respondent. Much more evidence of e.g. general canvassing, at least would be required. Even if (and it qoes not because of the facts I have found) but even if S.21(3) were to apply on the evidence I haveheard, and on the balance of probabilities , it has been established that such a gift was not for the purpose of influencing the votes of electors.

Para.4e: is a claim that during '1995and at least for3 months prior to .....election, the First Respondent gave the use of his motor vehicle to the office of the Government Representative of Niuatoputapu and which was so used ..... at a charge or for free or on credit, and which was used freely by one Taufa 'Otuhouma, clerk to the Government Representative, forofficial .....and personal purposes in order to influence .....Taufa 'Otuhouma to vote for him and for him to campaign and he did campaign for him to be elected .....•. Itis now common grounci that this particular claim must fail but! will deal with it, as it sets the scene for the other allegations about vehicles and my findings as to those matters.

Much eidence has been given before me about use of vehides. On the evidence there are only between .10 and 18 vehiCles (the lower figure may be more correct, given the Police sergeant's evidence, of actually mobile and lawful vehicles) on Niuatoputapu. Transport of the motorised variety is, and was at the time of the election, at a premium . I find that the Government Representative (both personally and through his clerk) acted with bona fides in endeavouring to arrange transport (in the absence of public transport) on election day for the elderly and infirm, and for voters from Vaipoa and Falehau.

He, and his clerk, used vehicles which they thought were best in the circumstances and the truck, L3920, which is the vehicle referred to in this (and other) allegations, was a vehicle which had been hired before for Government work and was hired again on election day. The Government Representative himself had no vehicle.

The truck, L3920, although registered in the name of the First Respondent and a motor dealer in Tongatapu, is known as Faenga Iloa's truck (that person being the First Respondent's brother in law). The Petitioner herself acknowledged that, as I understood her evidence in chief. Undoubtedly the First Respondent drove it from time to time. So did others, (and number of others, I add) ihcluding Faenga Iloa and Taufa 'Otuhouma.

When hired by the Government that truck was paid for; and I find that it was on a paying basis that it's use was obtained for election day and the day following. There is nothing wrong in any of that I find (e.g. A clerical mistake in writing down a figure for a month, does not a conspiracy make).

I will return later (on the other charges) to use of vehicles; but will concentrate now on the claim in para.4(e) and will make some general findings which also do affect those subsequent charges. I find for a start that the vehicle mentioned was not the First Respondent's alone as such although, importa ntly, it was commonly used and driven by him - and indeed he seems to have allowed others to use it, so that particular finding, of itself, may not be determinative.

But even if it was his to "give' out the use of (as I find he did on occasions) 1 find it proved on the balance of probabilities that the giving for use on election on day was not for the purpose of influencing voters (applying for the present the reverse onus under S.21(3)).

In fact as alleged it is claimed that this giving of the truck was "to influence ..... Taufa 'Otuhouma to vote for him". There is no evidence at all that Taufa 'Otuhouma wa an elector in this district. He was, before his clerkship here, on Tongatapu, and is again resident there. Sothe allegation would fail on that basis alone (as Mr. Niu accepted, when put to him, by the Court, in closing argument).

Again there is noevidenceat all in my view (and certainly no satisfactory evidence) that Taufa 'Otuhouma was a campaigner for or indeed, (and I will deal with it now) a

"strong supporter" of the First Respondent (as alleged further in para 6. of the Petition). The Petitioner referred lo the 2 men as being friends and attending the same kava gatherings. And in the end that is all that anyone's evidenre came to. Both the Firsl Respondent and Taufa 'Otuhouma were cross-examined closely as lo their relationship. Noth ing was revealedtomeother than acertain degreeof familiarityand friendshipbased on a general age similarity and a living in the same very small community.

That basis of the claim in 4(e) is rejected as well. l add that the claim of "campaigning for" is irrelevant in tem1s of S.21 (1) (a) in any event.

In para .36 l applied the reverse onus in S.21 (3). But given the words used in that section, of "gi ven ..... in the absence of good consideration" and gi ven my findings in para34 above, I hold lhat in fact S.21(3) does not apply. So it is, and was, for the Petitioner to prove that the giving of the truck, forconsideration, was to innuence Taufa 'Otuhouma as to his vote. That she has not done. However, if l am mistaken as to that aspect then, as I have said in para.36 above, even applying the reverse onus this claim must fail. It is dismissed.

. Para 4f: is a claim that on election day the First Respondent "gave or allowed .....L3920w hich hecommonlyused and with which thepeopl eand votersof Niuatoputa pu had associated him asowner, lobe used to transport voters from their villages and homes ..... without payment ..... for the purpose of innuencing them to vote for him ....."

I have already made commenton this truck and its use. I do not doubt the bona fides of its use. on election day. In effect it is alleged that the Government Representative (only here then some 7 or so months) and his clerk entered into some sort of conspiracy to aid the First Respondent to obta!n election. There is no foundation for such and I reject it absolutely and vehemently. It is worthy of note that there were no campaign ribbons, regalia, notices or the like on the vehicle. It is also worthy of note that the First Respondent's brother in law (Faenga Iloa) did not drive it on the day but that a secondary school teacher, unrelated and not a campaigner or supporter of the First Respondent (as I find), was asked by or on behalf of the Governmen t Representative todrive itas hedid from the other 2 villages on some 6-7 occasions.

I find nothing offensive or offending in any of those arrangements. I have already commented on thelackof motor vehicles. That is oneof the reasonswhy it was important that I should sit here in Niuatoputapu and get the correct navourof matters,j udge matters in proper context.

I find that the First Respondent himself did not know in advance of the hire of the vehicle L3920. Itisnot proved by the Petitioner, that the First Respondent gaveorallowed directly or indirectly it's use asalleged, (e.g. the school teacherdid not approach him) nor is it proved by the Petitioner that it's use was to inOuence voters as alleged (given thehire aspect and what I have said in paras.34 and 40 above). I go on to add, repeating what I said earlier in para 36, that even if the reverse onus applies, on the evidence it is proved that the use was not to inOuence electors' votes.

I dismiss this allegation also. Which means that I reject all the allegations of offences of bribery, under S.2l(l)(a), claimed to have been committed by the First Respondent.

General Corruption ·Use of Vehicles

I have already referred to S.33 and it having reference to "widespread and general malpractice·- see paras.3 and 4 abo've.

The allegation are set out in paras.5 to 12 incl. of the petition. I will refer to those

Para 5: relates to the appointment of the Government Representaltve as returnmg officer for U1e district and the appointment of 2 named assistant returning officers (all appointments being admitted by both Respondents). The duties and obligations of such officers are spelled out, inter alia, in S.23A. I donot intend reading them out in detail; but all the provisions enjoin and ensure secrecy-important obligations to ensure secrecy of voting.

I have already commented on my view of the bona fides of the Government Representative. This was the first election he had been responsible for, in thisway. From what I have heard he took great pains ·indeed as might be expected he probably took greater pains lo try and comply with the Electoral Act than others who had been through it before (the "I havedone it before, sol know it all" syndrome). Heacted as best hecould, with the aim of ensuring and achieving a fair, free and ju st election, within the limits of what was available to him here. As an example he was given only a copy of the 1989 Act Oust before the election and only after repeated requested by him) and not the 1992 Amendment Act, although he knew of changes through other written instructions from the Second Respondent. But that is not good enough. A person in the Government Representative's position must be given all the legislation (whether Acts, amendments, regulations, rules, Gazette Notices, orwhatever) which may be relevant.TheGovernment must do better-disasters could easily result

He, the Government Representative, had, I find, no personal axe to grind; nor did his clerk, Taufa 'Otuhou ma. The latter person, along with Pomana Hui, were the 2 assistant returning officers named in para 5of the Petition.

Para.6:claims that Taufa 'Otuhouma was a strong supporter and campaigner for the First Respondent. As I said in para 38above on the evidence I find that that is not proved by the Petitioner.

Paras 7 and 8: claims that Pomana Hui is the wife of Fe'ao Hui who was a strong supporter of and campaigner for the First Respondent and he owner of va LI . He is the son of the District Officer of Niuatoputapu (Ngatu Hui). Further 1t 1s said Ulat that District Officer was •a strong supporter of and campaigner for the First Respondent' and the voters knew him to be such. Whilst the family ties of these 3 persons, the Huis, are admitted, the supporter and campaigner aspect is denied.

The Petitioner herself said of the Huis that she did not know whether the son had any connection with the First Respondent except the First Responden t at a candidates' meeting had mentioned getting him to carry people on election day. Se said nothing of the father's alleged relationship to the First Respondent. The only evidence of that and I find it unsatisfactory, given what !will say soon as to it, is from a cousin of the Petitioner whoclaims tohave seen the District Officer with Lapuka Maca on election day, when Mr Maea was canvassing, it was claimed, for the First Respondent. Such a remote, and once only, connection, on theevidenceis not sufficient to prove any such claimed relationship J et alonean ag1mcy for the First Respondent by the District Officer and in the light of the authorities in Parker already mentioned. The First Respondent, in evidence, denied any such campaign or support relationship. That is the extent of the evidence. No connections as claimed arc proved. The son had a truck, but I will come to that when I come to para .12.

Para.9 makes a similar claim (strong supporter and compaigner and owner of a vehicle T260) in relation to Lapuka Maea. The Petitioner claimed that he was a supporter of the First Respondent on the basis only of the First Respondent's statement at the meeting about use of Mr Maea's vehicle for transporting voters.

A cousin of the Petitioners claimed that on election day she saw and heard Lapuka Maea entreating a voter to come and vote for the First Respondent, havingju st pulled up in his car. This evidence, if accepted, would be some proof of the allegation, although, not necessarily, of knowledge of this in the First Respondent or, more importantly, knowledge of this in the Government Respresentative and his clerk (given thecom1ption allegationsagainst the Government Respresentati ve and his clerk which this claim leads up to and which are made in para.12).

However, standing alone as this evidence does, I do not find i t reliable, or sufficiently reliable, to found proof, tothe requisite standard, of the allegation. I say that, in particular, becau se the witness claimed that the District Officer (Ngalu Hui) was with Mr Maea in hi s car, at between 9-lOam, and at a time when I find it well established that that pistrict Officer was in a posi tion on the verandah of this court house, with Town Officers, identifying their nocks for the assistant retuning officers. On the evidence I heard, and which I accept, Ngatu Hui, was in that position throughout the 9am lo 4pm voting day.

The First Respondent, inevidence, deniedanysuch campaign or support relationship with Lapuka Maea. As with Fe'ao Hui's vehicle hementioned Mr Maea's car and Mr. Hui's truck atacandidate's meeting-as a suggested means totransportelderly in particular. But having heard theresponseof the Government Representative (which was not in black and white terms as candidates, or those I heard from on this issue, believed, but really left it over to candidates to decide what was appropriate) the First Respondent, I find, did not himself persist with any arrangementsforthe useof eitherof those (orany other) vehicles.

Para 10 and 11: touch on meetings such as I haveju st mentioned. The Petitioner understood what the Government Representative said in black and white terms i.e. that a vehicle of a candidate, or of the candidate's representative (whatever that means), was not allowed tocarry voters to and from the votingarea on election day. The Government Representative, in effect, said in evidence, that, at the meeting, he said he believed it would be wrong if someone acting in the capacity of the representative of the candidate used a vehicle to transport voters. He did not prohibit, he says, as such. His stress was on theperson, not the vehicle. The difference between the 2 views is really, I believe, just one of perspective (see e.g. the first Respondent's view as commented on in para.57 above). I accept what the Government Representative says he told the meetings.

Para 12: is the heart of this general corruption allegation. In view of the factual findings already made I reject asunproved the claim that the Government Representative "approved and allowed the use of …..... L3920" "contrary to hi s advice as staled" in paras.10 and 11of the Petition. The use of L3920 was not contrary to any earlier advice by the Government Representative whether at fonos (for voters) or at candidates' meetings. It was sensible to arrange to hire the vehicle which was associated with Government work (particularly road maintenance o it got around the vi llages and would have been seen doing Government work) and, importantl y, to arrange an independent driver, not associated with any candidates in particular(that driver, the school teacher, did not even know whose truck it was which rather gives the lie to the Petitioner's claim that

"the voters of Niuatoputapu associated him (the First Respondent) and the owner".)

The allegation then goes on that the Government Representative approved and allowed the use of Mr Maea's car and Mr Hui's truck to transport voters lo and from the voting area without charge. There is no evidence to support that; it is unfounded ; 1 reject it. I accept the Government Representative's evidence that he did not do so.

Indeed theclaim that these 2 vehicles were used at all to transport voters on election day is, at best, vague and unspecific. The school teacher's evidence was to the effect that he saw both vehicles on the road that day, Mr Maea's car some 6times, but whether used asa taxi or not hedid not know (it hasa "T" i.e. taxi registration) and Mr Hui's truck once. The Peli tioner's cousin's evidence as to Mr Maea I have already commented on, adverse!y (paras 55-56 above). There is no other evidence. There is no reason why a taxi, hired, should not be used quite independentl y of candidates, by voters.

Para 12of the Petition then claims that the Government Representative in approving and allowing the use of the 3 vehicles (which I reject as unproved, as above) committed 'a corrupt practice and it was committed by the returning officer or assitanl returning officer for the purpose of promoting or procuring the election of the flrst Respondent'.

I stop there - a most serious - a startlingly serious allegation against electoral officials, (and in pa rticular against both a senior Government official holding responsible office, the Government Representative, and his clerk). I waited for evidence to su pport such a grave allegation. A nd I waited. None-absolutely none in my v iew - was forthcoming. In my view Mr Niu really was asking this Court to indulge in speculation and not act on evidence. I do not believe, looking back al my note, that Mr Niu put the allegation as such (or even indirectly really)to them. I put that to Mr Niu in his closing address; and heacknowledged that that was so, in effect. There was, I suggest, no basis forhim toput that. Theclaim isnotjust oneof dereliction of duty- it isa claim of deliberate dishonesty of the highest order - an attempt todistort, improperly, a people's election. I find there is, and was, no basis for that grave allegation. It is not proved.

The balance of para 12 relates to the claim (necessary under S.33 if the Petitioner is to be successful) that this alleged corrupt practice (rejected, adama ntly, by me) extensively prevai led to such an extent that it might "reasonably be supposed to have affected the result at Niuatoputapu." There was no corru pt practice; therefore i t did not, because it could not, extensively prevail.

I rject and dismiss as unproved, and as unfouncled, this claim of general corruption.

General Corruption - Cubicles and Returning Officers

I remind myself, again, as to S.33. Theallegationsare in para. 13of the petition. As I said (in para.2 above), there are 3 allegations.

First there is reference to the claimed duty in the Second Responden t through his returningofficers toprovide votingcubicles, toafford secrecy and freedom of voting, and the failure to fulfill such a duty. Particulars are pleaded describing the steps taken, the tables and places visited, on the way to the actual voting tables and thence lo the ballot box. I wi ll deal with those factual matters first; and dispose of the other 2 allegations before returning to the question of voting cubicles.

In para.13(a) there is a complaint, in effect, about the presence of officials on the verandah outside the courtroom, where the voting look place. 1 see nothing in that complaint. The officials had their backs to the voting room. Only limited numbers of potential voters were allowed on the verandah at any time, to go through the various

preliminary voting steps (checking identity and rolls, issuing ballot papers, marking off master roll and so on). Order was maintained, and supervision to ensure a free and fair election kept, by police officers (refer S. 18).

Implicit in para.13(a) of the Petition is a complaint about the P esence of 2 persons who I have already mentioned, Pomana Hui and Ngatu Hui. I have already found not proved the allegations of the Huisas supporters and/orcompaigners (paras 52-53above). There was nobasis for the removal of those 2 from the verandah; nocomplaint about them was ever made; it is apparent to me that the names or assistant returning officers were known to candidates before the election and the Petitioner, and that knowledge was instrumental in having 2 proposed assistant returnin gofficers (brothers i11law or the First Respondent) removedfrom the listand notappointed (Exhs D to G show thattransaction). Ir shehad real (or any) concerns about the Huis I am sure she would have done something similar - or even protested about their presence on the day - she voted at about 10:30 am and so could have tried to alter this (and indeed alter things physical inside the voting room, when we come to that) if she had wanted to.

· Para 13(b) alleges the presence in the voting room i tself or the final officials'table, at which were Taufa 'Otuhouma. the clerk to the Government Representative, and a woman police officer. The Petitioner gave evidence and said they were there inside the courtroom and thereby affectingthe freedom and independenceof voters- particularly the presence of Taufa 'Otuhouma as a claimed strong supporter of and campaigner for the First Respondent. That aspect I have rejected (paras.38-39 above;) and I repeat that rejection. I also repeat what I have ju st said in relation to the Huis (para .69 above) - the Petitioner if concerned about Taufa 'Otuhouma could have taken steps to have him removed (and I note that he had occupied the same position in Niuatoputapu at the previous (1993) election at which she, the petitioner, had voted). No protest before, during or after the election however - until the petition.

Furthermore the Petitioner is clearly wrong in what she has said as to the position or the woman police officer and Taura 'Otuhouma (and their table). It was outside the court room on the verandah facing away from the court room. A ll other witnesses agree with that position. I do not intend detailing them.

Para 13(c) I will return to containing, as it does, detailed references to the actual voting arrangements inside the courtroom; but I do note that it is wrong, (and the Petitioner's evidence was wrong). as to Taufa 'Ot uhouma being in the room and the voter marking his ballot paper in "full view of Taufa 'Otuhouma and the pol ice officer from where they were seated ..... • That does affect my view of the credi bi lity or the Petitioner, as well, forexample some of the matters I have mentioned above (paras 69and 70 for example as to lack of complaint by her, whether about personnel or lay out).

Para 13(d) is a claim that the presence of Taufa 'Otuhouma" in the courtroom and in a position tosee the votes cast by each voter, w hilst he was a supporter ..... of the First Respondent, a fact of which the voters were aware. would reasonbly be supposed to have affected the result of the election".

For the reasons already, exhaustively, traversed, I reject that entirely. It is factually incorrect in that Taufa 'Otuhouma was not physically present; even if he were he could not have seen the votes cast, given the position or the table the Petitioner alleged; there is noproof of hisbeing a supporter;even if he were (and he was not) there was noevidence to show voters were aware of that.

Accordigly there was and is no basis for the claims that the Second Respondent should have replaced Taufa 'Otuhouma as an assistant returning officer, or rcmoved'him from the Court room..I reject and dismiss those claims as unproved (and unfounded) and as unable to found any basis for a general corrupt practice allegation.

Which leaves then the issue of the accepted lack of voting cubicles at this election and in particular as it is spelt out in para 13(c) or the Petition. There it is said thai voters were directed (into this court-room) there "to take 1or2 lables, each with 1chair behind it, but each table about 3 metres apart, with no obstruction in between them oraround them. The voter would then sit and mark his vote on the bal lot paper" (linterpolate - Exh I is an exmplc - one tick only had to be made) • in the full view of the voter at the other table, and 'of Taufa 'Otuhouma and the police officer ..... and the returning officer ..... who was also present..... and or any person whowould stand by the door tocome in to vote, and or any person who would look through the open louvre windows (which had no curtains) .....•

The physical layout was as alleged, ie 2 tables facing towards each other, one on either side of this room, with a sizeable gap between them (3 metres, as pleaded, although it may not have been quite that gap). Leaving aside the other voter for the moment I deal with the claimed "full view• or the voting by various persons. The claimed v iew of Taufa 'Otuhouma and the woman police officer is clearly wrong - see paras. 71 and 74 above.

The claimed "full view" by the returnin g officer I reject on the basis of what he said in evidence with, I add, some support by some other witnesses. I also reject the claim that othervotersor potenti al voters could view themarking of ballot papers. Jn a general sense anyone looking in could see persons marking papers, but jn a specific sense of actually knowing what was being marked, or which candidate was being ticked, I reject thal Jn addition the evidence indicates that positive steps were taken to prevent "busy bodies" in· the waiting voter queue peeking through at those inside voting.

But the unease and/or lack of freedom which some voters spoke of i•1 evidence should not and cannot be written off - the perception of even a possibility of a lack of secrecy is a concern which should and must be addressed. The Second Respondent must sec that funding is availableand thatdircclions are madeand carried out toensurenot only secrecy, but an assured feelingor perception orsecrecy, within voters. Voters should not have tofeel that they need to guard their ba llot papers with their hands. Secrecy isrightly regarded as sacrosant.

I return to the "full view" of the voter at the other table. On all the evidence it has not been proved that that was so, given the distance thetables were apart. Examinees are almost invariably much closer together (and in every direction). But again perceptions arc important on this highly personal matter of voting. I wi ll return to what might be considered appropriate soon.

However, even i f I were to find, as a fact, that all the Petitioner's allegations as to voting cubicles and lack of secrecy were trnc, (which I do not) there is still a funda mental stumbling block (and i t is a block for the replacement ancUor removal claims in relation to Taufa 'Otuhouma as well). It is that it is said that all or any of these things (ie in combination, or alone) amounted to a cornpt practice. committed or omitted by the Second Respondent (through his returning officers) "for the purpose of promoting or procuring the election of the First Respondent ..... and that it extensively soprevailed du ring and at the election that it may reasonabl y be supposed to have affected the result

I need not repeat what Ihave said in relation to the some aspect of the other general corruption allegation i.e. as to the col"('llpt purpose claime 'against the Government Representative and his clerk-see paras. 62-63 above. Again this is an allegation of the gravest kind, quite unsupported by any evidence. There is, and was, no basis for it.

This claim is also reje cted as unproven. 1know I have not dealt with the claim that there was a duty to provid e voting cubicles, but it is unnecessary in view of the above which disposes completelyof the matter. But Iwill return to that claim shortly.

Certificate

Having rejected and dismissed all of ihe Petitioner's complaints of bribery and corruption I now, formally, dismiss the petition. The First Respondent, I determine was properly:, and is duly, elected and the election is not void. Iertify to the Speaker of the Legislative Assembly that determination accordingly; and a copy of this paragraph of the judgment should be forwarded (perhaps telegrammed) to the Speaker forthwith (s.37).

Future election in Niuatoputapu - recommendations

·I have already commented on the need to properly provide the Government Representative with all legislation and all necessary instructions (para 49 above) - and in good time.

I goon to the lay out of the actual voting area, if this court house is to be used in the future for elections. It was used in 1993 (and previously). In 1993 it is a matter of controv rsy between witnesses as to the voting room actually used i.e. whether the courtroom or an interior office (and if that office whether 1 desk or 2 desks - I add unscreened in any event, so open to the same complaint as this time around - and if I am told aright in 1990 on the pangai at Nuku'alofa no flax screens, as now used there, were then present. So perhaps there is some historical basis for no screens, gradually being remedied.)

I do not have to resolve what the position was in 1993. Ido observe however that it was not only Taufa 'Otuhouma who claimed that the courtroom, in a similar layout or arrangement, was used in 1993. So too did 'Isitolo Kivalu and another witness said this courtr<><;>m was used in 1993, but with just one table. One, would have though the clerk, as the assistant returning officer in 1993, would know the position. The GovertJment Representative thought hewas following the same pattern and layout in 1996 ashad been done, without complaint in 1993.

If the verandah is used for the preliminary steps, as in 1996, and that seems to me tobe sensible- undershelteryet nearby - then not only should the middleand eastern most doors into this room remain shut (as they were in 1996) but also the 3 sets of louvre windows on the verandah side should be covered, temporari l y, with some light materi al preventing vision in but not excluding all light. Perceptions are i mportant ashave said.

The western mostdoorshould remain open and thereshould be a separate exit door (as in 1996).

Voting should take place either.-

(a) in this courtroom, with the desks at a distance and a screen of some sort (flax, or even Mr Niu's string with a sheet draped over it) between and around the two;

or

(b) in theofficesoff the courtroom using the existingpartitionsand ensuring that the exterior windows are suitably covered in some way or that, if uncovered, noone canapproach them tolook inside (in fact the 2 offices on the Western side of the buildin g are probably the bes t and there are curtains already in place).

None of these suggestions should be seen 11s any adverse reflection on themethods employed in 9%. They are not Any system in capable of improvement. But if people, when voting; feel uneasy then that should be dealt with, if at all possible. However the fact that no voters complained in 1993, or at the time in 19%, or subsequently (until the petitioner took steps, filed her petition and found witnesses) probably says something generally as tothe 1993 and more importantly the 1996 elections being conducted "freely and fairly" (s.18).

MrNiu (and the Petition) referred, in relation tovoting cubicles, to s.3(3) of the Act and to a claimed mandatory duty to provide such cubicles. S.3(3) says that the Second Respondent "shall have the general control over and supervision of ..... t_he preparation anddistribution of.....voting cubicles and other fixtures needed .....:•. That does not say, and mean, that voting cubicles have to be provided at every voting place.

Indeed S.12(4) makes that clear. It says that "the elector shall retire to a voting cubicle or some private space in the voting area and mark his ballot paper .....• That is what has to be done - provide a voting cubicle or some private space. The Second Respondent must ensure that his returnin g officers provide such cubicle or space. The ballot isto be secret; voters should feel secure, and sure, that that is so(and Mr Niu is ri ght when he refers to the Electoral Act underlining the secrecy of the ballot in eg. S 12(4), S. 18, S.23 A. (3) and (4)). That is why I have made the suggestions in paras 88-90 above.

Costs

I will need to hear counsel as to costs (and Irefer counsel to S.38 of the Electoral Act).

Having heard counsel I reserved overnight the question of costs (because of the lateni:ss of the hour and failing light). Irecognise some force in what Mr Niu has said on behalf of the wholly unsuccessful petitioner. Normally costs should follow the event. They will here, but Iwill temper the orders somewhat recognising.

(a) the geographical isolation which made and make for difficulties over such as the 28 day limit for filing a petition - either take your chance and file your petition without your counsel being able to get proofs of evidence, or miss out entirely; and the difficulty, or indeed impossibility, for counsel to brief potential witnesses at all until the Court came here for the trial, given the distance and costs, and the absence of any means lo talk coherently, let alone privatel y, to persons here where telephone communications are through one very public radio-telephone.

(b) the public interest and stake in such a matter and the importance of the provision of proper voting facilities.

In the circumstances the Petiti•)nershould pay the full disbursements and witnesses expenses of both Respondents and a contribution to each Respondent's costs in the sum of $2,500.00.

Croci v Moa & Fifita

Court of Appeal
Hampton CJ, Tompkins & Neaves JJ
App. 3/96

24 & 28 May 1996

Practice and procedure - application to set aside default judgment
Practice and procedure - appeal - judicial review
Judicial review - Magistrates Court
Magistrates Court - splitting claim - judgment void

This was an appeal from a judgment in the Supreme Court dismissing an application for judicial review from a refusal by the respondent Magistrates to accept for filing and to refose to hear an application to "review' an earlier decision of another Magistrate giving 2 Judgments (I for $1,000 and the other for $300 - a "splitting" of the same action between the same parties where the defendant, the present appellant, was unrepresented).

Held:

1. The original plaintiff had but one cause of action against the appellant, the amount of which exceeded the Magistrate's jurisdiction.
2. Splitting the claim and the two judgments thereon was done without jurisdiction and the judgments a nullity.
3. The Magistrate could hear and detennine say the claim for $1000 but only if the plaintiff had formally and effectually abandoned the excess.
4. The appropriate course for a defendant who alleges the Magistrates' Court has no jurisdiction by reason of circumstances similar to those in the present case, is by way of judicial review in the Supreme Court.
5. In addition if a Magistrate entertains and refuses an application to set aside a judgment given in the absence of a party that party may appeal to the Supreme Court. But if a Magistrate declines to entertain such an application judicial review would be appropriate. A Magistrate is under a duty to hear and determine an application to set aside a default judgment under power to be found within its general jurisdiction (and not under the Supreme Court Rules).

Statutes considered — Magistrates' Court Act

Counsel for appellant — Mr Macdonald & Mr Appleby
Counsel for respondent — Ms Weigall

Judgment

This is an Appeal from the judgment of the Supreme Court of Tonga (Lewis J.) given on 9 Janual)' 1996 dismissing an application by the appellant for judicial review in relation to certain proceedings in the Magistrate's Court at Nuku'alofa. In those proceedings, which were numbered respectively 93/94 and 94/94, 'Alisi Tu'aefe Palelei Co. Lid was the plaintiff and the appellant was the defendant.

The application to the Supreme Court, which was filed on 22 May 1995, sought judicial review by way of writ of mandamus in respect of the alleged refusal of the respondent -

(a) to accept for filing what was described as "an Application to Stay the Execution of a Writ of Distress dated 13 February 1995", and
(b) to hear and detem1ine the 'Application to Stay" and an application described as 'an Application for Review dated 27 January 1995'.

The first and second respondents to the present appeal were named respectively as first and second defendants in the proceedings in the Supreme Court. The first respondent is a Senior Magistrate responsible for the administration of the Magistrate's Court at Nuku'alofa. The second respondent is the Chief Police Magistrale.

In order to understand the appellant's case, it is necessary to refer shortly to the history of the proceedings in the Magistrate's Court. 'Alisi Tu'aefe Palelei Co. Lid, which it may be noted was not joined as a party to the proceedings in the Supreme Court or this Court, commenced two proceedings against the appellant lo recover the balance unpaid of the price or a motor vehicle purchased by her from the company. In one proceeding. numbered 93/94, the amounted claimed was $1000. In the other, numbered 94/94, the amount was $300.

The two proceedings were heard together on 11 November 1994 in the Magistrate's Court constituted by Magistrale Palu. The Magistrale recorded that 'the two cases were allowed to be heard jointly as they were of same nature and derived from the same matter and between the same parties". The hearing proceeded in the absence of the appellant, the Magistrate being satisfied that she had been served with the procee of the court and had received due notice of the dale of hearing. In proceeding numbered 93/94, the appellant was ordered to pay $1000 within two months, in default a distress warrant to be issued. In the other proceeding, the appellant was ordered to pay $300 plus $151 costs within one month, in default a distress warrant to be issued.

The solicitor for the appellant prepared the document, described as the •Application for Review', dated 27 January 1995 and presented it, together with supporting affidavits, to the Magistrate's Court Office on 1 February 1995. The application relied on the fact that the appellant was not represented at the hearing and asserted that she had a substantive defence. Orders were sought that, in each case, the judgment of Magistrate Palu be set aside and that the distress warrant which, at the instance of 'Alisi Tu'aefe Palelei Co..Ltd, had been issued to enforce the judgment be stayed. No question was raised as to the jurisdiction of the Magistrate to hear the proceedings numbered 93/94 and 94/94. The solicitor was susequently informed that the first respondent considered that the Magistrate's Court had no jurisdiction to hear the application dated 27 January 1995 an application to slay the execution of the distress warrants. It appears that on 13 March 1995 U1e appellant paid the amounts in respect of which the warrants of distress had been issued.

The question whether the Magistate's Court constituted by Magistrate Palu had

jurisdiction to entertain the proceedings numbered 93/94 and 94194 was not raised in the Supreme Court by counsel for the appellant but by counsel for the respondents. Relevant to the juri sdictional issue are the prov isions of *s.59* of the Magistrates' Courts Act. That section provides -

> •59 (1) Every magistrate shall have jurisdiction to hear and decide civil actions where either the plaintiff orthedefendant resides in hisdistrict, provided that the amount claimed in any such action whether as debt, balance of account, or damages, or theva lue of the thing claimed does not succeed $1000.
>
> (2) Subject to the above, civil actions where the amount claimed whether as debt, balance of account, or damages, or the value of the thing claimed does not suceed $2000, shall be tried by the Chief Police Magistrate.
>
> (3) The rules of procedure governing Civil cases in the Chief Police Magistrate's Courts shall be the same as those for Civil Cases in the Supreme Court. The Registrar of the Supreme Court shall be the Registrar of the Chief Police Magistrate's Court."

The Supreme Court did not accept that the Magistrate's Court had nojurisdiction to hear and detennine the proceedings numbered 93/94. Having observed that "all the indications point towards the likelihood that the two claims are both part of the one agreement which was alleged to be breached by Ms Croci' and that the claim appeared to have been split soas to enable thejurisdiction of the Magist rate's Court to be invoked, the learned trial judge continued -

> "If that be the case then whichever ju dgment was delivered first, it de jure operated resjudicata the second (or following) judgment, thus providing an immediate appeal ground in respect of the following or second judgll)ent. •

We are unable to agree with the conclusion reached by the trial jud ge. As appears clearly to be theposition, 'Allsi Tu'aefe Palelei Co. Ltd had but onecauseof action against the appellant, namely a claim for debt arising from the alleged failure of the appellant to pay the full pri ce of the motor vehicle purchased by her, the amount of the alleged indebtedness being $1300. That amount exceeded the monetary limit of thejurisdiction of the Magistrate's Court constituted by Magistrate Palu. The jurisdi ction of the Magistrate's Court as so constituted could not be enhanced by the plaintiff company splitting the cause of action so as to claim $1000 in one proceeding and $300 in the other. Each of thejud gmentsgiven by Magistrate Palu was, therefore, given without juri sdiclion and isa nullity. What Magistrate Palu ought to have done was todismiss the proceedings. Itwould have been proper for him to hear and determine the proceeding numbered 93/94, in which the amount claimed was $1000, if, and only if, the plaintiff company had formally and effectually abandoned the excess, by release or otherwise, so as to bar any other proceeding for its recovery and prevent it being set off against any claim which might be made against the plaintiff company by the appellant.

There was some discussion during the hearing as to the appropriate procedure to be followed in the Magistrate's Court by a defendant who alleges that the Magistrate's Court has nojurisdicti on by reason of circumstances similar to those in the present case. In our opinion, the appropriate course for a defendant in such a case is to invoke thejurisdiction of the Supreme Court by way of judi cial revi ew pursuant to Order 27, Rule 1 of the Supreme Court Rules to seek an order of prohibition or certiorari as may fit the

circumstances of the particular case.

Counsel for the appellant also submitted that the trial ju e was in error in concluding that the appellant lwtl no right tojudicia l 1eview in respect of 1he failure of the failure of the Magistrate's Court to hear and determine the appellant's application to that Court to set aside thejudgments given, in the absence of the appellant, on 11 November 1994 and holding that the appropriate remedy was to proceed by way of appeal.

In ouropinion,theremedy by way of appeal would be anappropriateremedy, giving rise toa discretion in the Supreme Court todeny relief by way ofjudicial review in respect of the samematter, ifa Magistrate's Court entertains an application tosetasideajudgment given in the absence of a party and refuses the application. Where, however, the Magistrate's Court declines to entertain an application, we can perceive no adequate reason why relief by way ofjudi cial review would not be appropriate. We have nodoubt that a Magistrate's Court is under a duty to hear and determine an application to set aside a default ju dgment of that Court. Counsel for the appellant sought to find the source of juri sdiction in a Magistrate's Court to entertain suchan application by reference to Order 23, Rule 4(i) (iii) of the Supreme Court Rules which it was submitted, was made applicable by *s.59* of the Magistrates' Courts Act lo civil cases in those courts. We are unable to accept thi s submission in view of the amendment made to s.59in 1990 deleting the provision previously contained therein that the rules of procedure for civil cases in the Supreme Court were toapply to civil cases in the Magistrates 'Courts. We have nodoubt, however, that the power in a Magistrate's Court to set aside a defaultju dgment is a power to be found within its general jurisdic tion.

Itremains to consider what, if any, relief the appellant is entitled in the light of the conclusions to which we have come. Counsel for the appellant made it plain during the course of his submissions that the appellant, having satisfied the debt upon w hich the plaintiff company sued, no longer wished to contend that she was not indebted to the plaintiff company in respect of the purchase of themotor vehicle. In these circumstances, no useful purpose would be served by settin g aside thejudgment of the Magistrate's Court in proceedings 93/94 and 94/94 on the ground that that Court lacked juri sdiction to hear and determine them. Further, in view of the lack ofjuri sdiction in the Magistrate's Court to hear and detennine those proceedi ngs, it would be inappropriate to issue an order in the natureof mandamus directing the Magistrate's Court tohear and determine the appellant's appl ica tion dated 27January 1995to setaside thejudgments given on 11 November 1994 or to hear and dctem1ine the application dated 13 February 1995 to stay the execuli on of the distress warrants issued at the instance of 'Alisi Tu'aefe Palelei Co. Ltd.

In these circumstances, we are of opinion that the appeal should be dismissed and we soorder. In the light of the history of the matter, however, we consider it appropriate that there be no order as to the costs of the appeal to this Court.

Taufaeteau v Bank of Tonga

Court of Appeal
Hampton CJ, Tompkins & Neaves JJ
App.12/95

24 & 28 May 1996

Contract - banking loans - certainty - variation
.Banking - interest - contractual terms - variations

The appellant appealed from judgment in the Supreme Court rejecting all his claims against the resporident with respect to loan transactions including claims that the Bank could not charge interest at more than 8.5%; that interest over that rate plus insurance perm iums and fees and charges deducted should be repaid ; and that the Bank had fraudulently and unjus tly enriched itself at the expense of the appellant and damages should be awarded.

Held:

1. The allegation of fraudulent conduct and unjust enrichment werecorrectly and forth rightly rejected.
2. Theallegations that the interest rate provisions were too vague and ambiguous to be enforced were rightly rejected - the expression used was suffi cient to convey objectively that from time to time interest rates would move up and down.
3. As to the premiums fees and charges they were agreed to by the appellant in a letter and although not in the loan agreements themselves, the letter was part of the documents in which thecontract was tobe found and therefore the parol evidence rule was not relevant .
4. The non-registration of the letter under the Contract Act did not prevent the Bank collecting the fees and charges. The Contract Act creates a bar to an action upon such a contract i ,e, as to enforceability - an action for recovery by a plaintiff and not as here an action sounding in damages for alleged breach of contract.
5. The Bank, unilaterally, changed the loan category from residential housing to commercial and thereby charged higher interest, thejudge below finding that the Bank was so entitled because of the change of use of by the appellant, without notice. There was no contractual provision allowing that and the judge below was wrong. The appeal was allowed as to that aspect only and the matter remitted back for evidence to be heard on it.

6. Buf the appellant had suffered no loss or damage as at all times loan mmieys were outstanding.

Cases considered — Tonelli v Komirra Pty Ltd [1972] VR 737

Statutes considered — National Reserve Bank Act
Contract Act
Evidence Act

Counsel for appellant — Mr S.K. Taufaeteau
Counsel for respondent — Mr Appleby

Judgment

The Appellant (the Plaintiff in the Court below) appeals from a Supreme Court Judgment of 10 November 1995 rejecting all his claims against the Respondent (the Defendant in the Court below).

The claims and appeal relate to loan transactions, (and a number of documents recording those transactions), commencing in 1987 and 1988. At that time advances totalling $6.SOOO were made by the Respondent to the Appellant for "housing" purposes, with two loan agreements and a mortgage being entered i°nto by the parties.

The argument in the Court below, and here, was that the Respondent was wrong in charging more than 8.5% interest on the loans; that all interest over that rate should be repaid to the Appellant as well as all insurance premiums and commissions, bank fees and charges which, it was claimed, had also been deducted wrongfully and without contractual authority.· In additin it was' said that the Respondent had deliberately, and indeed "fraudulently" as alleged, unjustly enriched itself at the expense of the Appellant; and that not only were there moneys repayable, as already set out, but that both general and aggravated damages should be paid by the Bank.

In the Court below the trial judge, for reasons which seem sound to us, and which are factually based on the evidence he had heard, forthrightly rejected the allegations of fraudulent conduct and unjust enrichment. With his conclusions we agree. Those conclusions, to us, seem sound and appropriate.

The trial judge found that the Respondent Bank had made a mistake in calculating. charging and deducting interest from time to time at a rte higher than was allowed by law (i.e. by Order in Council gazetted on May 14, 1990, pursuant to s.40 of the National Reserve Bank Act (Cap.102) when the maximum interest rate chargeable for loan advances made prior to 1 July 1989 - thereby applying to these two advances in question - was set at 10% per annum; the Bank, mistakenly, having charged and deducted interest at 13.5%, that being the allowed maximum rate for advances after 1 July 1989).

The trial judge also found that when this was pointed out to the Bank it corrected the pos ition, crediting the erroneously charged interest to the Appellant's account and adjusting the loan account accordingly (on which loan account a significant debit balance was then, and still is, outstanding i.e. the Appellant still has some way to go to repay the advances made to him by the Bank). $5,976.33 was adjusted back in this way prior to the trial; and the Respor1dent conceded, at trial, that a further $1,064.43 had yet to be credited back and the account adjusted accordingly. That would take the interest charged and deducted back to a maximum rate of 10% both as allowed by law and. as claimed by the Bank, as allowed by the contract with the Appellant.

The Appellants' arguments before us, apart from the unjust enrichment claim which we have dealt with, were founded on these 3 propositions:-

!. That the interest rate provisions in the 2 loan agreements of 25 August 1987 (Ex Pl) ($50,000 advance) and 17 June 1988 Ex P2 (increased advance by $15.000) were so vague and ambiguou s as to be both meaningless and unenforceable, resulting in the initial rate of 85% only being able to be charged for interest and without any ability in the Ban k to increase that interest rate as it purported to do.

2. That the Bank could not, as it later purported to do. change the category of loan from residential housing to commercial, (when the Appellant apparently let

out his house without the agreement or consent of the Bank) and thereby increase the rate of interest chargeable (commercial rates being higher than residential housing rates).

3. That the trial judge was wrong in finding that the Bank could charge and deduct insurance premiums and commissions and bank fees and charges, based on a letter of 2 May 1988 by the Bank offering the further, increased, 1988 advance, which was accepted by the Appellant.

We see no substance to arguments (1) and (3) and reject them for reasons which we will express shortly. We will then return to argument (2), which we find has substance.

The loan argeemenls are both in the same phra seology. The interest prov isions are identical each: "The rate of interest payable shall be 8.5% per centum per annum or such other rate as the Bank may from time to time charge it s other customers on a like account.• The issue taken here, and in the court below, was with the words 'or such other rate as the Bank may from time to time charge its other customers on a like account'.

These words are not in our view vague or ambiguou s, or too vague to be enforced, which were the Appellant's arguments. The judge below ri ghtl y rejected the arguments made by the Appellant. He found that by using that expression "the parties contemplated and ultimately intended that the Bank would be empowered and entitled to vary the rate. They said so expressly in the agreements Pl and P2. The expression used to record their intention is sufficient to convey objectively that from time to time interest rates would move up or down in line with the rate being charged other borrowers. the accounts of whom were in the nature of housing loan agreements like that made with the Plaintiff ...•.

We: sec nothing in those conclusions. whether factually or legally, which can be said to be in any way exceptionable, let alone wrong. The agreements do provide a sufficient basis for a court to ascertain the nature of the obligation intended to be assumed. See, for example, the expression "current bank overdarft rate' held to be sufficiently certain in Tonelli v Komirra Pty Ltd (1972] V.R. 737.

The Appellant apparently claimed in the Court below that the interest rates "were intended to be, and should now be, constructed as• flat rates "of interest.• The trial judge. rightl y, rejected that. Leaving aside entirely on this issue the letter of the 2 May 1988 (which would support the Bank's argument, and the jud ge below) the twelve year mortgage signed by the Appellant of 8 January 1988 says this: 'to pay interest al the ra te of 8.5% per centum per annum or at the prevalent rate charged or chargeable by the Bank rrom lime to lime lo its customers on a like account ....'. Aga in those words are clear and unambiguou s. The Appellant is an accountant. How he could claim that the authority was only to charge a flat rate of 8.5% is difficult to comprehend. Small wonder that the trial judge found that 'the rate or interest to be charged by the Bank was variable at the instance of the Bank in both Exhibits Pl and P2 and according to the tenor and intent or the general agreement between the parties". We add that changes of rates of interest were clearly publicly notified in an acceptable form and manner. This agreement is rejected.

The next argument to be dealt with relates to the lettcr of 2 May 1988 (Ex.P.6). Two arguments were mounted, both here and in the court below.

First it was said that the letter cc•uld not be relied upon by the Bank as contractual authority to deduct insurance and bank charges (used in this judgment to cover insurance premiums and commissions. and Bank fees and charges) because of the operation of certain provisions of the Evidence Act (Cap.15) and that, therefore, the Bank was

restricted to the 2 fonnal loan agreements themselves which made no mention or such charges.

Secondly it was said that, e'en if the letter coulu be relied upon, thl·provisions of the Contract Act (Cap.26) - now repealed but still applicable to thesetransactions - would in some way prevent the Bank collecting such charges because the letter had not been registered under the Contract Act (as the loan agreements had been).

First as to the Evidence Act, the Appellants argument was based on the parol evidence rules in sections 78and 79. It was submitted that the loan argreements (Exs.Pl and P2) only could be looked at, and that the accepted loan offer letter (P6) could not be prayed in aid by the Bank to fill in any deficiences (e.g. as to insuranceand Bank charges). The short answer is in S.78 itself which says that ".... where any contract .... has been reduced to the form of a document or documents, noevidence shall be given of the terms thereof except the document itself ....• The underlining is ours. The contract here is to be round in a numberof documentsincluding the loan agreements,(Pl , P2), the mortgage (PS) and the letter (P6). All are executed by the Appellant

The mortgage (PS) contains provisions as to insurance (clause S) and as to default in payment of insurance premiums (e.g. clauses 12 and 18). The letter (P6) (which is endorsed by the Appellant in this way: "The abovementioned tenns and conditions are acknowledged and accepted") has within it reference to "Special Conditions:- Insurance of the housein the Bank's name with policy to be held by the Bank. Mortgage Prepayment Insurance to be taken in the name of the Bank". Insurance and insura nce charges were clearly contempleted and intended by the parties; and deductions of commissions and premiums were made with cntractual authority.

As to the Bank fees and charges, provision for them to be deducted is clearly contained within one of the documents makin g up the overall contractual arrangements between the pa rties, i.e. in the letter (P6) which provides•A once only Establishment Fee of $2SO will apply only for the increase in addition to other Bank and Statutory Charges. Full details of these charges will be available to you when you call to sign our documentation".

It is noteworthy that the loan agreements do not specify that they recorded or purported to record, exclusively, the whole transactions between the parties and that no other document could be looked at and relied upon.

The trialjudge was correct, inour view, in concluding thatthe letter (P6) •forms part of the agreement between the Plaintiff and the Bank"; and that the Bank fees and charges were deducted properly and with authority.

As to the claims that the non-registration of the letter (P6) under the Contract Act meant that these various insurance and Bank Charges were not collectable, we agree with the trial judge's conclusion that the Contract Act cannot affect these transactions. Under the Act any agreement or contract as to money to be lent or services to be rendered has to be registered if any action toenforce the ontract were to 'be maintainable" (s.S). In our view the section creates a bar to an action upon any contract for "money to be lent or services to be rendered ...• if the contractual document or agreement is not registered. Here the letter (P6) was not registered separately; itwas relied on by the Bank asauthority for the deduction of the various insurance and Bank charges (made over a period of time and without any obje ction, apparently, having been made by the Appellant at all); therefore the Appellant claimed in soi11e way that the agreements contained in that letter

were unlawful.

The argument in not sustainable. The relevant provision of the Contract Act (s.S) relate to enforceability i.e as the trial judge said. 1t relates to "an action for recovery by a plaintiff" and not to (as here) "an action soundin g in damages for alleged breach of contract ...."

We now return to the Appellant's argument as tothe unilateral change, by the Bank, of the loan category from residential housing to commercial: and the jus tification for thereby charging higher interest rates.

If the category stayed as residential housing, a it clearly started out in these transactions, then the Respondent Bank acknowledges that the highest interest rate it could have charged (from the start of 1991or thereabou ts as we were advised from the Bar) was at 9.S%. As set out above the Bank has recalculated interest back from 13.5% to 10% for vari ous periods; sothat anotherrecalculation will be necessary (from 10% back to 9.S%), with furthercrediting back to the Appellant'saccount and adjustment of that loa11 account accordingly followingour decision that the Appellant must succeed on thispoint

The point is short. The original loan was "Purpose of loan: Housing• (Pl) and the extension loan (P2) "Purpose of loan - Housing Increase".

The interest ra te provision, as already set out, referred to variations of interest rate being tied to the rate the Bank "charge(d) its other customers on a like account".

The "likeaccount" clearly related to residential housingaccounts; and thetrialjudge so found.

The Appellant later rented the house out and thejudge found that "the nature of the loan changed from a loan of a residential nature to a loan of a commercial nature" .... and "that there was no disclosure by the (Appellant) to the (Respondent) of the change to letting ... Was the Bank upon discovery of the letting simply en titled to alter the interest rate unilatera lly? I conclude that the Bank was so entitled. After all the Plaintiff had wrought a change of use without notice".

With that conclusion we disagree. Noneof thedocumen ts (whether Pl, P2, PS, P6) allowed for such to be done. There was no contractual provis ion spelling out any ability in the Bank to do that. Mr Appleby agrees that that is so. I le comes hack to rel yi ng upon the same reasoning as relied upon by the trial judge i.e. beca use one party "breached " the agreemen t viz. that the house being financed would be used only for his personal residential requi rements, the Bank could act unilaterally as wel l.

The Bank had other remedies. Indeed it could ultimate ly call up the loan. Jn a lesser and not asdrastic, way it could have renegotiated the tennsand conditions of the loan with the Appellant (including the category i.e. residential or commercial, which would affect the interest rate). It chose not to do so.

It is bound by the same provisions of the loan agreements (and mortgage) as it acknowledged and on which it relied (as earlier set out) to say that it did have the ability to vary the rate of interest. Those documents referred to "a l ike account" i.e to other customers with residential housing loan acc011nts. Those words were, and are, alsr binding upon itand unless and until the contractual a1Tangernen ts were properly \·aried the Bank was bound tocharge and deduct interest at the rateapplicable to residential Joaqs and not charge and deduct, as it did. interest as if one a commercial loan.

So recalculation and adjustment will be required, and must be made by the Bani That can, and should, be done in the manner in which previous recalcula lions ani:I

adjustments have been carried out.

This Court is not in a position to carry out such recalculations. It is appropriate that we allow the appeal in relation to this aspect only and remit the matter to the Supreme Court forevidence tobe heard, if necessary, as to the recalculations and adjustments. We would expect, however, that the Banlc will be able to recalculate and adjust the figures without the need to further trouble the trial judge.

A claim was madeon behalf of the Appellant that the Respondent should pay interest to the Applicant on all moneys recalculated and in effect recredited or yet to be recredited to the Appellant's loan repayments (i.e.on the $5976.33, the $1064.43, and the amount, as above, involved in the further reduction from 10% to 9.5%). With that we do not agree. At all times loan moneys were outstanding; fixed automatic deductions, as authorised by the Appellant (P6), were being made and put towards principal and interest (on the 12year mortgage); it just means that the Bank put a greater part of those set figure automatic payments towards interest, rather than to capital repayments, than it should have done; and that the Bank must make the proper adjustments, from interest wrongly taken, into the capital repayments. The Appellant has suffered no loss or damage.

The Appellant succeeds on this appeal to the extent set out. He is entitled to costs which we fix in the sum of $1,000.00 and disbursements.

Given the limited success of the Appellant overall, but also given themistakes made by the Respondent in calculating interest rates; the balance still needing to be recalculated and adjusted back ($ 1064.43) as at the trial in the Court below; and the present finding and the need for further adjusbnents we take the view that the award of costs against the Appellant in the Court below, should be set asideand that each party should bear their own costs in that Court.

Fifita v Minister of Police & Kingdom of Tonga

Supreme Court, Nuku'alofa
Lewis J
C.614 & 1049194

21 April & 13December 1995

Judicial review - principles - dismissmal
Employment - dismissed -judicial review

The plaintiff unsuccessfully sued over his alleged wrongful constractive dismissal as a prison officer. The matter is set out in full in the Court of Appeal report (where on appeal the plaintiff succeeded) which follows. This report is only as lomailers of principles of judicial review in such circumstances.

Held:

1. On judicial review it is not the decision as such which is liable to review, it is only the circumstances in which the decision was reached - theconcern is the decision - making process and not the decision.
2. Immediatedismissal mean simmediatesubject tothe constraints of thenatural justice principles.
3. In Tonga the Courts have power to review decisions of Cabinet because Cabinet decisions in Tonga are much wider and include many decisions which, in otherjurisdictions, would be made by Ministers and their staff. The fact decisions are made by a body of Ministers does not remove the protection of judicial review where the power is given by statute or regulations made under statute. Any exercise of a statutory power is reviewable.
4. A power which affects rights must be exercised judicially.

Cases considered — Chief Constable of Nth Wales v Evans [1982] 3 All ER 141; Kalala v Kingdom of Tonga C.117/93 Ward CJ 31/3/94; Pohiva v Kingdom of Tonga C.7/86; Ridge v Baldwin [1964) AC 40

Statutes considered — Prisons Act (& Rules)

Plaintiff in person
Counsel for defendants — Mrs Taumoepeau

Judgment

Judicial review issought by the Plaintiff (whoisunrepresented) of thecircumstances leading to the Plaintiff then an ,\ssistant Superintend ent of Prisons resigning from the service.

The Plaintiff alleges that he received a letter from the Minister of Police dated the 4th February 1991 requiring him to take one of two courses:-

resign of

- sufferdismissal.

The Plaintiff also alleges that the demand amounted to the Plaintifrs constructive dismissal from the service by the Minister of Police the First Defe11dant and by the Kingdom of Tonga, the Second Defendant. The Application for Judicial review is made pursuant to ex parte leave granted by t\lis court for judicial review on 8November 1994.

The difference between ap appeal from a judicial decision and judi cial review is explained in CHIEF CONSTABLE OF THE NORTH W/\LES POLICE *v.* EVANS [1982) 3 ALL ER 141 by Lord Brightman who said,

> "I ... turn to the proper purpose of the remedy of judicia l review, what it is and what it is not. In my opinion the law was correctly stated in the speech or lord Evershed in Ridge *v.* Baldwin [1964) AC 40 at %. His was a dissenting Judgment but the dissent was not concerned with this point. Lord Evershed referred to ... •A danger of usurpation of power on the part of thecourts under the pretext or having regard to the principles of natural jus tice. I do observe again that it is not the decision as such which is liable to review it is only the circumstances in which the decision was reached and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.• Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power or the court is observed, the court wil I in my view, under the guise of preventing the abuse of power, be itself guilty or usurping power."

The Plaintiff in this review carries the evidentiary burden as well as the persuasive burden or proof on the balance or probabilities. . . .

Provision is made in the Prison Act (Cap.36) and rules for the d1sc1phne and dismissal of prison officers including commissioned officers. Section 15 or the Act pro\ides for a court of inquiry for major offences by prison officers. "Major Offences' is not defined in the act.

Rule 71 of the Rules pursuant to the Prisons Act in particular sub-rule (28) renders any subordinate officer liable to prescribed puni shment by the Minister of Police

Ruic 87 provides:-

> "87 A II Officers must be of good moral principle and unblemished character; intoxication or disreputable conduct or any kind will render an officer liable to immediate dismissal."

The phrase "Immediate Dismissal", must 111 my opinion be viewed as me_aning immediate subject to the constraints of the natu ral justice principles. In the dec1s_10n or this court Kakala and others v The Kingdom of Tonga (1994) I 17/93, Ward CJ, delivered '.l l March-1994 and in particular at p.6, Dental Therapists sought leave and obtained judi cial review or the decision or cabinet concerning a review or their status and pay.

Ward CJ at 6said:-

> "I.raised the question of the courts power to review a decision of Cabinet but havingconsidered thematter further, I am satisfied my concern was misplaced. When Caibnet makes policy decisions in relation to the government of the country, the court would not have a right of review .... but in Tonga, the laws provide that the decisions of cabinet are much wider and include many decisions which, in otherjuri sdictions, would be made by Ministers and their Ministerial Staff. Tonga isunusual and possibly unique in the involvement of Cabinet in the general admini stration of the public service. Matters such as pay discipline, appointment and dismissal of even juni or public servants are cabinet decisions. Were they made by a Minister they would undoubtedly by ;ubject to review and the fact that they are made by a body of Ministers does not remove that protection where the power i s given by statute or regulations made under a statute. .b.ill'_ exercise of a statutory power is reviewable, although .as has already been stated, such review does not empower the court to reconsider the merits of the decision itself but orly the manner in which it was made by the decision making body except, of course, when the decision falls within the Wdnesbury definition of unreasonableness. This accords with the case of Pohiva v The Kingdom of Tonga (Case No.71'86), in which Martin CJ,considering a case of dismissal of a public servant by cabinet in exercise or a power/given under estacode, similarly concluded this was subject to judicia l review.• (my emphasis)

It is not contended by the Plaintiff that this is a case on "Wednesbury unreasonableness•. Hiscase isthat in the absence of a clear allegation and an opportunity to answer, the statutory powers invoked by the Minister of Police ought be reviewed and the requirement toresign imposed upon him declared tobea denial of principles ornatural jus tice. The Crown submitted during the hearing that the Plaintiff was in breach of rule 87at the mat eri al timeand was told why and how. The witness Uepi says that the Minister told the Plaintiff of the complaints against him in the presence of Uepi.

The Plaintiff has proved that he resigned. He resigned upon receipt and as a consequence of the lelier of the Minister dated 4 Febru ary 199L

The resignation of the Plaintiff is not contradicted by the Defendants. Rather do the Defendants rely upon "the fact of the Plaintiff's resignation as his voluntary act which would preclude him from judi cial review. Thal submission bears scrutiny.

The defence assertion that the resignat ion of the Plaintiff was a voluntary act precluding him from judicia l reivew is not in my opinion so simple a matter as the Defendants would have it. In fact on any readingof the letter of 4 February, the Plaintiff was presented with Hobson'schoice. The option presented as to the manner of his taking his leave would only make his leaving less uncomfortable. It would not alter the fact of his going.

The decision in RlDGii v BALDWIN [1964) AC 40 decided among other things that a power which affects rights must be exercised jud icially. Lord Hodson made the point at 130:-

> "The cases seem to me to show that persons acting ina capacity which is not on the faceor itjudi cial but rather executive or admini stration have been held by the courts to be subject to the principles or natural ju stice."

The Plaintiff however acknowledged and responded to the reprimand warnin g and

offer of options by specifically accepting the first, namely to accept the advice of hie Minister of.Police and refonn.

It is clear from the evidence that the Minister decided by 4 February 1991 that be would give effect to the Plaintifrs dismissal on the grounds charged again t the Plaintiff in July at a time when he had declined offer of a tribunal hearing for precisely the matte11 for which he had been warned in July.1990, the Minister says so much in exhibit "PY', the Jetter dated 4 February 1991.

I am unable to conclude that from the facts as have found them to be there has been a denial of natural justi ce or any basis advanced by the Plaintiff in this review requiring this court to interfere in the administrative process about which the Plaintiff has complained.

The Plaintifrs claims are dismissed.

Fifita v Minister of Police & Kingdom of Tonga (No.2)

Court of Appeal
Hampton CJ, Tompkins & Neaves JJ
App.4/96

24 & 28 May 1996

Employment - contructive dismissal - rules of naturaljusti ce
Judicial review - dismiss{ - rules of naturaljusti ce

The appellant applied to the Supreme Court for judicial review of his constructive dismissal as Assistant Superintendent of Prisons, which he argued was unfair wrongful and unlawful. His claims for reinstatement and damages were dismissed. On appeal.

Held:

1. It was unusual for the Minister of Police and Prisons to use a conference of police officers at which to take disciplinary action against an officer. There was no evidence the appellant was given any notice of the issues to be raised and the circumstances would 11f>t give the appellant a reasonable opportunity to respond.
2. The Minister's subsequent Jetter seeking the appellant's resignation was, in th circumstances, a constructive dismissal.
3. The fact that the Minister was not himself proposing lo dismiss the appellant, but rather was threatening to recommend his dismissal to Cabinet did not affect the application to the Minister's own administrative action of the rules of natural justice.
4. The appellant must be infonned, fairly and full y, and in a clear and unequi voca l way what grounds were advanced in support of the proposed dismissal and he must be given a fair opportunity to be heard in defence, explanation or mitigation by the Minister making therecommendation, before any conclusion is reached on action to be taken.
5. Significant parts of theaffidavits filed on behalf of the defendants (respondent here) were hearsay; significant reports referred to in the affidavits were not annexed so that the cou1t could not consider the nature and seriousness of the allegations and whether, and in what manner, particulars of them should have been given to the appellant.
6. There was noevidence Ital the complaints and allegations in the reports were made available to the appellant or that the appellant was infom1ed of the allegations before the ccnference or the subsequent letter. There was no evidence that he was given any opportunity to reply to them. tochallenge their accuracy, or to explain then.

7. This was a serious breach of the rules of natural ju stice enti tling the appellant lo rel ief. The appeal was allowed, the Supreme Court jud gment set aside and the action referred lJack to that Court to detenni ne damage;.

(8. NOTE ·A porl ion of the judgment i n the Supreme Court appealed from immr.diate precedes this judgment)

Cases considered Ridge v ,!?aldwin [1964] A C 40
O'Rei lly v Mackman [1983] 2 AC 237

6CJ

A ppellant in person
Counsel for respondents Mrs Taumoepeau

Judgment

Theappellant, w hoat the relevant time was an Assistant Superintendent of Prisons, regi sno.:d from the Prison Service on 6 February 1991, in circumstances that he contends amounted to constructi ve dismissal. He applied to the Supreme Court by way of an application for review, seeking a declaration that his resignation was a constructive dismissal was unfair, wrongful and unlawful. He sought an order for his reinstatement, and unspecified general, special and exemplary damages.

Lewis J, in ajudgment delivered on 13th December 1995, dismissed the appellant's application for review. This appeal is against that judgment.

Factual Background

In March 1978 theappellant commen ced employment with the Prisons Department. In 1980, the then Superintendent of Prisons, who was the father of the appellant, invited the appellant to take leave without pay to undertake further studies overseas. He did so. He graduated with a Bachelor of Arts degree in Human Services from the University of Hawaii.

He returned to the prison service. On 24 July 1989,he was promoted from Prisons Cadet Officer to Assistant Superintendent of Prisons. At that time he ranked third in the prison hierarchy.

On 12July 1990 at the A nnual Police Officers' Conference, the Minister of Police, in circumstances to which we later refer, gave the appellant the alternative of reforming, a tribunal hearing, or resignation. The appellant agreed to submit a written apology and to reform his behaviour. He did the former. W hether he did the latter became a matter of dispute.

On 4 February 1991 the appellant received a letter from the Minister of Police that, in his submission, amounted toconstructive dismissal. He resigned on 6February. In due course he obtained other employm ent. At the time of the hearin g in the Supreme Court h« was aged 36. He was then, and is now, a high school teacher by occupation.

The proceedings were commenced on 6July 1994. The appellant then, and at all times since, has acted on his own behalf. The respondent s filed an application to strike out the proceedings on the grounds of delay, and that the claim had no basis in law. There was a succession of hearings of both the application to strike out, and the application for review, the final hearing being on 1 December 1995. In the course of them, Lewis J extended the time for bringing the application for review until 6 July 1994. The application to strike out was dimissed. Although the respondents did not file their statement of defence until 30 November 1994, the day before the final hearing, an application by the appellant forjud gment by default that he had filed on 21January 1995 was also dismissed by Lewis J in his judgment delivered on 13December 1995.

The constructive dismissal

We now refer in more detail to the events that led to the appellant's resignation on 6 February 199L

We have referred to the Annual Police Officers' Conferen ce and the actions that the Ministertook at that confcrence in relation totheappellant. The appellant's aceountis that when hearrived at the conference, he was told by his immediate superior, Superintendent Uepi, that the Minister intended to insist upon the appellant taking one of three courses of action. The Minister did so. The minutes of the meeting record the following:

"MOP. 'Akau'ola Address **the** Conference

(1) Expressed dissatisfaction with ASP Fifita's behaviour to his superior officer (Superintendent Uepi) and allowed ASP Fifi ta tochoose between these alternatives.

1. Accept the MOP's advise + reform
2. Tribunal hearing
3. Resign

ASP Fifita accepted MOP's advise and will submit a written apology to Superintendent Uepi plus reform behaviour in the future which will be monitored by the Superintendent of Prison Uepi.•

We share Lewis J's view that it was, to put it mildly, unusual for a Minister to use a conference of Police Officers at which to take what appears to have been disciplinary action against an officer. There was no evidence to indicate that the appellant was given any formal notice of the issues to be raised. If the Minister's action was calculated to cause maximum embarrassment to the appellant, we have no doubt it was successful. Further, the circumstances in which the Minister expressed his dissatisfaction would not give the appellant a reasonable opportunity to respond to any criticisms expressed.

On 14 A ugust 1990 Superintendent Uepi reported to the Minister of Pol ice in these terms:

"INFORMATION REGARDING ASP FIFITA ST.

Dear Sir,

I write this letter with respect and to convey this information regarding ASP Fifita ST as according to the decision made on his through the mercy of your honour in regard ing the one in 3 options that ASP Fifita asked for during the Police and Prisons and Fire Senior Officers' Conference in July, 1990.

Your Honour decided in your serious advice that he write and state hisapology llJld surrenderthathewon't gothrough the pathofdisobedience and that he must keep to the rules of the department and that he be obedient and other things that you warned ASP Fifita on.

Afterthe conference wereturnedtoHu'atolitoli prison andcontinued with looking for the escaped prisoner FIONA IKETAU and I told him in my meeting that he go with some of the officers looking for the prisoners and AcUPrison Officer 'Aholelei to go with another class and in carrying out that duty, he went and carried out and he submitted to me his letter of apology shown above and I again told him that he must keep to his words that he prayed to the Minister and that he must obey the decision made by the Minister about him and Fifi ta keeps toitup to today 14/08/90 and I also told ASP Fifita that he must do according to the decision already received from the Minister of the Ministry and Fifita said that he understand and he will obey and keep to it.

I concluding my letter, I enclose the letter of A SP Fifita regarding all his short comings and that he won't repeat again. And that he has a civil case with a prisoner 'Ikani Latu, after that there will be nothing else concerning him and he will be completely free tocarry out his duty to the dept.

This is the nat1;1reof the dutycarried out by A SPFifita, it is building up and have departed from his ways in the post, and now he is paying more attention to his work.

I hope that 1 have mentioned something regarding ASP Fifita."

The tone of this letter suggests that a little over a month after of Police Officers' Conference, Superintendent Uepi was satisfied with the appellant' s conduct. The lelter that was enclosed is from the appellant to the Superintendent dated 16 July 1990. Itreads,

"RE: APOLOGY

Dear Sir,

I respecfully give my apology to you based on all the short comings in carrying out my duties to the government of Tupou but which is upon your shoulders.

All short comings won't happen again and I feel great love for you and the department. You will understand the repentent heart and true apology at the ti me of carrying duties.

I pray and hope for forgiveness from you as my boss."

The appellant says that he wrote that letter of apology, not because he considered an apology was called for, but only becau se of the alternatives in the Minister's direction al the Police Officers' Conference.

On 4 February 1991 the Minister of Police wrote to the pla intiff the lelter that resulted in his resignation. Itreads,

Dear Sir,

J, with respect want lo convey to you, that I have reviewed every part of your work as regarding the serious wanting I made to you on the 12 July, 1990 and there has been no progress.

Therefore, I will recommend your dismissal lo His Majesty's Cabinet, from the prison's department.

J am gi ving you now a last chance to write a letter of resignation today, if you want to, so that you w ill have the chance to seek work at other departments. If you won't accept this, I will then go on to submit my submission to Cabinet as I have mentioned."

The reference to recommending the dismissal to the Cabinetaccords with s.21 of the Prisons Act (Cap 36) which provides that the Cabinet, on the recommendation of the Minister of Police or a board of inquiry, may dismiss any prison officer.

This letter amounted to a constructive dismissal. That is apparent from its terms. This conclusion is not affected by the appellant adopting what was the only course open to him of resignation. Had he not done so, the Minister would have made the recommendation to Cabinet that he be dismissed. There is no reason to doubt that that recommendation would have been adopted. Significantly, the letter does not suggest that, if the Minister made the threatened recommendat ion, the appellant would be given an opportunity to defend himself before the Cabinet.

Was there a breach of tbe rules of natural justice?

Although the appellant in his affidavits and submissions referred to a number of issues, the essence of his case is that both on the first occasion at the Annual Police Officers' Conference on 12 July 1990 and, more importantly, in respect to the Minister's letter of 4 February 1991, the Minister failed to observe the rules of natural ju stice, in that the nature of the charges or complaints were not put clearly to him, and he was not given an adequate opportunity to defond himself against those charges or complaints.

The legal principles applicable are beyond doubt. The landmark decision in this area is that of the House of Lords in *Ridge v Baldwi11* [1964] AC 40. The Chief Constable of Brighton Watch Committee was dismissed without having been gilen any notice or offered any hearing. Despite a later hearing at which the Committee confirmed their decision, and an appeal to the Home Secretary, the House of Lords held that the dismissal was null and void. Lord Reid-at page 66 referred to:

> " ... an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation".

The importance of this principle was emphasised by Lord Diplck in *O'Reilly v Mackma11* [1983]2 AC 237 at 276, where he said the right of a man to be given

> •... a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended tliat a failure to observe it should render null and void any decision reached in breach of this requirement".

The principle is not affected by the fact that the Minister was not himself proposing to dismiss the appellant, but was rather threatening to recommend his dismissal to the Cabinet. A decision to make such a recommendation was itself an administrative action that affected the appellant's rights.

The first issue therefore is whether, in the circumstances of this case, the appellant was fairly and fully informed of what was alleged against him . It is not sufficient for the appellant to have some general understanding or the broad nature of the compl,aints. Before such an important decision of recommending dismissal can properly by made by the Minister, the appellant must be informed in a clear and unequi vocal wayjust what arc the grounds advanced in support of the proposed dismissal. Then he must be given a fair opportunity to be heard in defence, explanation, or miti gation by the person responsible for making the recommedation, in this case the Minister, before he comes to any conclusion on the action to be taken.

To apply this principle to the circumstances of this case, it is necessary to refer to the evidence in more detail.

There was filed on behalf or the respondents an affidavit by Superintendent Tapueluelu who, at the time the affidavit was sworn on 28 February 1995, was the Superintendent of Prisons. That affidavit was unsatisfactory. It should not have been accepted and acted upon by the court for two reasons.

First, significant parts of the affidavit are hearsay. It refers lo events that, it is clear from theaffidavit, are not within the personal knowledge of thedeponent. Itrecitesevents in 1989 and 1990 leading up to the Minister's reprimand of the appellant at the Annual Police Officers'Conferenceon 12July 1990, when the deponent was not the Superintendent. It refers to complaints made by certain persons to persons other than the deponent. For example, it contains allegations by the appellant's wife concerning the appellant's conduct. It refers tocomplaints by the prison's chaplain to Superintendent Uepi regarding the appellant's behaviour. If the respondents considered that evidence of this conduct should properly be placed before the court, that should have been done by deponents who had personal knowledge of that conduct.

Secondly, and more importantly, the affidavit refers to a number of reports On 23 May J 990 Superintendent Tapueluelu, then the Deputy Superintendent, submitted to the

then Superintendent Uepi, a report regarding the appellant's alleged affair with the wife or a prisoner. On 11 June 1990 he against submitted a report regarding the appellant's perfo1mance in taking sick leave without a certificate. No doubt it was these reports that contributed to the Minister taking the action he did on 12July 1990. Not only is there no evidence that copies or these reports were made available to the appellant lo make him aware of the cpmplaintsagainst him, they were not annexed to the affidavit to enable the court to consider the nature and seriousness or the allegations.

The affidavit slates that on 6 November 1990 the deponent submitted a full report to Superintendent Uepi_ concerning another warder's misbehaviour, but apparently containin,g an allegation that the appellant failed to do his duty and had deliberately covered up theoffence. Perhaps most notably of all, the affidavit states that on 18January 1991 Superintendent Uepi submitted a report to the Minister or Police that the appellant had continued to default in his duties and wished to recommend that the appellant "be released" - apparently a reference tohis dismissal. There is noaffidavit from the Minister. In the absence of evidence from the Minister to the contrary, it is a reasonable inference that it was this report that led the Minister to write the letter of 4 February 1991.

As with all the other repor:ts referred to, this report was not annexed to the affidavit. All these reports should havebeen before the court, not to enable the court tojudge the merits of the allegations and complaints, but to enable the court to be informed of the nature of the allegations and complaints as relevant to whether, and in what manner, particulars of them should have been given to the appellant.

Mrs. Taumoepeau was unable to produce these reports. At the hearing on 1 December 1995, the appellant's personal confidential ministry file was placed before the court. We have examined this file and invited Mrs.Taumoepeau todo so. These reports are not even on the appellant's personal file.

There was no evidence to indicate that the complaints and allegations contained in the reports were made available to the appellant either by providing him with copies of the reports or in any other way.

Superintendent Uepi was called to give evidence by the appellant at the hearing on l December 1995. He was cross-examined by Mrs. Taumoepeau. She asked him about the details or the allegations. The full transcript or his evidence is not available but the court has the notes or that evidence made by Lewis J. The following are some of the exchanges as recorded, but with abbreviations expanded to the full words.

> "Q. What was the attire, or what wearing at the conference?
> A. I can't remember his clothing but his hair was not cul, he appeared different.
> Q. Was he also warned at conference and in your presence as to his disobedience to head of department?
> A. (None recorded)
> Q. To your knowledge at conference was Firita clearly told that if he continued things ... warned about appearance, disobedience to superiors and things he was warned about?
> A. Al the time as Superintendent or Prisons my feelings werethat if someone like this do these things I would dismiss from work.

After a reference to the letter or 14August, 1990:

> Q. So to your knowledge of your letter you say you told him or the things he should stop doing?

A. Yes.
Q. What did he say?
A. He sai4 he understood.
Q. After that he did not refonn and continued doing things what was done?
A. I remember some things and I thought I'd bril\g tliem to Minister afterwards.
Q. Because he was not reforming an carrying out duties what did the Minister do to him?
A. He wrote a Jetter can't remember exact a words (gives his recall)"

The evidence then refers to the Jetter of 14 August and to divorce proceedings involving the appellant

There isnothing in this pass-ageorelseWherein Superintendent Uepi's evidencethat establishes that the appellant was infonned of the allegations and complaints against him before the events of 12 July 1990 or the decision of the Minister conveyed in the letter of 4 February 1991.

Even if the appellant did understand the nature of these complaints and allegations, there was no evidence that he was given any opportunity to reply to them, to challei;ige their accuracy, or to explain them. In the absence of any affidavit from the Minister, we infer that the Minister made the decision recorded in his letter of 4 February 19'Jl to recommend dismissal if the appellant did not resign, in reliance at least on the report of 18January 1991 from Superintendent Uepi, and probably in reliance on some or all of the other reports to which we have referred, without any reference to the appellant of the nature of the allegations and complaints in these reports, and without giving the appellant an opportunity to reply, challenge, or explain them.

This was a serious breach of the rules of natural justi ce entitling the appellant to relief.

The relief to be granted.

The appeal is allowed. The jud gment of the Supreme Court dismissing the
340 appellant's claim is set aside.

There will be a declaration that the plaintifrs resignation following the letter of 4 February 19'Jl was a constructive dismissal and that that constructive dismissal was contrary to the rules of natural justice and therefore null and void. It is set aside.

We are not prepared to accede to the appellant's request for an order requiring the respondents to reinstate the appellant to his previous position in the Prisons Service. We exercise our discretion against doing so for these reasons.

Over 5 years has gone by since the constructive dismissal. That delay renders reinstatement inappropriate. Although in certain cases, the court will order the reinstatement
350 of an employee unjustifiably dismissed, the general approach is that it is unsatisfactory to make orders in the nature of specific performance of a contract of service. Damages is the preferable remedy.

Further, the result of this decision is that the Minister's constructive dismissal has been set aside. This court makes no judgm ent on the merits of the allegations and complaints against the appellant. If the appellant were to be reinstated, there would be nothing to prevent the Ministerproceeding with the dismissal procedure, after giving full notice to the appellant of the allegations and complaints against him and giving him an opportunity tobe heard in his defence, possible by means of a court of inquiry constituted
360 unders.15of the Prisons Act. We donotconsider it to be in the interest of any of the parties

to have all these issues reopened so long after the events.

Itwill be for the appellant to determine what, if any, action he should take to seek compensation. The action is referred back to the Supreme Court. The appellant can take such further steps in the present action, or otherwise, as he thinks fit.

As the appellant appeared on his own behalf, there will be no order for costs..

Hakeai v Minister of Lands & ors

Court of Appeal
Burchell, Tompkins & Neaves JJ
App. 15/94

27 & 31 May 1996

umd - surre11der - gra11ts - cancellation - natural justice
Natural justice - land - applicable

This was a successful appeal against a decision of lhe Land Court upholding a grant to the fourth respondent, following a surrender by the third respondent. Initially the Minister had registered the appellant without notifying the fourth respondent, a competing claimant, and then cancelled lhe appellants grant and registered the fourth respondent without notifying lhe appellant.

Held:

1. ll is clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is natural justice.
2. Here both on the first grant (to appellant) and on lhe purported cancellation of lhal and the second grant (to fourth respondent) natural justice had not been observed.
3. The successive errors must lead lo an order setting aside the actions taken by lhe Minister and referring thematter back to him fordecision aflerconsideralion of lhe contentions of both sides.

Statutes considered Land Act, ss.54, 84

Counsel for appellant Mrs Tu'ilotolava
Counsel for first and second respondent Mrs Taumocpeau
Counsel for third & fourth respondents Mr Niu

Judgment

This appeal is concerned with lhe consequences of a surrender of two allotments a lown allotment and a lax allotment, with the consent of Cabinet, as on and from 6 February 1991, by one Viliami Hala Mosese, the Third Respondent. Such a surrender is a significant act in the law, for which provision is made by s.54 of The Land Act (Cap. 132). By s.54(1), it is lawful for the holder of a tax or town allotment, with the consent of the Cabinet, tosurrender the allotment or part of it. Ifhedoes so, "any allotment or any part thereof so surrendered shall, subject to lheprovision of [the] Act, immediately devolve upon the person who would be the heir of the holder if such holder had died·and it there be no person on whom the allotment or any part thereof can so devolv the allotment or any part thereof if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof.• (Emphasis added).

In the present case, the holderwho surrendered was unmarried and without children. Had he died al lhe dale of the surrender, his heir would have been his first cousin Hala Hakeai, the father of lhe appellant, but for a circumstance that would have raised a complete bar against thecousin inheriting. That was the factthat Hala Hakeai already held town and tax allotments. By s.84of the Act, it is provided that a son orgrandson otherwise entitled to inherit may make election between an allotment already possessed and an allotment of lhe same kind of his deceased father or grandfather, but:

> "Save and except a son or grandson of the deceased holder, no person who already holds a tax or town allotment shall be permitted to succeed as heir to another allotment of the same kind as the allotment he already holds or to choose between anallotment already held by him andone towhich hebecomes entitled as heir."

Consequently, it is quite clear that in this case the surrender of the allotments could not lead to 1-Iala Hakeai taking them. In the particular circumstances, it is conced, the result is thal the line of inheritance came toan end upon the surrender, and the allotments reverted to the Crown.

The land, having reverted to the Crown, was available lo be granted a fresh. That was lhe purpose of the surrender, for the holder wished to enable the Fourth Respondent Manuao to obtain a grant. But before any steps had been taken to that end, the appellant, or his father on his behalf, lodged an informal application, upon which a purported registration of a grant was made in favour of the appellant. However, there was no actual deed of grant. It was conceded that the informal application did not comply with the requirements for a valid application.

Upon the miscarriage of the intention of the surrender becoming known, and within some l days, the Minister of Lands cancelled the registration in favour of the appellant, and registered Manuao as the holder of the allotments. Neither when the appellant was registered was notice first given to the proposed applicant Manuao, nor when the cncellation was efected was notice first given to the Appellant. Nor was the Appellant given any opportumty to make a submission before Manuao in his tum became registered as the holder of the allotments.

ll is clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person'sapplication will generally be entitled toa fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice. Here, Manuao, although the officials of the Ministry

of Lands knew the surrender had been arranged to enable him to apply for a grant of the allotments, was not given any opportunity to argue that he should have priori ty before the purported grant was made to the appellant. That was legally wrong. If he had been given the right to comment, this whole matter might well have ended then. It is to enable both sides of a case to be considered that the principle of natural justice exists.

But the Minister, on learning what had happened, made the same mistake again. He should have given the Appellant an opportunity to answer the claim that his registration was wrong. Instead, the Minister simply cancelled it, and registered Manuao. That, too, was wrong. Whenever the Minister has competing claims for the same land, he should be careful to ensure that both sides get a hearing - not, of course, as in a court, but an opportunity to put each point view before a decision is made.

In the present case, the successive error of the Ministry of Lands must lead to an order setting aside the actions taken by the Minister, and referring the matter back to him to enable the appropriate decision to be made after a consideration of the contentions of both sides. Itshould be made clearthat this order does not imply that one side or the other should receive a grant, but only that the failure of the Minister to allow natural ju stice lo either party vitiated his decisions. They must be considered again.

Accordingly, the appeal is allowed, the orders of the Land Court are set aside, the registration in favour of the Appellant (which was not validly cancelled) and the registration in favour of the Fourth Respondent are each set aside, and the applications of the appellant and the Fourth Respondent are referred back to the Minister to be dealt with according to law. The Minister of Lands is ordered to pay the costs of the Appellant and of the Third and Fourth Respondents of the appeal, but in view of s. 152of the Act, there is to be no order as to the costs of the hearing in the Land Court.

Touliki Trading & anor v Fakafanua & Kingdom of Tonga (No.2)

Court of Appeal
Burchett, Tompkins & Neaves JJ
App.3/95

20, 21, 22, 23, & 31 May 1996

Constitution ·property rights .interpretation -jurisdiction
Administrative law ·judicial review ·basis of
Statutory i11terpretatio11 ·Co11stitutio11 - principles

This was the appeal by the unsuccessful plaintiffs, exporters of squash pumpkin, against the judgment of the Suprei:ne Court (reported in 1995 Tonga L.R.) dismissing their constitutional and administrative law challenges to the governments imposition of a quota system, the fixing of a total quota figure and the allocation of quota.

Held:

1. The claim that the appellants had signed agreements as to quota only under duress (i.e. that they would not get licences unless quota limits were agreed) did not amount to economic duress within the authorities.
2. The claim that natural juustice was denied the appellants in relation lo the amount of Ilic total quota for 1994 was rejected on the facts.
3. The appellants claimed that an amendment act in 1993 to the Licences Act (allowing the maximum quantity of any produce or commodity which may be exported) and an Order in Council of 1994, made pursuant to it (limiting the amount of squash to be exported in 1994) were invalid under the Consti tution.
4. Jurisdiction of the Court, founded in Cl.90 off the Constitution to examine legislation was clear - if on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or othenvise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, nohvithstanding that the question may involve internal proceedings of the Assembly. A statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the House was not attended by any irregularity.
5. Reliance having been placed on various Clauses of the Constitution (Clauses 14, 14, 17) by the appellants, they should be examined in the light of an understanding of their place in the Constitution, it being read broadly with an eye toitscontinuingeffectiveness both asthe people's guarantee of fundamental rights and as a practical instrument of government.
6. Cl.I contains a profound philosophical concept linking the inhabitants of the ·

Kingdom with the whole of human kind as inalienably free and equal. This isthe fundamental basis of all that follows but isalsoaconstitutional guarantee against both slavery and serfdom, and the arbitrary or despotic exercise .of power. The second sentence of Cl.I is not an independent guarantee with respect to property rights - cls. 14 & 18 provide that - but a stateent of a corollary of the.9pening affirmation of human liberty and equality. The Constitution does not place first the possessions of Tongans but their liberties.

7. The Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State, but, before doing so, gives concrete application tothebasic openingstatement, in a series of clause which are concerned with the implications of the constitutional entrenchment of human liberty. Only indirectly are any of them concerned with questions relating to property.

8. Cl.14 in context, isnot a provision about the resumption of citizens' property orabout planning orother regulatory measures or restrictions affecting the use of property but is a guarantee against arbitrary criminal proceduresleading to capital punishment, a fine or confiscation of property, or imprisonment. The clause is not directed against legislative action.

9. The first clause directly concerned with questions of property is cl.18, providing for taxation according to law and for resumptions of land upon payment of the fair value.

10. Cl.l in saying that "all men may use their lives and persons and llme".lo do certain things and "lo use their own property as they will" does not provide an independent guarantee designed lo forbid legislation restrictin g the use of private property. That would mean any kind of legislation regulat111g the use of property, whether for an economic, environmental, social, aesethel1c, health or any other reason, would collide with the Constitution. Such a meaning over looks the grammar and syntax, and the history, and would be unworkable.

11. The appellants' argument for that meaning accepted that there must be some unexpressed limitation i.e. that all legislation affecting private property was prima facie constitutional so that, if it was challenged, the gove11nent had lo prove aju stification for it to the satisfaction of the court, was rejected. There was nothing in the language or the historical context to suggest thedraftsman had anything of the sort in mind and the suggested limitation should not be imposed by an ipcedixit of the court. No such limitation is necessary because cl.I (is a guarantee of personal freedom, including freedom to use freely the property a person does own, which he necessarily owns by law.

12. Cl.I says nothing to restrict theability of the State toenact laws regul.I111gthe use by a citizen of his property in the interests of society or of other citizens. Where property was intended to have some measure of immunity cls.18 & 48 show the draftsman knew how to counter it.

13. Cl.4, it wasargued, forbade a law affecting a particular groupin the community and exporters of squash are such a group. But growers or exporters are not a "class" and the laws about export of squash apply equall y to every person who wishes to grow orexport squash. Socl.4was of noassislance tothe appella1'.ts.

14. Accordingl y the constitutional attack on the amending Act and the Order-in-Council failed.

15. :A.s to the adminstrative law challenges and the claims of denial of natural justi ce, the taking into account of irrelevant considerations, and of bias, the judge below was entitled to dismiss them quite tersely, as he did. There was no failure shown.

16. Uusually for an administrative law case the facts were very fully explored in evidence, because administrative law does not provide an appeal on the merits but a review of the procedure followed, including the Jawfulnesof the taking mto account ormatlers considered.

17. The law requiring the principles of natural ju stice to be observed is a law of primary importance. If a matter is to be taken into account against someone in the making of a decision there must be an opportunity to make answer. And there will be no real opportunity unless the matter on which the answer is required is made known to him who must answer. There was no such breach by the Minister demonstrated where. These challenges failed.

Cases considered

News Ltd v Aust. RF.L. (1996) 58PCR 447; 135ALR 33
Dimskal Shipping v Int. Transport Workers Fed. [1992] AC 152
Fuko v Vaikona (1990] Tonga LR 148
Min. of Lands v Pangia (Scott J, 1952)
Fotofili v Siale (3/8/97, Privy Council) [1996] Tonga LR 227
Allied Structural Steel v Spannaus (1978) 438 US 234
Home Bldg & Loan Assn v Blaisdell (1934) 290 US398
U.S. Trust Co. v. State of New Jersey (1977) 431 US l
James v Clwealth of Australia [1936] AC 578
Cole v Whitfield (1988) 165 CLR 360
Nationwide News v Wills (1992) 177 CLR l
Australian Capital T.V. v C/weallh (1992) 177 CLR 106
Equal Oppbrtunities Cmmsn v Sec. Slate for Employment [1994] I All ER 910
Hudson Waler Co. v Mccarter (1908) 209 US 349
Ram v Min. for Immigration (1995) 130 ALR 314
Poananga v Stale Services Cmmsn [1985] 2 NZLR 385
Min. of Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Statutes considered

Licences Act (s.5 and Order-in-CounCi l, J994)
Constitution

Counsel for appellants — Mr Harrison QC anq Mr Macdonald
Counsel for first respondent — Mr C Edwards
Counsel for second respondent — Mrs Taumoepeau

Judgment

The export of squash pumpkin to Japan is of great economic importance to Tonga. As a consequence of governmental concern to ensure the continuing success of this trade, after a few years of attempts at voluntary regulation, the Tongan legislature passed an Act amending the Licences Act specifically for the purpose of authorizing an Order-in-council to regulate it by the imposition of a quota-system. In respect of the 1994 season for exports to Japan, the system was introduced. The appellants, who are exporters involved in the trade, brought an action in the Supreme Court challenging the constitutional validity of the amending Act and of the Order-in-Council, and also challenging, on administrative law grounds, the fixing of the total quota figure by the Privy Council and the allocation of quota as made by the responsible Minister, the First Respondent. Their action having failed in the Supreme Court, they have appealed to this Court.

A difficulty should be noted at the outset. Since the 1994 season has long passed, the success of one or more of the administrative law arguments could not lead to an increase in the quota for the appellants for the year in question. Even had the matter been decided before the season ended, there would have been no assurance that a reconsideration of the quota would have assisted the appellants. The same decision might have been reached on unassailable grounds. Indeed, it is difficult to envisage success of the administrative law challenge to the allocation of the appellants' quota alone as ever having had a prospect of achieving a useful result for the appellants. Provided the Order-in-Council validly fixed the total quantity of squash allowed to be exported for the season, the allocation of the appellants' quota could not be varied in their favour without a reduction of the quota fixed for other exporters. That is because the whole quantity available for allocation was allocated. In this situation, a Court could hardly have ordered a reconsideration of the appellants' quota in an action in which the other exporters had not been joined. On the other hand, the issue of the validity of the Act and Order-in-Council can lead, in proceedings to which the Kingdom is a party, to a declaration of invalidity in the event of the appellants' success.

The background should be stated in a little more detail. The squash market available to Tonga in Japan has been called a "niche market". It is limited to a season of a few months from October to December, as Japanese consumers obtain their squash during the larger part of each year from domestic production or imports from other countries, such as Mexico or New Zealand. In 1991, concerns that the volume of exports into this niche market required to be limited, and that the export of large quantities of squash, including poor quality squash, endangered Tonga's export trade, led to the sending to Japan of what was called the "Government's Squash Investigating Team", which reported in January, 1992. It concluded that a large increase in the volume of squash exported in 1991 'had a major effect on the wholesale price' in Japan, causing Japanese importers 'a loss of at least T$2.7 million'. The industry had grown enormously in a few years, and it was 'important to maintain cordial business and working commercial relationship with Japanese importers'. Trust was 'paramount'. The report specifically referred to a need to limit the volume of squash exported, on grounds both of 'the absorptive capacity of the Japanese market' and of the need to 'ensure high quality and high prices for the season'. There was reference to 'the export licensing system" as 'probably the only system' available within the existing legislative framework, and there was a formal recommendation that 'Tonga must control the export tonnage'.

Following his very comprehensive report to the Government, the squash exporters of Tmg, including the appellants, all signed a letter referring to an undertaking given to the Minister of Labour, Commerce and Industries (the First Respondent) on 3rd March 1992 setting 'agreed allocations' for each of them for the 1992 season, on the basis that total exports would be limited to 10,000 metric tonnes. The letter stated that 'consensus' had been reached, though with difficulty, and that 'each and every one of us made concessions in the national interest, and to reciprocate the trust that you (i.e. the Minister] have placed on [sic] us".

In the squash exporting companies (which were seven in number) again met with the Minister, and a document entitled a 'Memorandum of Agreement', dated 27 April 1993, was signed on behalf of each. It set out what it called agreed conditions 'previously endorsed in meetings of the Squash Exporters and Officials of the Ministry ... in March and April, 1993". The first was that 'the total tonnage of squash to be exported to Japan in 1993 shall be 13,000 MT' (i.e. metric tonnes).

The second was:

> 'That the allocated tonnage stated hereunder shall be the export quota for each of the Seven Companies and that each Company shall not exceed it's export quota unless approved by the Hon. Minister for Labour, Commerce and Industries."

A table of allocations immediately followed this clause, totalling 13,000 metric tonnes, of which the appellants' shares were 1250 MT and 2250 MT respectively. Then the next clause, clause III, contained two sub-clauses:

> '1. That any export of squash in excess of 13,000 MT shall not exceed 10% of the 13,000 MT and only with the approval of 'the Hon. Minister for Labour Commerce and Industries. [emphases added].
>
> 2. That as determined by the market environment and shipping arrangements a review will be held on the 2nd week of September 1993, and that any changes be subject to the approval of Hon. Minister for Labour, Commerce and Industries."

There was also a cl.X, directly forbidding 'poaching' of growers registered with one exporting company by another.

In each of 1992 and 1993, licences where issued by the Minister, following these agreements, to each of the exporting companies, pursuant to the provisions of the Licences Act. Notwithstanding the documents, the appellants argued that the expressions of agreement they had signed in 1992 and 1993 were signed only under duress. The duress alleged was that no licence would be issued unless quota limits were agreed. It is difficult to see how this could amount to economic duress within the authorities, which were recently reviewed in the Australian case News Limited v. Australian Rugby Football League Limited (1996) 58 FCR 447; 135 ALR 33. See also Dimskal Shipping Co. SA International Transport Workers Federation [1992] 2 AC 152. But in any event, there is evidence a letter, dated 13 February 1992, on the letterhead of the second appellant, signed by the Minister for Labour, Commerce and Industries, which was received by both appellants, Dr. Sevele, which expressly endorses the recommendations of the Government's Squash Investigating Team, and expressly stated that the volume of squash exports for 1992 season must be restricted to 10000 MT to 12000 MT for the niche market".

When agreement was reached on 10,000 metric tonnes, with provision for allowance

of a tolerance of 10%, i.e. another 1,000 tons, for 1992, it seems very unlikely that any duress (even of the most attenuated kind) was involveo.

Notwithstanding the agreements, the appellants expo1ted substantially above their quota in both 1992 and 1993. Other companies also exceeded quota, but not to the extent that the appellants did in 1992, and to nothing like the extent that the first appellant did in 1993, or that the two appellants did in 1993, if they are taken together, as their own application to exceed their quota, made on 2 November 1993, sought that they be. The evidence is that the importance of a quota system was repeatedly stressed to the Minister on a visit to Japan in 1992, and that in 1993 he stressed at a meeting with the appellants and others that he "took a serious view of their conduct• (i.e. in breaching quota). Also in 1993, legislation was introduced into Parliament to enable quota to be imposed by law. The appellants contested the point, but there seems no reason to doubt that the major purpose of the legislation was to implement the report of the investigatin g team already referred to and to impose more effective control over exporters who did not honour agreements setting quota. The Licences (Amendment) Act 1993 was passed on 2 November 1993, and the royal assent was given on 3 January 1994. By this Act, a new subs. (4) was added to s.5 of the Licences Act, as follows:

> "(4) (a) The Privy Council may by Order-in-Council from time to time fix the maximum quantity of any produce or commOdity that may be exported in such period as the Council shall deem fit.
>
> (b) If a maximum quantity is fixed under paragraph (a) of this subsection the Minister of Labour Commerce and Industries shall exercise discretion in alloting such quantity to licencees.•

An Order-in-Council, as contemplated by this provision, was made by the Privy Council on 8 April 1994, limiting the 'maximum quantity of squash to be exported to Japan under the Licences Act for the last quarter (October- December) in 1994 [to] 17,000 metric tonnes'. In due course, as required, the Order-in-Council was laid before the Legislative Assembly, and the Government Gazette of 1 November 1994 records that it was "passed by the Legislative Assembly of Tonga on 15 June, 1994.'

While the Act was awaiting assent, and before the Order-in-Council was made, a further report was issued assessing the impact of the 1993 squash export season and assessing the prospects for 1994. It is dated 8 December 1993. Although a report to the Tonga Development Bank, it was publicly available, and must obviously have been of great interest to squash exporters. Under the heading "Executive Summary", the report makes nine points. The first is:

> "The Japanese Importers were very disappointed with Tonga for not adhering to the quota set earlier in the year. This results in a loss of confidence in dealing with Tonga.
>
> However, the passing of the new law with regards to power to control export volume has opened up a door for further involvement under the existing arrangments.
>
> The proposed volume for 1994 is 13,000 MT".

(It will be observed the Bank had no doubt about the role of the new Act.). The ninth point returned to the major issue, asserting that Tonga "must ... instigate an effective quota system". The body of the report contained much material supporting the primacy given to the issue of quota. It stated that he "excessive import in 1993 has very serious implications•, referring to disruption of the markets in Japan, the creation of "mistrust in the Japanese importers and wholesalers", and the danger of the importers "losing all confidence in dealing with Tonga". It slates: "The Importers are expected to lose a lot of money this year.• That, of course, would be on top of losses in 1992 of several millions of dollars. But the report suggests that the new Act, which it says "should be used effectively to control the export quota for 1994", has prospects of improving market expectation in Japan.

It was in this situation, with the Bank report indicating it was proposed that total exports would be fixed under the amended Act at as low a ceiling as the 13000 metric tonnes fixed for, but exceeded in, the previous year, that the Ministry held meeting with the representatives of the exporters, growers, and applicants for new licences. The minutes of a meeting attended by representati ves of the appellants on 12 January 1994 show that they initially supported a total of 20,000 metric tonnes, but that after discussioIJ a representative of the second appellant proposed basing quota for 1994 on the actual shipments for 1993, a proposal which would have led to the imposition of a total of 17,643 metric tonnes, or almost exactly what was ultimately fixed. The minutes reveal no disagreement at that stage by the representative of the other appellant.

In the light of the Bank report, and of the practica lities of preparing for the growing season, the matter required to be dealt with without undue delay. Growers had to know the quantities to plant, and fertilisers and seed had to be imported. Senior counsel for the appellants himself said that preparation of the land had to begin in February to March for planting to be done by the middle of July. There was every reason to make the decision on quota early in the year. Following the exporters' meeting in January, it must have been apparent to everyone that, unless afler securing passage of the new Act, the government was not going to implement it at all, quota would be fixed at between 13,000 mt. {as the Bank proposed) and about 17,000 (or at most 20,000) as had been discussed with the exporters' representatives. The opportunity to make any further representations was obviously open, but time was limited. Once an Order-in-Council was made, it would be placed before the Legislative Assembly for confirmation, and there would be a final opportunity to raise objections. In this situation, the appellants chose, not to put any argument forward in respect of the total quota to be fixed if the Privy Council went ahead under the new Act, but to seek to persuade it not to impose any quota at all. By a letter of 17 March 1994, addressed to the Minister, they asked 'that the quota system be eliminated". Although the letter must have been meant to be placed before the Privy Council, when it came to consider the fixing of the total quota, since the Minister's power under the Act would only be enlivened upon the making of an Order-in-Council, they did not refer to the issue discussed in January.

The Minister placed the letter of 17 March 1994 before the Privy Collilcil as an attachment to a careful Minute in which the issues are discussed. The discussion again confirms that the whole purpose of the legislation was seen as related to the exigencies of the market for the export of squash to Japan. The minute recommends the fixing of quota at 17,000 metric tonnes. It refers to the lower figure supported by the Bank, but not to the discussion at the meeting in January. There is no clear evidence to show that that discussion was mentioned, or on the other hand that it was not mentioned, in the course of the deliberations of the Privy Council.

One of the issues raised in the appeal is whether natural justice was denied to the

appellants in relation to the issue of the amow1t of the total quota. Considering the circumstances outlined above, there is no ground for this complaint. The Minister recommended , and his recommendation was accepted, almost the very figure which had ultimately been pressed at the meeting in January. The later letter chose to concentrate on a more fundamental question. The appellants were not entitled Ni require the Privy Council to divide up its consideration of the matter to suit their submissions. A decision was required. After the Bank report was made, the issues were quite apparent, and the appellants chose their stand. In any case, the letter of 17 March 1994 was not the appellants' very last word on the matter. A further letter signed by Dr. Seveleandone Siale on their behalf, dated 22 March 1994, suggested, with reference to "total quota for 1994",that "a planned total tonnage of 17,000 is a reasonable and realistic figure to work on".

But the appellants' principal grounds of appeal attack the quota decision at a deeper level. They contend that both the Act and the Order-in-Council are invalid under the Constitution of Tonga.

Subject fo special provisions concerning the Land Court, cl.90 of the Constitution confersjurisdiction on the Supreme Court 'in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom'. Clause 91 confers, subject to any Act, a right of appeal to the Court of Appeal. Itis accordingly not in doubt that an Act of thelegislature (oran Order-in-Council) may be declared invalid by the Supreme Court, or by this Court on appeal, if it be found to infringe the Constitution: Fuko v Vaikona [1990] Tonga L.R 148 at 150- 151, citing Minister of Lands v Pangia (Scott J., unreported, 1932); Fotofili v Siale (Privy Council, unreported, 3 August 1987). In the last case, the Privy Council stated the law:

> "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the House was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If; on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of thewill of the legislature, or otheiwise of the validity of a supposed law, it follows that the question whether theevent or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.
>
> Again, a statutory provision can be examined and struck down if it iscontrary to an express provision of the Constitution although its passage through the house was not attended by any irregularity.'

In the present appeal, the appellants place reliance on the following clauses of the Constitution:

> '1. Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free forever. And all men may use their lives and persons and time toacquire and possess property and to dispose of their labour and thefruit of their hands and touse their own property as they wili.
>
> 4. There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.
>
> 14. No one shall be intimidated into giving evidence against himself nor shall the lifeor property orliberty of anyone be taken away except according tolaw.
>
> 17.The King shall govern on behalf of all his people and not so as to enrich or benefit anyoneman orany onefamily orany oneclass but without partiality for the good of all the people of his Kingdom.'

It is therefore necessary to examine these provisions, doing so in the light of an understanding of their place in the document, read, as a Constitution should be, broadly, with an eye to its continuing effectiveness both as the people's guarante of fundamental rights and as a practical instrument of government.

The Constitution of Tonga opens (in the first sentence of cl.l) with a profound philosophical concept linking the inhabitants of the Kingdom with the whole of human kind as inalienably free and equal. This concept may be seen, notonly as thefundamental basis of all that follows, but also as a constitutional guarantee against both slavery or serfdom and the arbitrary or despotic exercise of power. So far as slavery is concerned, cl.2 goes on to provide a more SpP.cific guarantee. But cl. litself contains a second sentence referring to the right of all to 'us·their lives and persons and time to acquire and possess property and to dispose of their la'x>ur and the fruit of their hands and to use their own property as they will.• Historically, as emerges clearly from S. Latukefu on The Tongan Constitution at pp 20-34, this sentence seems to have been added in order to put it beyond question that customary rights of chiefs over the property and labour of other Tongans, rights analogous to those of the lords over their serfs in feudal Europe, were forever abolished. Itis significant, as an indication of the role of the second sentence in cl.l, that it is introduced by the word "And'. It is not an independent guarantee with respect to property rights - cls.14 and 18provide that - but a statement of a corollary of the opening affirmation of human liberty and equality.

Tosee cl.lof the Constitution as concerned with establishing the foundation of the Tongan State in such an affirmation is not to see it as less, but as more, important. The Constitution itself does not place first the possessions of Tongans, but their liberties. In subsequent clauses, the Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State. But before doing so, it gives concrete application, in a series of clauses, tothe basic statement with which it opens.

Clause 2 directly forbids the institution of slavery, and makes a proclamation of freedom for all who live under the flag of Tonga. In theoriginal form of the Constitution of 1875, an additional clause, cl.3 (since repealed), took the same theme one step further by making provision todeal with the then prevalent practice of indentured orforced labour procured from other Pacific islands.

Clause4reflects the equality implicit in cl.1(weare all "of one blood') by requiring that the general law of Tonga apply equally to all, while cl.5 establishes freedom of religious worship and practices, subject to the law and peace of the land. Succeeding clauses protect freedom of opinion and speech, freedom to hold peaceable political meetings, freedom from arbitrary arrest (secured by the constitutionally guaranteed

availability of Habeas Corupu), freedom from arbitrary punishment and freedom from double jeopardy. Each of these early clauses of the Constitution is primarily concerned with the implications of the constitutional entrenchment of human liberty. On! ·indirectly is any of them concerned with questions relating to property.

Itis in this context, after no less than five clauses securingthe µiotection oi1ongans against abuses of the State's power to institute criminal proceedings, that cl.14 is found in the Constitution. There follow cl.15, concerned with the fairness of trials, and cl.16, ensuring that search warrants shall only be issued "according to law'. In this context, it is plain that cl.14 is not a provision about the resumption of citizens' property, or about planning restrictions or any other regulatory measurers affecting the use of property. It is a constitutional guarantee against arbitrary criminal procedures lea.ding to capital punishment, a fine or confiscation of property, or imprisonment. But the clause is not directed against legislative action, for its prohibition is 'except according to law".

In cl.17, the Constitution turns to the topic of Government, while continuing lobe concerned also with the liberties of Tongans. Clause 17 requires the King to govern impartially and for the good of all. The firsl provision of the Constitution di1ectly concerned with questions of property then follows, cl.18. It provides for taxation 'according to law", and for resumptions of land upon payment of 'lhe fair va lue•.

After this brief survey of the first eighteen clauses of the Constituti on, it is appropriate to goback to examine further the second part of cl. I. What it guarantees, in terms, is that 'all men may use their lives and persons and time" to do certain things. The infinitives, of course, literall y express the purposes for which life, person aud time may be used. But the appellants, overlooking the grammar and syntax (and the history. which shows that the original form of theclause, differently expressed, was toprecisely lhe same effect), treat the last of these purposes, 'to use their own prope1ty as they will", as an independent guarantee, designed to forbid legislation restricting the use of pii vate property. So understood, the prohibition is sweeping, for lhe entitlement it protects is 'to use lheirown property as they will". A ny kind of legislation regulatingthe useof property, whether for an economic, environmental, social, aesthetic, health or any other reason, would collide with the Constitution . Plainly, that would be unworkable, so theargument accepted there must be some unexpressed limitation. What was contended was that all legislation affecting private property was only prima facie unconstitutional, so that. if it was challenged, the government had to prove aju stification for it 10 the satisfaction of the court. Logically, the same must apply to each of the other purposes expressed in cl.1 of the Constitution ; the result would be to submit all legislation affecting the acquisition of any proprietary right, and all labour laws. lo the same ordeal by li ti gation.

Since it is admitted that the concluding words of cl.I cannot be applied l i terally, and must be subjected to some limitation, a reasonabl y question is why that limitation should not be the one arising out of the textua l and hi storical selling. The meaning so suggested has already been indicated. The limitation proposed by the appellants had no such connection with the language of the clause. Itwould be imposed by the court on the ana logy of cases in other jurisdi ctions concerned with other problems. In particular, reliance was placed on United Stale "contracts clause" cases. But these have been regarded asconnictingand unsatisfactory, even in the cou11lry of thei r birth .The contracts clause, on the face of il, presents none of the problems of construction, aiising out of lhe structure of the language, lo which altention has been directed in the case of cl. I of lhe

Constitution of Tonga. As was said in Allied Structural Steel Company v Spannaus (1978) 438 US 234 at 240, the "language of the Contract Clause appears unambigu ously absolute: 'No Stale shall ... pass any ... Law impairing the Obligation of Contracts'.• Yet the Su preme Court of the United States has felt compelled to reject a literal view of the words: Home Building & Loan Association v Blaisdell (1934) 290 U.S. 398 al 428. In United States Trust Company of New York v Stale of New Jersey (1977) 431 U.S. 1at 22, the Court held: The States must possess broad po\Ver lo adopt general regulatory measures without being concerned that private contracts will be impaired, .or even destroyed, as a result.' Th Court also .held (at 23): •As is customary in reviewing ecoilomic and social regulation ...courts properly defer to legislativejudgment as to the necessity •and reasonableness of a particular measure." Its decision, nevertheless, to invalidate a State's legislation affecting its own existing contractual obligations, was reached by a bare majorit y, provoking a strong dissent from Brennan, While and Marshall JJ, who thought it new in the face of a century of authority, and said (at 33) that "by creating a constituti onal safe haven for property rights embodied in a contract, the decision substantially distorts modem constitutional jurispru clence governing regulation of private eeonomic interests"

Then reference was made-to Australia's notoriously difficult and inconsistent cas law on s.92of its Constitution (see James v Commonwealth of Australia (1936) A.C. 578; [1936) 2 All E.R. 1449 at 1473, where Lord Wright referred to "free speech' as meaning "freedom governed by law', but accepted a different view of the freedom guaranteed by s.92; Cole v Whitfield (1988)165 CLR 360, where the High Court over-ruled the whole complex series of previous decisions), and to the recent i:ases (Nationwide News Pty Limited v Wills (1992) 177 CLR 1; Australian Capital Television Pty Limited v. The Commonwealth (1992) 177 CLR 106) dealing.with implied guarantees. A decision on the reach of European anti-discrimination law was also cited illgyfil_ Opportunities Commission v. Secretary of State for Employment (1994) 1 All ER 190). None of these concerns the interpretation of a provision al all comparable with cl.I of the Constitution of Tonga. There being nothing in the language or the historical context to suggest the draftsman had anything of the sort in mind, the suggested limitation should not be imposed by an ipse dixil of the court. No such limitation is necessary because cl.1 is a guara nteeof personal freedom, including freedom to use freely the properly a person does own, which he necessarily owns by law and not otherwise, andtherefore subject to the provisions of the law. Cf. the famous dictum of Holmes J. in Hudson Water Co. .Y.:. Mccarter (1908)209 U.S. 349 at 357, ullered with respect to the contracts clause of the United States Constitution: 'One whose rights, such as they are, are subject lo stale restriction, cannot remove them from the power of the Stale by making a contract about them. " Clause 1says nothing to restrict the ability of the Tongan State to enact laws, of the kind enacted in every civilized country, regulating the use by a citizen of his_property i n the interests of society or of other citizens. Where property was intended to have some measure of immunity, cls. 18and 48 show that the draftsman k,new how to confer it.

It was suggested, during the argument, thal cl. I of the Constitution could be regarded as concluding with a wide guarantee against any legislation affecting either labour or private property, but subject lo a limitation, to be implied from cl.17, in favour of legislation 'for the good of all the people of [the] Kingdom". The Court would have lo decide whether legislation (for example, in pursuance of a policy to promote tourism

on economic grounds or alternatively, to restrict it on environmental grounds) would be "for the good of all the people". Questions of onus; parties, representation of interests, and proof may be left to one side. There are great difficulties with this proposition. Clause 17 is removed from the context of s.l; it makes no reference to a guarantee of freedom in respect of the use of property; and it is 11ot a provision abou legislation, but about the xercise of executive power. Throughout the Constitution, a careful distinction is pi;eserved between executive, legislati9e and judi cii!l fuctions. As cl.31 declares, "the form of Government for this l{jngdom is a Constitutional Government". Under Ihat form of government, as in, for instance, the Commonwealth of.Australia, the Crown exercises executive power through ppointed Ministers and, in Tonga, a Privy Council. In accordance with cl.34, the l{jng, on succeeding to the throne, swore an oath "to govern in conformity with the laws [of Tonga]". By cl.41, his Majesty •governs the country but his miisters are responsible". Clauses 54 and 55, dealing with the appointment by the l{jng with the consent of Cabinet of Governors of Ha'apai and Vava'u, also show a keen appreciation of the distinction between governing and legislating. Itisimpossible to find in the Constitution, which takes in all essentials the same form today as itdid in 1875, any suggestion that cl.17 is concerned with other than executive powers.

Itremains, of the clauses on which theappellants rely, to consider the terms of cl.4. This is a provision relating to legislation. The appellants argue that it forbids a law affecting a particular group in the community, and exporters of squash (generally, or to Japan) are groups entitled to the constitutional protection. But it would not be a normal use of language todescribe growers as a "class•, orexporters asa "class":Ram v.Minister for Immigration and Ethnic Affairs (1995) 130 ALR 314.

The law about the export of squash, in the present matter, applies equally to every pei:son who wishes to grow or export squash. The law is "the same"; only the activities to which it attaches are different. Itfollows that cl.4 is of no assistance lothe appellants.

Accordingly, the constitutional grounds argued by the appellants fail. Neither section 5of theamended Act, northe Order-in-Council made pursuant toit, is inconsistent with the Constitution within the meaning of cl.82 of the Constitution or otherwise.

It remains to consider the administrative law grounds argued in respect of the allocation of individual quota toeachof theappellants. They claim that they were denied natural justice, that irrelevant considerations were taken into account, and that the Minister was biased against them. Plainly, the credit of the Minister, who gave evidence, is very important. He is entitled to have full weight given to the fact that the trial judge, who saw and heard him cross-ecamined, accepted him as honest and truthful.

An important issue was whether the Minister took as irrelevant consideration into account by giving weight to what he perceived to be the appellant's breaches of the agreements fixing quotas in 1992 and 1993. Having regard to both thereports which have been cited (that tothe Government and that totheTonga Development Bank), the Minister would have been entitledt'o regard any breaches of this kind seriously. As has been said, he gave a warning about the matter in 1993. That was when he found out about what had happened in 1992. Of course, the giving of such a warning put the appellants on notice that breaches of the agreements in respect of quota were mailers that would(or, at least, might) be taken into account, and should be dealt with in any submissions they might make. Indeed, the matter was raised in formal correspondence with their solicitors in early 1993.

Unusually, for an administrative law case, the facts were very fully explored in evidence. That is unusual, because administrative law in common law countries does not provide an appeal on the merits, but a review of the lawfulness of the procedure followed, including the lawfulness of the taking into account of matters considered. But since the appellants did choose todeal with the facts exhaustively in evidence, and were permitted to do so, the Court is in a position both to decide whether any legal error occurred in relation to them, and also whether, if they had been fully examined according to law, the decision might reasonably have been affected. SeePoananga v State Services Commission (1985] 2 NZLR 385at 410; cf Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24 at 39 -42.

The evidence shows, as has been said, that the appellants, both in 1992 and 1993, exceeded their agreed quota. Although on 20 January 1992 Dr. Sevele, as Chairman of the second appellant, had written to the Minister about "the mistaken belier that the Japanese market could absorb as much as we could produce" and that "we must ... limit the tonnage to be grown and exported to 10,000mt", on 11August 1993 hewrote on behalf of both appellants a letter addressed to"All Our Japanese Buyers" which stated: 'Our two companies ave never had any problem willi marketing excess tonages over so-called quotas overthe past three years- to the satisfaction of both you buyers andourselves". The same letter referred to the appellants' combined quota of 3500 mt, commenting: "But according to our solicitor, this restriction is not legally binding". It also stated: "So the 6000 mt hasalways remained as our export target", and "if we examine our performance of the past three years ...wehave alwaysexported tonnageswell in excess of ourso-called licenced [sic]quotas". Figures were actually set out toshow an excess of 757mt in 1992, or more than 25% above quota. Further letters in September 1993 confirmed the appellants'intention to ignore the agreed quota and the high -sounding professionson the basis of which they had obtained export li<tence.

It could not be disputed that the appellants' conduct was dishonourable. Having claimed lo have "made concessions in the national interest" in the 1992 agreement, and pledged themselves in the 1993agreement to•a sincere endeavour on our part toenhance this important industry by working together [with the other exporters] and in joint cooperation with the Ministry", they had blatantiy stolen a march on their competitors by deliberately and dishonestly setting out to exceed greatly their agreed share of the quota. They had also, according tothe views of twoofficial reports, seriously endangered a major national economic interest. Itisimpossible toju stifythe contention that thesecircumstances which were amply proved - indeed largely by admissions - were not properly tobe taken intoaccount when allocations of quota came tobe made pursuant totheOrder-in-Council.

But the appellants, seizingon a statement by the Minister that the quota agreements had been breached, claimed he took an irrelevant consideration into account. They asserted this on the basis that they had avoided actual breach of the 1993 agreement by obtaining increased quota under the second clause of that agreement. Having regard to the 10% limit on !!!1Y increase stated in cl.III, this is at best dubious. But the point is not worthy of extended examination. The letter to Japanese buyers of 11August 1993 makes it clear th re was breach by repudiation long before the enlargement of quota was sought. Of course, the Minister was left with no alternative when a jo int application from the appellants was received by him in early November 1993. The appellants told him they had "confirmed Orders in Japan for an additional 2,550 thousand metric Ions of squash".

If he had not e;ir;pressed consent, both Japanese buyers (whose goodwill had already been gravely damaged) and Tongan growers would have been at risk of suffering heavy losses.

In any case, the appellants received quota allocations which indicate that excessive account could not have been taken of their grave conduct. In evidence were the minutes of a meeting of Mini stry officials with squash exporters held on 31 March 1994. The meeting was told of the Privy Council's decision to fix total quota at 17,000 mt. The minutes indicate that the Mi nistry had already worked out fi gures allocating allbut 1,000 mt, which the Minister proposed to confirm. Thedetails were read out. At thi s meeting. at which both theappellantswere represented, the minutes donot suggest any dispute was raised about thesedetails. What the meeting then discussed, and failed to resolve, was the allocation of the remaining 1,000 mt. The minutes note: "The Ministry was asked by the exporters to decide the 1,000 Mf ." The conclusion i s inescapable that the dispute was limited, at the time, to the relatively small quantity of 1,000 mt which could possibly have been allocated between the appellants and the other exporters.

Once it is appreciated how seriously theappellantshad contravened theagreed basis on which they had received their export licences for two years (in the second year, after a fonnal warning), and in respect of how small a quantity they failed to receive what they regarded as an acceptable allocation, it becomes apparent that they must have been very unlikely, on any evaluation of the circumstances, to have received any higher allocation. The Minister, who was believed said he did not "punish" them. but he did take the circumstances into account. If this decision reflected those circumstances to any degree, and it could properly have done so significantly, the result that did eventuate would have followed. The Minister said in evidence that "in comparison with all the other exporters [the appellants' excess over their agreed quota] was very outrageous", and 'to me it was the degreeof the excess which weighed in my mind". At the same time, he made it clear that the most important consideration, in his opinion. favouring the allocations he made was the price received for their squash by the growers from the exporters who obtained those allocations.

But in the argument upon lhe appeal, counsel for the appellants urged that the Minister's deliberations concerning this matter involved a contravention of the rules of natural justi ce. Counsel appeared to be suggesting that his clients were denied an opportunity, by reason of lack of notice, to defend themselves against the accusation of breach of quota agreements. However, in an affidavit 242 paragraphs long, Dr. Sevele nowhere makes such an allegation. On the contrary, the whole thrust of his complaints is to assert there was open conflict about whether quota agreements had to be adhered to, and he openly boasts of his success in evading them. Far from asserting he was not warned of the Minister's attitude tothe appellants' "excess tonnage•. he complain s that a Ministry official raised it with him in 1993 as a subject upon which the Minister "has it in" from him. In the circumstan ces, the trial judge was entitled to dismiss this aspect of the appellants' case quite tersely, as he did. 'Since the plaintiff s carry the burden of proving matters•, he said, "which would show a failure on the part of the Minister to act reasonably and in accordance with the principles of natural ju stice, ... [and] since that has not been shown in any respect, the plaintiffs must fail".

One additional matter, on the issueof naturaljustice , was argued. Itwassuggested the appellants should have been notified, so as to give them an opportunity to rebut i of a complaint of "poaching" of growefl! alleged against them. But again, Dr. Sevele does

nt allege that he was not made aware of this issue, and counsel for the appellants u 1ot;_he onus lay, was unable lo point to any evidence that his clients were not in

In ordertoavoid any risk of misunderstanding it should be em h . requiting t11e principles of natural ju stice to be observed is a law of p as1zed.that the law I a matter.is to be.taken into account against someone in the mak:in :aZ n ;e. kind here 111 quehon, there must be an opportunity to make answer. And there will no real opportumty unl ess 11le matter on which answer is required is made known to hi l ti! t the circumstances proved here donot demonstrate a breach of th

M. . Then it as repeated on appeal, as ii had been asserted to the trial judge that the t 1 1stew as bi ased, acted out of malice or self-interest, or might reasonably be pposed .o ave one so. Each of these allegations was rejected, as a matter of fact b the trial JUdge w o saw.and heard the witnesses. He held of the Minister: "I acce• I · . h nesl w1tn ss 111 every respect•. No reason whatever emerged in the argun!ent t:e 01 q_m1. 1fy this or to conclude, i the face of such a finding, that lhe Minister's deni :J the oenous charges levelled aga111st him should not be given full weight N d th s of suggest any reasonable basis for an apprehension of bias. . or o e acts

All the grounds of appeal having failed, the appeal should be dismissed with costs.

Attorney General v Moala & Akau'ola

Supreme Court, Nuku'alofa
Hampton CJ
C.162/%

21June 1996

Co11tempt of court - caution - u11limited power
Practice a11d procedure - adjoumme11t - dismissal - 011us of proof
Co11tempt of court - evidence - proof

The defendants were prosecuted for committal for contempt of court arising rrom a newspaper article published in a newpaper or which thefirst respondent was allegedly the publisher and editor and the second respondent the deputy editor. One defendant (the second) was served, the first was not. The second respondent appeared at trial, but the prosecution sought to adjourn the trial against him.

Held:

1. The powers of a court to commit for contempt being unlimited, an m ee somewhat arbitrary, should always be exercised with the greatest orcautl n.
2. The proscution against the second respondent was based n the allegatkon that at all material times he had been responsible for the article conceme .
3. The matters had been set for trial for some 3 months. The second respondent had filed, 2 months before trial, an am.davit saying that he had no know e ge of the article and was on vacation leave overseas.
4. Theprosecution attended trial anticipaling the matters against both re pondents proceed ing. The first respondent not having been served, an adjoument against both was sought. The prosecution did not have evideetocal aga1sl the second respondent and in particular to meet the assertion of his being overseas. His name did not appear on the mast head or the particular edition or the newspaper, whereas his name appeared on other editions, and that indicated some substantation or his claim.
5. The Crown had had some 2 months at least to prepare its case yet it came to court anticipating the matter proceeding. An adjournment r te case was rerused and the proceedings against the second resndent d1sm1ssed.
6. The Crown was granted leave to serve the first respondent out or the j\lrisdiction.

[NOTE - The judgment against the first respondent 1mmed1ately follows].

Counsel for prosecution — Mrs Taumoepeau
Counsel for second respondent — Mrs Taufaeteau

Judgment

The powers of a Court to commit for contempt, being unlimited, and indeed somewhat arbitrary, should always be exercised with the greatest or caution.

It is with that in the back or my mind that I approach this particular matter.

The proceedings originated from a publication in the newspaper "Taimi 'oTonga•. the edition Vol.7 number *50* published 27 December, 1995.

It is an editorial article on page 4 orthat edition orthe newspaper which has brought the Attorney General's contempt proceedings against Filokalafi Akau'ola as Deputy Editor and against Kalafi Moala as the Editor and Publisher or the newspaper.

I will not go into the details or the editorial article itselr, because it is irrelevant to thejudgment which I am giving in relation to Mr. 'Akau'ola.

These proceedings started with a motion by the Attorney General seeking the commital forcontemptorKalafi Moala in relation to this newspaper editorial which I have referred to.

Those proceedings were commenced on the 20th Febrnary this year. On receipt or that motion I directed that there should be an arfidavit or affidavits filed setting out the evidential basis for the application, including exhibited copies or the newspaper and a verified English translation.

An affidavit was filed confirming the newspaper and the translation which had been supplied but going on to refer in paragraph 2 or the affidavit or Joanna Weigall to defamation proceedings which are, and were, completely irrelevant to the editioria l published which has been complained about, and to these present proceedings.

Itmay be that the Crown has to look at that affidavit and what is said in it because, it seems to me, that ir s claimed this complained about editorial interfered with thecourse or justice in particular legal proceedings then it is those particular legal proceedings which the affidavit should refer to, not some quite unrelated or irrelevant defamation' proceedings. The particular proceedings which are claimed to have been effected are criminal, or private prosecution, proceedings in the Magistrates Court, presently Oi:i, appeal to this Court. That is something of a side wind but none the less I feel constrained to mention it in relation to the state or this file.

On the 18March 1996, I granted leave to the Attorney General toissue a summons to Kalafi Moala directing him to appear in this Court *oil* Friday 29 March to show cause why he should not be commitled for contempt of court; and I directed that the·Aitorney General should serve Kalafi Moala with the summons, my order or 18th of March, the notice or motion and the artidavit.

Later today I will come back to that aspect of service in relation to Kalafi Moala because it seems that the proceedin gs against him have not been properly served on him and the summons against him will have to be further enlarged to enable service to take place.

On the 29 March application was made on behalr or the Attorney General, (that application being supported by an affidavit to which I will come shortly) tojoin or to add as a respondent Filokalafi 'Akau'ola, the Deputy Editor or the newspaper. Mr 'Akau'ola, in person and with counsel, waspresent on the 29 March when an order was madeadding him as a respondent to the contempt proceedings.

That order was made on the basis oran affidavit on behatr or the A ttomey General, sworn by the Acting Solicitor General, that, inter alia, stated and I quote "printed in every

issueof the Taimi 'o Tonga is the fact that Filokalafi 'Akau'ola is the Deputy Editorof the Taimi 'o Tonga" and further "at all material times Deputy Editor of U1e Taimi 'o Tonga, Filokalafi 'Akau'ola, had been responsible for the said editorial of.the Taimi 'o 1_'o a 'Vol.7 No.50', during the absence overseas of the Editor and Publ•slter of Uie Tamu o Togna, Kalafi Moala".

On the29of March 19%, not only did I make an orderjotmng Filokalafi Akau?la as a respondent to the contempt proceedings but I also set the mtter d?wn for heanng against both men (the question of service on Kalafi Moala not havmg bemg raised at that time) the trial to take place today Friday 21June 1996.

The matter hasbeenset down fortrial, then, forsome three months or so. In response to a direction made by me that any affidavits, to be filed in reply by the respondents.(if such affidavits were to be made - and there is no complusion in that regard, these being criminal proceedings, to which the usual criminal onuses and standards aply) but as 1say in response to that direction the respondent Filokalafi 'Akau'ola on 16Apul 1996, swore, and filed in this Court, an affidavit in these proceedings.

In it he took issue with the wrongful mention of the defamation proceedings in the affidavit of Ms Weigall yet no step seems to have been taken by the Crown to rectify that position (and that isthe matter that I havealready referred to) but he also, firstly and more importantl y, said this: He "fully denied" the allegations saying:- "That I have no knowledge to the publicat ion of this article appearing on Taimi 'oTonga Vol 7 No.50, 27/ 12 because **1** was on vacation leave overseas".

He went on to point out the difficulty about the defamation proceedings and1 other than that.he asked for an order that the action be struck out against him, with costs.

As I say tliat affidavit was filed on 16April 1996, over 2 months ago. The affida11 according to the certificate of service on my file, was served on Crown Law on 17 Apnl. Certainl y the Acting Solicitor General today in front of me does not argue that the Crown did not know of the affidavit.

Today, I cameinto court anticipating that the contempt proceedings would be heard against both respondents. I anticipated the respondents presence today l? answer the allegations. So, likewise, as Mrs. Taumoepeau frankly conceded .t me, did the Crown anticipate their presence. That being so in effect the Crown ant1c1pated (as I dtd) the matter, the application for committal for contempt, proceedi ng today.

As it has turned out Kalafi Moala is not present and, as I have said, there ha ve been problems in relation to service, which I will deal with subsequently.

Filokalafi 'Akau'ola however was present and he, both i n person and through his counsel. acknowledged service on him of the summons and of the earlier.documentation and indeed he acknowledged service of those documents in his affidavit. which I ha11e al ready referred to.

When I raised with Mrs. Taumoepeau the matter of proceed ing aga111st Mr. 'Akau'ola today, he having appeared to answer, she indicated tha .she. sou.gill an adjournment of the proceedings against him. She rather based her pos1t1on 111 thi s way: that because of the defects in the service on Mr. Moala 11d l!et:ause of the both respondents in relation to these proceedings and their positions in rel ation to the.same article, therefore the proceedings against Mr. 'Akau'ola should be held over until Mr. Moala is properly served and before this court.

She frankly conceded that she did not have evidence available lo hi>r tcd:iy to call

in rela tion to the case against Mr. 'Akau'ola and, In particula r, in relation to his denial on oath that he 'had no knowledge of the publication of this article, because he was "on vacation leave overseas".

, Mrs .Taumoepeau indicated that the prosecution against Mr. 'Akau'ola was brought ·On t11e baStS that he was the Deputy Editorand that he is norm ally shown on the mast-head of the newspaper as being the Deputy Editor.

Interestingly enough on the mast-head of the particular edition of the newspaper **in** · question that is of 27 Dec mber 1995 Mr. 'Akau'ola's name does not appear. Mrs. Tamoep au sumitted that previous and subsequent editions of the newspaper showed him as bemg the Deputy Editor. If that in fact is so, and given the absence of his name Oil the eoition i n question. that in my view indicates some substantiation of what Mr. 'A ka11'ola himself has said on oath in his affidavit namely that he was away at the time of this particular publication on 27 of December last year.

Mrs. Taumoepeau indicated lome that she rud not have available to herany evidence on this.point ; tha t is she could not call evidence to indicate to his court involvement by Mr. 'A kau'ola in this parti cular edition, letalone that he had some responsibility in relation to the actual editorial under question.

The Crown have had so1i1e 2 months. at least, to prepare its case; it came along lo cou1t loday anticipa ting the matter proceeding. How, it was going to do that against Mr. 'A kd u'ola in the face of his denial of involvement of any sort I cannot comprehend at this stage.

That being the posi tion I am not prepared tograntan adjoumnient of thiscase against t1r "A ka11'ola . It has been set down now for 3 months, and for at least 2 months of which the "'1uwn ha> c kuown of his denia l of involvement and of responsibili ty. Given that and give11 lie CLIIICt ssi<im 111..dc to 111e today and, as I say, given the caution with which .:u111l-1 11Jt 111uct:tdi11g, should he approached generally (as I remarked at the start of this Jl!dg111< 111). I have 1eo.rhuJ thee.lea, v iew that theseproceedingsagainst Mr. 'A kau'ola (and I e111plidsi:; t l1al i i" is only i;i 1cla tiun to him) should be dismissed. That I now do. The applic:11iun, in >•1f..u·.···· i11 rela tes Mr. 'Akau'ola for committal for contempt of court in 1elatio11 lv ll1e a1l ie.le i11 the Taimi 'o Toi1ga of 27 December 1995 is dismissed.

I a m aim of tl1f ½iew, i11 tile circumstances, that he is entitled to costs and failing ag1..:e111t11t as tv lu;is then costs will be as fixed on taxation by this court.

ThJI C01lljJ l t:lts i11ejw.lg111ent so far as i t relates to Mr.'Aka.u'ola. Mrs.Taumoepeau, i n r latio11 tu Kalafi Moala, accepts that personal service has not been effected on him, of the summons and a ll uf the other doctm1ents such as the notice of motion and affidavits, lhc ha11slatio11 of lhe nticle in queslio11. I am told, by Mrs. Taufaeteau, that Mr, Moala is µ"senlly i11 tti" Z.t:aland, an<l is resident there. Mrs.Taumoepeau has applied forleave le. sen•e the 111\x:eeJings 011 him, out of the juri sdiction. In the circumstances I am prepared lo 1nake s11...l1 an u1Jer.

.Attorney General v Moala (No.2)

Supreme Court, Nuku'alofa
Hampton CJ
Cl62/96

9 & 10 October 1996

Contempt of court - freedom of speech - sca11dalisi11g courts - i11tejeri11g with justice - tests to be applied
Co11stitution - freedom of speech - co11tempt - bala11ci11g
Sente11cing - contempt of court

This was the trial of the other respondent, mentioned in the report, immediately above, on a charge of contempt of court, by publication of an article in a newpaper claiming tha inter alia, justi ce was not able to be obtained in the courts in Tonga.

Held:

1. The respondent was the admitted author, editor and publisher of the article in question.
2. The defence raised was the freedom to express an opinion, according to cl.7 of the Constitution, on a matter of public interest i.e. the conviction and sentencing of a controversial, high profile, politician on an assault chargeeven although the matter was still alive before the courts', as under appeal to the Supreme Court (although the respondent claimed not to be aware of that appeal).
3. The complaints against the article were of scandalising the courts of Tonga (i.e. bringing the courts into'general disrepute, an attack on the courts as an institution thereby affecting the public confidence in the administration of ju stice); and secondly of tending to interfere with the course of justice in the particular proceedings.
4. That latter fonn of contempt is governed by the (U.K.) Contempt of Court Act 1981 and particularly by the strict liability rule (whereby conduct may be treated as contempt of court as tending to interfere with the course of ju stice in particular proceedings regardless of intent to do so - but only if the publication creates a substantial risk that the course of ju stice in the particular proceedings will be seriously impeded or prejudiced).
5. Courts andjudges are alike open to criticism and the law ought not to be astute to criticise adversely if reasonable argument or expostulation is offered against anyjudicial act as contrary to law or the public good. Justice is not a cloistered virtue - she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary people. It is the inalienable right of everyone to comment fairly upon matters of public importance. That right is one of the pillars of individual liberty - freedom of speech.
6. The rightsof freedom of speech and as enshrined in cl.7are not absoluterights. Anyoneexercising those rights must observe a duty toact responsibl). Tofind the balance between the right of freedom of speech, and protection of the courts, is the hardest task in this sort of case.
7. At the end of this century there is a greater accommodation or tol erance in the courts of criticism, trenchant criticism and stronger language than was fonnerly the case.
8. Criticism of individual decision should be temperate, made in good faith, and in the honest belief that the criticism is accurate and well-founded.
9. Applying the various criteria the article here, although some of the language was some what extravagant and some of the cri ticisms very robust indeed, did not overstep the bounds.
10. Bearing in mind that the case was on appeal to a judge (and not to be tried by a jury) the test of substantial risk that the course of ju sti\;e in the proceedings in question would be seriously impeded orprejudiced, had not been shown to have been made out.
11. As toscandalising the courts the headline and the first 2 sentences of thearticle mo_unted, from 1 magistrate's decision, an extraordinary attack on all courts, and overstepped and had the effect of undem1ining, and shaking people's confidence in, thedecisionsof courts. Thearticle and it's author and publisher were in contempt and the respondent found guilty.
12. The court had a whole range of sentencing power. Passi on here had overcame objectivity. Regret had been expressed. The respondent was censured (reprimanded) and ordered to p,ay costs.

Cases considered
In re Read & Huggonson (1742) 2 Atk. 291
B v Gray [1900] QB 36
Ambard v Att. Gen. (Trinidad and Tobago) [1936] 1 A II ER 704
B v Commsr. of Police, exp. Blackbum [1968] 2 QB 151

Statutes considered
Constitution, Cl7
Civil Law Act s.3
Contempt of Court Act 1981 (UK)

Counsel for Crown — Mrs Taumoepeau
Counsel for respondent — Mr:; TdUfaeteau

Judgment

I intend giving a jud gment immediately because, first, I do not want the matter further delayed; secondly, I am aware that the respondent is in a difficult situat ion in relation to other matters and will want to know his position insofar as these proceedings are concerned; thirdly, some little time has now passed since the publication of the Editorial or the Article which is in question in these proceedings.

To do it in this way may mean that my reasons may not be as fully or as happily expressed as might be the case i f I were able to take further time and release a jud gment in writing subsequent

If I do not deal, or seem not to deal, with a particular submission of either counsel or an authority raised in argument by either counsel, it is no disrespect to the argument or to the authority.

I am grateful to both counsel for the material that they have put in front of me, particularly the authorities. And it has assisted me greatly in reaching a view and in being able to express an immediate view on the matter.

·These proceedings were started by a motion by the Attorney General himself, alleging that in an Editorial A rticle published in the Taimi 'o Tonga' volume 7, number 50 of Wednesday 27 December, 1995, the respondent before me, Kalafi Moala as the publisher and the Editor of that particular newspaper, 'Taimi 'O Tonga', was in contempt of Court.

The Attorney's motion was support by an affidavit from a Senior Crown Counsel. That affidavit referred to somefactual matters, to the newspaper article itself, (which was in theTongan language)and toan Englishlanguagetranslation of that article. Subsequent affidavits were filed. One by Mrs Taufateau of counsel, acting on behalf of Mr. Moala, and a later, further, affidavit by the same Senior Crown Counsel.

Neither of those deponents, i.e. Mrs Taufateau or Miss Weigall, Senior Crown Counsel, were required for cross-examination on their affidavits when the matter came to trial before me. When it did come for trial, the respondent, Mr Moala, pleaded not guilty, and the matter has proceeded before me as a defended trial.

I will deal with some preliminary matters first before turning to the actual article complained of. Those preliminary matters really involve my clearing the deck of certain aspects which are not in issue in this matter.

It is clear, as was alleged, and as admitted in the affidavit of Mrs Taufateau and further admitted by the respondent today in evidence, that at all material times, the respondent wasnot only the Editor and publisherof thisparticular newspaper, but thathe was indeed the author of the article in question.

The motion, as filed by the Attorney General, setout thearticle in full, and followed that in paragraph three of the motion, with an English translation of that article. It is not my intention to read either the article in original fonn or in the translated form into this jud gment, but I will from time to time refer to some extracts from the article as I proceed with this judgment.

Both the article and the translation were properly in evidence before me and, on the evidence, I accept that the English translation provided tome in the motion (supported by affidavit) is ableto beaccepted and relied onby me. I find that translation is infact in very large measure, if not entirely, supported by what was set out in Mrs Taufateau's affidavit of 16 Apri_I, 1996 in paragraph 5. Mrs "I:aufateau at the start of that affiavit had said that

she was duly authorised by the editor and the publisher, Mr Moala to act and to say the following things. Then I tum to paragraph 5 and it was set out in this way:

> "That the Editor veri ly believe the newspaper is free tu make comment on decision and to express it's opinion about it according to clause 7 of the Constitution; "freedom of the press• and he believed that theeditorial was fair comment according to his own translation of the editorial of Vol.7 number 50, 27 December, 1995, as of an ordinary person" (and then went on lo set out a translation which, as I have said, is very much the same, in all important respects, as the translation from the prosecution).

In evidence today, Mr Moala backed away somewhat from that translation in pragraph 5 of the affidavitand from the translation of the prosecution and it seems tome that he tried to water down, as it were, certain passage in the translation. In particular, that process was attempt to be applied to the headline, the first and second sentences and to some extent the last sentence of the article. For reasons that will becomeapparent as I go on with this judgment, a deal of thejud gment will focus on those particular portions of Ihis article. Mr Moala tried to make the language less absolute, less strong, but I am not persuaded that what I have been provided with by the prosecution and what he, himself, p1ovided through his lawyer is not indeed reliable. And I am reinforced, somewhat, in that view by the fact that a witness calkd on his behalf, in the courseof his evidence, provided a translation that seems to me to be very much in line with the translation earlier given by the prosecution and in paragraph 5of Mrs Taufateau's affidavit.

Those are the preliminary matters I want to deal with.

It is worth stating now some of the background which led to Hie writing of this erlitorial article and I do not intend to state the background at an • leni;th. In Parliament, in Tong", apparently in October 1995, there was an unfortunate incident that took place involving;. ,rel!known, andindeed controversial , memberof Parliament, 'Akilisi Pohiva, and the then Aeling or Deputy Speaker of the House. That incident involved, amongst .lher things the hrowing of a book by Mr Pohiva which resulted in tlie House taking "· ;:..r 11d suspending for 14 days Mr Pohiva. Subsequently the Acting Speaker, the ,Jerson at v•ltom the book was thrown, took pdvate prosecutiou proceedings in the ·fag:;ttate' Court against Mr Pohiva for assault. That charge was heard iu the tgisllale's Court on 12 D,reni\Jer 1995. It would seem that a claim or argument raised ' y Mr Pohiva of doublejeopard r was rejP.cfed by the Court. Mr Pohiva was sentenced 'o one months imprisonment of the charge, that sentence to be suspended for a period of three years.

Itwas those events, both in the House and then in the Magistra te's Court, which led lo i'.1r Moala, for reasons which he eplained i11 his evidence, writing and publishing the Jitorial con1plained of. Put sh011ly, he says that he thought that the decision in the Aagistra te's Court could, and should, legitimately be criticised and in particular thr Jentencing decision which, he saw as "peculiar" or "odd" or "funny" (in the serise of µeculiar or odd). He felt, as he put it in evidence, that given the high profile, the controversial profile, of Mr Pohiva, and the imminence of Parliamentary elections, that he should himself in some way try tocreate a balance in the public mind; that the public should not be jus t left with a view that "here was Mr Pohiva in trouble with the law again,"but that the public through his editorial column should be told what the real situati_on was as Mr Moala perceived it I paraphraseof course whahesaid, but that was,

as I understood it, the effect of his evidence.

The article or editorial was published on 27 December 1995. By that time Mr Pohiva had in fact appealed from the Magistrate's Court to the Supreme Court against the findings in the Magistrate's Court. Therefore it is quite clear that the criminal proceedings, the private prosecution proceedings, were still alive and active, still before the Court, as at the time of the publication of this editorial.

Mr Moala says that he was not aware that an appeal had been filed. I have no reason to doubt his evidence on that point but it assumes no significance in the light of the subsequent parts of this decision..

The editorial in question is complained of, in effect, in two respects. The first is that it scandalises the Courts of Tonga. Scandalises Courts generally, scandalising being a term going back some 250 or more years now; certainly used by the then Lord Chancellor, Lord Hardwicke in In Re Read and Huggonson (1742) 2 Atk. 291 at 469. Scandalising is a term that means bringing Courts generally into disrespect. An attack on Courts as an institution.

"It is important that Courts retain the respect of the community in which they operate and that that respect must not be undermined. The system of justice at large must not be undermined. So scandalising the Court is a contempt because it affects the public confidence in the administration of justice and thereby impairs the administration of justice. The claim by the prosecution here is that the headline of the editorial itself, the first two sentences of the editorial (i.e. the first paragraph containing the first two sentences) and the last sentence of the editorial fall within this category of contempt.

The second aspect complained of is that the balance of the article, or indeed the article as a whole, tends to interfere with the course of justice in particular proceedings. The prosecution, on behalf of the Attorney General, refers not only to the appeal proceedings from the private prosecution I have just referred to, but also to certain defamation proceedings in this Court which has been brought by Mr Pohiva and his wife against another newspaper, 'The Chronicle', and the Kingdom of Tonga and which were said to be due to go to trial in front of judge and jury in March of 1996.

It seems to me that this allegation of contempt is the type of contempt which is now governed in the United Kingdom by the Contempt of Court Act 1981 and by what is said to be the Strict Liability Rule which is contained within that Act. (See our Civil Law Act (Cap.25) section 3).

That Strict Liability Rule which, as I have read the authorities, is really in accord with the common law in any event, is contained in section 1 of the Contempt of Court Act 1981. That says that the Strict Liability Ruie means the rule of law whereby conduct may be treated as a contempt of Court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

That Act goes on to provide in section 2 subsection 2 (and again it is a reflection of the common Jaw), that the Strict Liability Rule applies only to a publication which creates a substantial risk, and I emphasise the word substantial, that the course of justice in the proceedings in question will be seriously, and again I underline the word seriously, impeded or prejudiced.

Before I go on to deal with each of those two aspects complained of, I do want to refer to some of the authorities which touch on both aspects complained of. As has been said the classical statement aoout this area of the law of contempt is to be found in the

judgment of a full bench of the Queen's Bench Division in England, in the case of R v Gray, the judgment having been given by Lord Russell C.J. The report is at [1900] Q B 36 and this particular passage at page 40;

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, Lord Chancellor, characterised as "scandalising a Court or a judge." That description of that class of contempt is to be taken subject to one and an important , qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

The second judgment to which I wish to refer is from Lord Aikin in the Privy Council in Ambard v the Attorney General of Trinidad and Tobago [1936] 1 All ER 704 at 709:

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is cummilled by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

The third case is that of R v Commissioner of Police of the Metropolis. Exparte Blackburn [1968] 2QB 151 at 155. This is in the Court of Appeal in England, Lord Justice Salmon;

> "The authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism ... It is the inalienable right of everyone to comment fairly upon any matter of public importance. This right is one of the pillars of individual liberty - freedom of speech, which our courts have always unfailingly upheld."

It is primarily those three cases, as I read them, that lead to the commentary (and fair summary, in my view), which can be found on the subject in Halsbury 4th Edition Volume 9 Contempt of Court and in particular at particular at paragraph 27 on page 21.

The other general matter I refer to, so that it is clear I have it in mind at all times is the effect of Clause 7 of the Constitution of Tonga. Clause 7 says: "It shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom or 'spetch and of the press forever but noing

in this clause should be held to outweigh the law of slander or the laws for the protection of the King and the Royal family.•

The rights enshrined in clause 7, of freedom of speech and freedom of the press, are notabsoluterights. Anyone exercisingthoserightsmustobserveadutyofactr esp111sibly. It is in that area of finding the balance between the right to fre{.d'1m of speech and expression of opinion, and thereby to criticise courtson theone hand and of the protection of courts from being brought into disrepute on the other hand, that the hardest task of the court in this sort of case is to be found.

300 It is well said that courts should be subject to criticism and that, provided that that criticism is genuine and .is reasonable, the court should stand a real deal of it. Undoubtedly it is also true that times have changed since 1900 and that at the end of the century there is a greater accommodation or tolerance to be found in the cou1ts towards criticism that might otherwise, or in earlier times, have been seen as unreasonable. A greater tolerance towards the use of stronger language and of more trenchant criticism.

Before going on then to deal with the two aspects at issue here, I ju st reiterate that thepurposeof thelaw of contempt is toprteserve respect in thepublic for theadministration of justi ce in the courts.

310 I tum to the two aspects complain ed of and T'will deal wi th th e second aspurct first. That is the claim that the article would tend to interfere wi th the course of j ustice in particu lar proceedings.

Ithas been said that criticism of indi vidual decisions(and I suppose this is in an ideal world), should be temperate and be made in good faith and in the honest belief ! at the criticism is accurate and well founded. Of course as I have al 1eady said there has uecn a move in this century towards the allowance of language that a t the start of the century would ha ve been seen as quite intemperate.

320 Without going into the article itself in detail in this j11dg111e.1i, I ha ic reached a *view* about it, tryi ng to do the bal ancing act which I have already referred to. A ltl1ough some of the language is somewhat extravagant in its terms and although some of the criticisms of the particular decision are very robust indeed, yet in the light of: (i) the protection that the courts have always given to freedom of speech and f1eedo111 to e;;prnss opinion and (ii) the caution which a court must exercise in this sort of situation ""hen a court is silling in judgment in relation to i ts own affairs and (i i i) clause 7 of the Constitution: l ha ve reached the conclusion that thearticle as a whole does not overstep the bounds in 1elahon to the claim that thisarticle would tend to interfere with the course ofjus tice in particular proceedings.

JJO As I have said, undoubtedly the particula r proceedings (of the private prosecu tion and the appeal from the Magistrates Court lo the Supreme Court in those proceedings) were still alive and were still active. The appeal was to ajudge of this court. Bearing in mind the test of substantial risk that the course of just ice in the proceedings in question will be seriousl y impeded or prejudi ced, I have reached the view that that was not the case here.

It is perhaps worth my reading ju st this extract from the While Book 1997 The Supreme Court Practice Volume II ; under the commenta1y *to* section 2 of the Co111emp1 of Court Act 1981. In paragraph 5912 page 1958; •A publi cation refening lo pa1licular legal proceedings is less likely tb be held to create a substantial ri sk that 340 the course of ju stice in those proceedings will be seriously impeded or prejud iced if the proceedings are

to be heard by ajudge rather than tried by ajury. The possibility that an appellate court will be influenced is even more remote."

I will stop the(e. That extract I have ju st read reflects very much the pre-existing common law, pre-existing prior to the Contempt of Court Act 1981, and one o y has to look at what is contained in Volume 9of Halsbury (4th Ed.) Contempt of Courtparagraph 14, footnote 6 to that paragraph, where there is reference to various cases and it is said, that although 'proceedings can only be said to have been determined finally when the House of Lord has heard and ecided onan appeal, the likelihood thatapublic;e.tion would 350 influence an appeal, and thereby amount to a contempt, is plainly very slight

Sostrong the language may have beeri, robust thecriticism may have been, butl find that it ha not been shown, on this aspect, that this article would have interfered with the course ofjusti ce in those appeal proceedings.

The prosecution also rely on the defamation proceedings which 1 have referred to earlier in thisjudgment. Those proceedings, as disclosed in the evidence before me, ar quite unrelated, factually, and in any other way, apart from the fact that they involve Mr Pohi va who was also involved in these private prosecution proceedings.

I find that there is no real evidence before me on this aspect tha't would indicate that the publication of this article referring, as it does, to only this one particular case, would have tended to interfere with the course ofju stice in those defamation proceedings which were to go in front of a jud ge and a ju ry in March of 1996.

I am sure that thejud ge at that trial, (and ultimately the matterdid not come to trial, it was settled, but if it had come to trial, that the judge) would ha.ve been alerted to the possibility, particularly if that was in the mind of counselfor the Kingdom of Tonga, that some prejudice from this earlier article might be seen and would have carefully directed thejury accordingly. Quite why aju ry would have connected the twocases, I am not sure:

Lookingat the tests laiddown, "substantial risk", "seriously impeded or prejudiced", I am not satisfied on those aspects in relation to this particular allegation. 370

Which brings me back to the first aspect that I referred lo, i.e. as I put it generally, the scandalising of courts; the bringing of the court and the administration ofjustice into disrepute; a lowe1ing of courts in the eyes of the public generally.

As I understand the authorities, there is noquestion of an intent having to be shown that someone set out to deliberately undermine ju stice. If comment is made which oversteps the bound s of reasonable courtesy and fair criticism and that has theaffect of impairing the administration ofjust ice, and confidence injusti ce, in the system at large, then that is sufficient to constitute a contempt.

The Law of Contempt exists to preserve respect for administration of ju stice in the 380 courts and that is importa nt.

This editorial article started out with a headline which said in the English translation •Justice is no longer available in Court", then the first two sentences read in (lranslation in English) this way, "It is not possible to obtain justice from the Courts of Tonga and the peopledonot trust the decisions of the Court anymore because it's validity is in question." Those are quotations from the prosecution translations.

The prosecution also, underthis heading or this aspect, complain of the last sentence of the article which reads in translation "However this kind of thing be littles the Court in the eyes of the peopele." I say at theoutset that l am not so troubled or indeed not really 390 lroubled at all by that last sentence. I see it as connected to, and merely the punchline

following, thecriticism orcritique that had been undertaken intheparagraphsimmediately ave it, ofthe particular decision in the Magistrate's Court, first loproceed with the case, the private prosecution of Mr Pohiva when the Legislative Assembly had already dealt with it and secondly then to give a sentence of one months i!11prisonment, suspended for three years.

I see that last sentence as being connectedwith the criticism of the individual decision and the body of theeditorial and it says in effect, (that last sentence), that thissort of decision does not help the public view of the court. I would rather place that sentence in the same category as theaspect I have already dealt with, as to whether it would affect the particular legal proceedings. Itwa_s pa!1 of the robust criticism that I have already referrd to.

I come back the to what! see as the important part of this editorial on this aspect and that is the headline and the opening two sentences. in the arfidavit of Mrs Taufate'au, _paragraph 5, te translation that is provided there of those first two sentences was this; "It is no longer possible to obtain ju stice from Tonga Court pf Justice. The people no longl\r trust \he decision of the Court anymore because it's validity is in question." There is no great difference between the two translations; ttte effect in JllY view I the same.

In fact from one poiilt of view, it might be said that the translation, "It is no longer possible toobtainjusti ce from Tongan court" israther worse, is rather moreof a slur, than the prosecution translation of "It is not possible to obtain justice from the Courts of Tonga."

As I said at the start of thisjudgment Mr Moala in his evidence today tried towater down sdme of the passages and the opening sentence was one of those. He would have itthat that-should now read "It isincreasingly difficult toobtain justice from Tonga Courts of Justice." For the reasons I expressed earlier, I reject that proposition of his.

The headline itself, "Justice is na' longer vailable in Court". I bear in mind that headline writers strive for effect (the tabloid press all around the world in this day and age attest to that andreflect that) and it is an increasing tendency to find extravagant headlines that often bear no relationship at all to the article or the subject which follows.

Nonetheless in my view, it is a long link indeed to make, from- criticism of one Magistrate's Court decision in a private prosecution matter, in quite a low level and, in some senses, il)significant matter to a headline such as this.

But.the two opening sentences in my view are worse. From one relatively minor case (and that at aJow level in thejudicial system), and from a criticism of that one case, (howeverjustified that criticism might be), to write in an editorial that "it is not possible toobtainjustice from te courts of Tonga and the people do not trust the decisions of the court anymore", is to mount an extraordinary attack on all courts.

As I have said, it is possible to understand, (and I am not making any comment on the validity of ihat), to some extent, the criticism of theindividual case that ismadein the body of the article, but to attack, (as those openings do in my view) all courts, Courts as an institution, isin thejud gment of this Court tooverstep. Ithas theeffectof undermining, of shaking the confidence of the people in, the decisions of the Courts.

l noted with interest that Mr Moala, in hisown evidence in chief, in effect accepted that really he had gone too far, in making such general statements from only one case. As l made a note in my book, he said that headmitted that probably it could have been written differently, although he wel on to say hedid not intend to diminish the authority of the

court. Undercross-examination, hewasasked how hewould have said it differently, how he would have changed the wording and he said that he would have, or rather could have, worded it in the way of; "Court decision criticised; jus tice not believed to have been obtained in Court decision.• That of course would have related it to the particular case being subjected to criticism.

It was interesting to hear Mr Moala's witness, Mr Pohiva, say under cross-examination, when theseopening sentences were put to him, that heregarded them asvery general statements, covering not ju st the particular case. That from a man who was very much involved in the proceedings themselves. If that was lio\v he perceived it, then the general public would well perceive it in a similar way.

I conclude that this editorial article was indeed in contempt in the respects which I haveoutlined. I based those findings, as I say, on theheadline and inparticularon the two opening sentences and I base it on the aspect of the scandalising of the courts themselves, the bringing into disrespect of the Court.

So in that respect, Mr Moala, I find that those parts of the article - were indeed a_ contempt of Court and l find you guilty of contempt in regard to those, i.e. the translation of the criticism of a particular case into such a wide and sweeping and disrespectful criticism of the whole judicial system.

Having made that finding, there is in this court a whole range of sentencing powers available from committal to imprisonment downwards. (Counsel were further heard on the question of penalty).

Mr Moala, I detected in you, when I listened to your evidence, and I listened very carefully, two things I think that are important in tenns of your position at the moment. The first is that you obviously felt strongly about what had taken place in the House and then, more importantly from your point of,view, what then occurred in the Magistrate's Court. A nd I detected in you, in the way you gave your evidence, the desire, in writing this particular article, to come out fighting,or as an advocate, for Mr Pohiva.

It is perhaps in that that you .lost something of the objectivity which might be expected in an editorial writer and in an editorjal. As I have said in the course of my jud gment, Courtsare not and should not be, immune from criticism. But it wasin making those ratherextravagantopeningstatementsthat you did overstepand indeed, did yourself a disservice in my view. I said I have listened carefully. I did not detect in you any malice or any undesirable intent, (undesirable from the Court's point o(view), or an intent tc» set out to scandalise a Court. But I am sure you had a rush of blood, and passion overcame objectivity. So I have that matter in mind when I look at sentencing.

Secondly, I observe in you, (and already I have touched on it to some extent in my judgment), an acceptance that, with hindsight looking at the article, you could have worded it differently. You could still have had thesame impact but would not have spread your criticism quiteas wideas you did. And I accept that is a genuine expression, in effect, of regret on your part.

So those are the two things I wanted tocommenlon from listening to you today, and those are important when it comes tothis aspect of matter. And they innuence me on the question of sentence.

Also innuentia l is the fact that it would seem_ that you have been the publisher and editor of this paper for some time. I have not been told that there have been other proceedings of this sort. If there had been any, I dare say I wol!ld have !eard abou it.

I referred earlier to the fact that the range of penalties available seem to be these: from imprisonment, (committal to prison), to a suspended term of imprisonment. to fine, to putting you on a bond or security for good behaviour, or indeed of reprimand.

I have thought carefully about the malter. I have reached the view, and it is shaped by the factors that I have referred to, that in this instance the matter can be dealt with in a lenient way. It is my hope, and it is my belief, that no great harm has been done. But let this be seen, as it were, as a shot across your bows.

There isa balance that hasto bestruck. It is difficult, but freedom of speech, freedom of expression of opinion, freedom of the press, have to be balanced with responsibility. It is an editor'sjobto find that balance. I am surethat theproceedings here and theoutcome of this proceedings will be salutary.

I intend to formally censure, to reprimand you.

I do not intend to innict or impose any other pena lty, but I do intend that you pay an amount towards the cost of these proceedings . I say an amount because I would wanl from the Crown an indication now, (if it can be given) or subsequently, (if it wants time to consider the position) as to what the costs were in lhese proceedings. I will then heru argument about the extent of costs which should be awarded. (Counsel further heard).

Mr Moala: You will be reprimanded, censured, in relation to the finding of contempt. There will be an award against you, in favour of the Crown, of a sum of costs which I will determine in the next short whi le.

Bank of Tonga v Peacock & Peacock

Supreme Court, Neiafu, Vava'u
Hampton O
C.500194

29, 30 April, I, 2, 3, 6, 7, 10, 16 May, 28 June 1996

Banking - due diligence - breach - d111y of care - damages
Damages - defamation - trespass - assault
Land - mortgages - growing crops
Contract - consideration - forbearance
Defamation - damages - 110 loss proved
Assault - damages
Trespass to goods - damages

The plaintiff sued for amounts owing on 2 bank accounts; the defendants reponded with a series of 6 counterclaims based on negligence. negli gent mis-statemtents or misrepresentations, breach of contract and/or negligent statements, defamation, trespass to goods and trespass (assault) to person.

Held:

1. The bank was entitled to judgment of the marketing account and even if additional clauses were read into the lending contract demand was able to be made, as it was, and thedefendants were liable. There was good consideration for the agreement; the plaintiff would forbear from making demand and executing on the securities.
2. A defence under s.16 Land Act of illegality was rejected as not applying to the first defendant (a non-Tongan whose crops were part of the security, and in any event doubt expressed whether the word "stock" in context in the agreement referred to growing crops, but rather harvested crops).
3. The bank was entitled tojudgment on the other account. There was no basis for the claim of coercion as the agreed compromise (the basis for suing) was firstsuggested by thedefendantsthemselves about a year before the agreement.
4. There was no basis either for the counterclaim s of negligence relating- to the management of that account; or for the counterclaims of negligent mis-statements and/ormispresentation by thebank leading tofurther borrowing by the the defendants on the first (marketing) account. This latter was fanciful hindsight .
5. If an institution provides finance for a client's claimed purpose that does not make the institution a party to and/or a guarantor of that purpose.
6. The counlerclaim based on the (authorised by the defendants) cros5 credit checks between th plaintiff and anotl1er bank, whoal so leant tothe defendants

alsofailed. Factually what was said was accurate, repeated what had been said before and if theclaim wasindefamation, was privileged in thecircumstances and not acated by malice. In any event the defendants got their loan there was no damage.

7. The counterclaims for the plaintiffs statements and advert1smg when taking stepsto make demand on theloan and execute onortake possession of secured chattels were based on breach of contract, breach of a claimed duty of care and defamation.

8. The plaintifrs servants unduly and unnecessarily pa icked and rsh and inappropriate actions followed, with a lack of due d1hgence, a fatlre to exercise a reasonable standard of care (over identifying secured items, advertising andof tak.ingortrying toseizechattels) in circumstances wherethe bank owed duties of care to the defendants.

9. Some words spoken in instance were defamatory but did not fall within any of the categories in s.16 Defamation Act and no evidence was called as to monetary orother loss.

10. Jn the circumstances total damages of $1100 were awarded for the breaches of duties of care in relation to advertisements. The advertisements were as well defamatory contained incorrect details, were not warranted in the circumstances and not privileged, but here s.16 applied and no proof of loss was required. Damages of $7000 were awarded.

11. Trespass to goods did occur by the bank seizing gs which were not, nd never were, secured. Due diligence was not exercised. Damages tota11mg $1500 were awarded.

12. As tothe assault (trespass to pers6n) force was used on the the first dfendanl by the plaintifr s emloyees to take possession of a tractor which was not, and never was, secured. Damages of $1000, to the first defendant only, were awarded.

13. Orders were also made in favour of the plaintiff for possession of cem secured chattels and funds; but the plaintiffs application for an order secunng to it certain leasehold lands was rejected - the actual security was a "pledging' of the "registered mortgage" (not the leaseorland); thebank has powers under the mortgage; and the l)'latter was one forthe Land Court (which has exclusive jurisdiction) in any event.. The plaintiff had rights under s.109 Land Acl

Cases considered — Tu'ipulotu v Fau (Dalgety J 3112/93 L 134/93)

Statutes considered — Defamation Act
Evidence Act s.80
Land Act ss.109, I49, .16

Couse} for plaintiffs — Mr Appleby & Ms Osmundsen
Counsel for defendants — MrT11'utafaiva & Mr Piukala

Judgment

General

On 24 !'-. lay 1994 in scenes "hich might have se"ed well in any cinematic farce the First Defendant and the Vava'u Branch Manager of the Plaintiff met and confronted each other, over a tractor, on the road from Longomapu to Neiafu . Farcical it may have been; unedifying from any one's point of view it certainly was.

Unfortunately it led to an hardening of attitudes by both Plaint iff and Defendants and to the issue of these proceedings within a week or so with all the resultant interim injunctions and other interlocutory orders and much protraction and delay. One suspects that if that confrontation on the road from Longomapu had not taken place, this action and all that it has come to mean and represent, particularly in the First Defenda nt's mind, well might not have resulted.

Basically there are 2 claims by the Plaintiff against the Defendants; and 6 counterclaim s by the Defendantsagainst the Plaintiff . I wi ll deal with each of theclaims and the counter claims and the defences with respect to each in this order.

i. Plaintifrs claim - Peacock Marketing account
ii. Plaintiffs claim - Nua/Peacock account
iii. Defendants' counter claim - Nua/Peacock account
iv. Defendants' counter claim - "Agricultural lending programme"
v. Defendants' counter claim - Tonga Development Bank
vi. Defendants' counter claim - Plaintiffs advertisements and statements
vii. Defendants' counter claim - trespass to goods
v111. Defendants' counter claim - trespass to person - assault on First Defendant.

The narrative which follows expresses my findings of fact on the evidence which has been presented tome. There are some 300 pages of agreed documentary exhibits and I have heard some 15witnesses. (When I refer tothedocuments asagreed I mean that these documents were accepted in Court, by agreement of the parties, without the need for formal production and as being available as evidence before me). I also add that, particularly with events of some years ago, I find that the documents, especially asto the history of the Plaintiffs banking relationship with the Defendants, arc generally more reliable than human memories affected, as I find they have been, by later events.

Claim Peacock Marketing Account

I intend givingan history of matters leading up to the borrowi ng of the Defendants from the Plaintiff which culminated, ulti matcly, in the May 1994events. (The long ractua l narrative is omitted here).

I find that therewas goodand valid consideration for this loan agreement. This long running and often extended (in amount and in term) overdraft had been repayable on demand, explicitly in tcrmsof the loan agreements of June I991 and March 1992, since the overdraft limit went from $20,000 lo $60,000. In addition the previous agreement of March I992 (Exh. p 190) was "to be reviewed by 311792".That time had passed. The Defendants still wanted and required the overdraft facility; the Plainti ff would not call up the advance- would forbear from making demand and/orexecuting on (taking possession of) securities and would continue the advance oroverdraft facilities. The First Defendant in evidence said, in acknowledging the debt, that it was never the Defendants intention not to pay off the overdraft but the May 1994 events supervened and made things impossible in effect for the Defendants.

I hnve given a comprehensive history (and that is helpful and will shorten my consideration of some of the other heads of claim and counter claim). I did not want to leave any stone unturned. I think I have noL But on this part of the claim I can see no defence. Even *if* (and it is a very big if indeed) but even if the First Defendant's additional clause at Exh. p 173a is read into the agreement of 20 August 1992 (Exh. p 204), and I do not see how it can be, but presumably in some way through the additional clause in the offer letter at Exh. p 201a (para. 55 above) - then on the evidence it is very clear that at the time of demand (and whether in May 1994 or March 1994 or earlier) (a) the Defendants were "not operating the Peacock Marketing Account at all, let alone satisfactorily if that is how the clause should be read; and (b) the business was "not performing satisfactorily".

Demand was able to be made; the Defendants jointly and severally are liable to the Plaintiff on the overdraft account and pursuant to the loan agreement of 20 August 1992

That deals with the defences raised by Mr. Tu'utafaiva. Quantum is I believe quite straight forward (subject only to any matter as to the unauthorised "ULFs" - see para. 46 above and paras. 40- 42 of the amended Statement of Defence- an arithmetical exercise involving deductions, to be made, and recomputation of interest) - and is shown to be, under this head $96,069.61 as at 31 March 1996. I add that no items "pledged as security" have in fact been taken into the Plaintiff s possession or realised on in any way.

The only other defences raised io the amended statement of defence (para. 31), and not mentioned by Mr. Tu'utafaiva, are a claim that the loan agreements are "void and of noeffect". On quite what basis I do not know. I reject that defence. The para. 31 goes on: "Further the Defendants plead s. 16 of the Land Act of Tonga as a defence". That is a claim of illegality - a Tongan subject cannot (on pain of criminal penalty - imprisonment and or fine) pledge or charge growing crops.

This then is directed at the security provision in the 20A ugust 1994 loan agreement: "Loan agreements charging over ... plantation stock and frozen goods". I am not persuaded at all that those words in the context of this agreement and in the light of the Land Act section mean growing crops of e.g. vanilla or manioke or anything else. Stock is not a word appropriate to describe crops. Stock might well describe crops after harvesting and/or perhaps after some processing. But not whilst growing in the ground (see further para. 45 below). So I reject the claim of illegality under the Land Act. Thal may well affect other orders sought by the Plaintiff and certain interim injunction earlier made but I will come to that in due course.

There are other difficulties in the path of this defence as well. It could only apply to Siusi Peacock - the First Defendant is not a Tongan subject. Yet it is he who has the lease of the relevant land (lease 4883 as claimed under mortgage) and it is only he who has entered into the mortgage. So even if stock included growing crops I am not pers•Jaded on the evidence that such crops were those of the Second Defendant (Siusi Peacock). 1 add that in any event my view is that this particular limited provision, even if it were illegal (and it is not) would be able to be severed from the rest of the contract and would not render the whole agreement invalid as illegal. It does not go to the heart of the agreement. That defence fails also.

Claim : Nun/Peacock Account

A history is necessary (but not as long, fortunately); the matter seems to go back lo about 1985. (A factual account followed, in lhe judgment).

The result was a proposal in writing (in about May 1992) *fr9m* the First Defefldant (Exh. pp 193-9) offering $5000 by 10!llOnthly instalments. The Bank moved slowly- and there are not the indications of pressure that the First Defendant now complains of. The Bank did not respond to that proposal (making a coWlter offer) until 9 Decemlier 1992 (Exh. p 218); and then, failing any respo11se, made a further ounter offer (in effect accepting the Defendants offer of $5000 by 10 instalrne!lls) in March 1993 (see EXh. pp 225, 226). The Defendants both accepted this on 28 April 1993 (Exh. p 228) an I reject a claim of coercoin made by lhe First Defendant, but not by the Seconil Defedanl The compromise reached was initially prqposed by the First Defendant about a year before; the compromise resulted in the Plaintiff forgoing some $7000 approxiamately.

The 10 payments were made by automatic transfers from the Defendants' joint personal account. as authorised by both Defendants, between May 1993 and Thbruary 1994 (Exh. pp 59-63) leading to difficulties with that account then becoming overdrawn (refer as lo that to ttte correspondence about ilal Exh. pp 229-233).

Including unauthorised Limit Fees again, the amount owing as at 31 March 1996 on that personal account of both Defendants is $6314.32 (Exh. pp 281..2 and I note that in those last 2 pages, as with the.other business account, no further ULFs are charged). Subject then to ULFs being deducted - no proper authority for such deductions having been proved - the Defendants arc jointly and severally liable to the Plaintiff for that sum. Leavingaside any question of a concluded contract (of 28 April 1993 with consideration at the very least with the Second Defendant) both Defendants are liable. They are sued on the overdrawn balance of their Bank Account. They both authorised the deductions from that account

I reject the Defendants' defence of the Plai11tiff being estopped from denying that the debts were entirely Nuas and not the Defendants at all (from the factual account above); and of negligent and /or unlawful conduct (which perhaps goes more to the counterclaim).

Counter claim - Nua/Peacock Account

$15,000 is sued for under this head by the Defendants. The allegations are of negligent mismanagement and/or unlawful conduct of the Defendants personal account by the Plaintiff by making or allowing w1authorised deductions therefrom; allowing unauth orised overdraw ing to occur; charging unauthori sed fees and charges (indeed a claim of a charge of $200 per month for which there is absolutely no evidence anywhere - the ULFs (11 in all from 31 15/93 to 30/4/94) total only some $105.56 or-so, and I have dealt with at para. 87 above.

Given the factual matters traversed already I reject such allegations. Subject to what 1 have said as to U.L.Fs the deductions were authorised and lawful. This was a joint account. Both Defendants authorised the deductions and the account going into overdraft. There has been no proof of damage or harm. This part of the counter claim is dismissed.

Counter claim "Agricultural Lending Programme•

Again I believe I have said enough on the way through the history of the Peacock Marketing account to indicate that 1 find that, factually, there is no substance - and can be no substance legally or factually - to these claims that the Plaintiff."promised" (the word repeatedly used in the pleadings) that it would finance (in some unlimited way, as claimed) the Defendru1ts' farming; that it would provide markets for the Defendants' crops so that they could then repay their loans; that it would finance (again in some unlimited way) •all necessary facets" of the Defendanls marketing crops overseas (including a shop

in New Zealand, delivery vehicles, freezers and coolers, shipping finance, crops purchase finance); tl)at it would finance the Defendants and only 2 other persons to market crops in New Zealand.

These claims arewild and extravagant in my view. They. have no foundation . I refer to e.g. my comments in e.g. paras 13, 17, 18, 19, 20, 22, 24, 25, 26, 27, 29, 30, 31, 33, 36, 41.42 and 65 above.

Given the nature of what isclaimed by the First Defendant - the "agreements• he had with the Vava'u manager, Mr. 'Ahota'e'iloa, it is extraordinary that there is not onejot of supporting documentation. The First Defendant is an intelligent man; he is and was versed in businessand in banking. He entered into all mannerof agreements . Yet nothing at all with the Bank on such crucial - such vital to him, his wife, and their bu"siness - matters. There is not even any reference to such "promises" or "agreements' in any of the exhibits, let alone the Bank diary notes.

The First Defendant is an articulate man and he can write comprehensive and coherent letters (of complaint if he thinks necessary). He can also "write in' clauses into Ban offers of finance (e.g. Exh. pp 173a, 20la). The nearest thing to a close to contemporaneous complaint by him is in the 2 letters of January 1991 (Exh. pp 160 -2) which come to a claim of a lack of full financial support'as "we were assured of". The discussions of the First Defendant with Mr. Schwenke of July 1993 (Exh. pp 230 a - c) are revealing ("Gavin stated that he is suffering as a result of the easy borrowi ng years in Vava'u and accepts responsibility for his position" - when put to him in evidence he in effect acepted that as the position).

The onlydocumentation the First Defendant points to is thepaperof Mr. 'Ahota'e'iloa of. May 1988 (Exh. pp 72-77). The paper must be read in its entirety - but it is as it says in the first sentence "The aim of this paper is to explain brieny why Bank of Tonga participated in providing this (Commercial Farming) Finance in Vava'u since 1987'. The Bank did move, I find, from traditional housing and personal lending into financing commercial plantation fishing and livestock in Vava'u. But that was all it did. Itremained a financier but moved into those sectors. It was not a marketer; i t was ot a guarantqr of markets; it was not an establisher of monopolies in markets overseas (how could it possibly do that latter); it was not, either, an unreserved or unlimited provider of finance.

Undoubtedly the then Vava'u manager was an enthusiast and tried to achieve cooperation between various sectorsof the Vava'u communily- witness e.g. his diagrams, and comments on Exh. pp 73-4 in the interests of all Vava'u. He did refer to the Bank's financing of this commercial activity as 'this Agricultural Lending Programme" (Exh. p 76) but that is as close as it gets (if that can be called close) to the Defendants' claims of the Plaintiff "implementing i ts agricultural orientated economic development program with the ... first 5 year plan' (amended counter-claim para.55).

The Defendants called, i n support, a witness, Mr. Piu, who claimed to have been similarly 'pulled in" to marketing arrangements with the Plaintiff. He said he was to research and then market produce in New Zealand as part of the Bank's project. He spoke o' • Ie Bank giving him moneys to undertake the project - or his part in it. Under cross ex ;n1i nation ittumed out that the•giving' was that he applied for and sometimesobtained loans from the Plaintiff for specific business proposa ls of his own, which he admitted he saw as opportunities to make moneys for hims.,;r and his family (although he seems to have wilfully misled his partner, his uncle). He regarded the business as his own; the

money from the Bank as loans which had to be repaid by him 'for sure ; and accepted that the Bankconsidered each loan application on its individual merits. He now owes moneys to the Plaintiff (on judgment) ; he has, I believe, an axe of his own to grind and has overstated the position. None of his evidencewas put tothe Bank'switnesses. Interestingly his name does not appear in the list of names provided by the Defendants as being the 'over 30 people instead of 3 to market in New Zealand" financed by the Plaintiff (para 63 a of amended counter-claim).

In the paper (seeparas. 95-96) it isclear that the Plaintiff was only a financier acting within itsown normal limitseg.Exh. p74:"Procedures -These following suggested steps start from the preparation of the proposition to accompany the nohnal requirement s of a Loan Application (Refer to Bank Rules)'. There were and are such Rules. Or eg. Exh. p 75: "Bank position is to say "Yes' or "No" in terms of Bank's lending guidelines".

I reject the First Defendant's evidence (as with Mr. Piu's) on this as fanciful hindsight. There is and was no substance tohis claims under this head (for a total of some $350,000 I add). There was no such plan or programme as he alleges; there was no withdrawal from or abandonment of such in 1990 as he claims, causing him Joss. It is significant that at that claimed time of withdrawal from the programme he had moved of his own volition (and against the Bank's advice/wishes in effect) from exporting crops from Tonga into importing meat i nto Tonga - and on such a scale as noted earlier in this judgme nt that most finance from the Bank was being sought for that at this time; and he was prospering by it, he said. Importing meat was never part of the plan or programme, even accepting entirely (which I do not, at all) everything which the First Defendant said about it.

The First Defendant's fundamental misconception, it seems to me, is to say that if an institution provides finance for a client's claimed purpose, that makes the institution a party to and/or a guarantor of that purpose.

Specifically there is no evidence to spport the various allegations in paras. 54 to 64 of the amended Statement of Counter-claim. There was noprogramme or plan as alleged; no promises of unlimited finatice, of providing markets; nojoin ing of such a programme in reliance on promises; no failure "to comply" with promises. There was no loss of income proved by the Defendants (generally, let alone specifically arising from claimed breach of promises). There was no "invitation' to establish markets in New Zealand or overseas and no acceptance of such; no "promises and representations" by the Plaintiff; and again no failure to keep promises.

Whatever the actual legal cause (or causes) of action; and Mr. Tu'utafai va, brought in late as counsel, had difficulty spelling it out initially - though he disclaimed contract and seemed to base himself on negligence (negl i gent mis-statement and/or misrepresentations) - I find that there is no factual basis for any claim at all. The clai ms of $100,000 for loss of profits; and $250,000 for "loss of profi t, pain and anguish" are dismissed. Itmay not be insignificant that the original counter claim of 28June 1994made no mention of these allegations; nor did the October 1994 amended version (filed just before the fi rst scheduled but absorted trial); they were not made i n pleadings u n til April 1995- a growth with hindsight.

Counter claim :Tonga Development Bank

This is a claim for $10,000 for in effect the alleged breach of a claimed duty by the Plaintiff to take care when making a credit report to the TDB, on the Defendants. in

September 1992.

Thr.re was a long history of cross credit checks between the 2 Banks, both of whom were lenders to the Defendants. E:\amples of such arc found throughout the Exhibits. Such checks were done with the written authority of the Defendants.

The one complained of in the pleadings (counter claim paras.66-68) is to be found at Exh. p. 212 Mr.Langa'oi described it's making in evidence. I find that the figures used in it were accurate and the added on interest (for 1year) acceptable and as had been done in the past.

There was a comment of "unsatisfactory" in relation to the business loan, which involved a small sum compared with the overdraft. Ifind that the use of that word in rela,tion to that term loan, was appropriate given the then history and situation of the loan i.e. in arrears by some $4,000. The Plaintiff had a duty to the TDB to report accurately and with care. It did so, I find. There was no overstating or falsity as alleged, let alone malice on the part of the Plaintiff. Indeed the complained of report reflects exactly the previous May 1992 report (Exh. p 196) to the TDB; the only "adverse" comment there being as to the term loan - again an "unsatisfactory" for the overdraft account even though it showed that account was over its limit.

The Defendants complain that thiscredit check of Septe111ber 1992prevented them then getting finance (counter claim para.69). In fact that is not true. The credit check was in relation tothe possible furtherTDB loan which was granted to the Defendants - seethe TDB loan agreement Exh. pp 2 12 a-c of 8 September 1992 (and the then TDB manager in evidence confirmed that this loan was granted).

So what was stated was true and accurate, Ifind. It was indeed in privileged circumstances (if in fact this is·a defamation pi'eading - which Mr.Tu'utafaiva said it was not); itwas not actuated by malice; the Defendants still gottheirloan; there was nodamage or other consequences to them (and certainly no evidence to substantiate the claims in para.70of the counterclaim). There was no"unlawful conduct" - as claimed, and however that is founded (which I am left uncertain about).

I reject any claim to amend thecounter claim to allege similar things about another later (but ill defined as to quite when) report by the Plaintiff to the T.D.B. This was first raised by the First Defendant in his evidence, when he saw the problems with this September 1992 position and referred to a March 1993 event. No such March 1993 documents have been produced. In para. 68B of the counter claim there is detailed reference to the TDB manager and what was alleged to have been said to him by the Plaintiffs then Vava'u manager. The T.D.B. manager was called and gave evidence for the Defendants. He did not give evidence which accorded with para.68B - in fact did not touch on that aspect at all. That 'witness referred to a loan application made by the Defendants to the T.D.B. about May 1994 (see the credit check at Exh. p 256) when because of the unsatisfactory credit reference from the Plaintiff the further loan request was refused. By then relations between the Defendants and the Plaintiff were at flash point.

The First Defendant himself had control of these pleadings at various stages and in particular when the counter claim was put, roughly, in it's present form.Iwould not allow such a late amendment in these circumstances even if one had been applied for- it has not

This claim is rejected.

Counter claim - Plalottrrs advertisci:ment & Statements

We now come to the events of May 1994. The first head in this part is a claim for $30,000 for advertisements and statements said to be in breach of contract or rather, as I have heard the evidence, a clai 111 arising from an alleged breach of a claimed duty of care that the Plaintiff owed the Defendants as borrowers from it under the loan agreements and in 1instance in particular, said to be defamatory- (paras. 72 -80and 83- 84of the counter claim). The second head is a claim for (or rather as part of a claim for) $150,000 for defamation arising from some of the same advertisements (paras. 91 - 94 of the counter claim).

Ifind that the Plaintiff, through its servants, unduly and unnecessari ly panicked in May 1994. Without good grounds, and without proper checks being carried ou its servants convinced themselves that the Defendants were selling up and leaving the juri sdiction. This was not so. The First Defendant did intend going back to the U.S.A. as he had been doing (and as the Plaintiff knew see diary note of 17 May 1994 at Exh. p. 245) for some little time past. But the Plaintifrs servants convinced themselves that matters were far more sinister. Rash and inappropriate actions followed. As the General Manager of the Plaintiff candidly said - there was a lack of due diligence in various respects, by Bank Officers, through this lime. A failure to exercise a reasonable standard of care (as I say in various respects - over identifying secured items, in care over advertising. in physically taking or trying to take chattels; and as Iwill come to); in circumstances where I find that the Plaintiff did owe duties of care to the Defendants.

There is, Ifind, a misconception as to the claimed breach of contract. The written-in clause (Exh. p 204) "That Banlc reserves the right to advertise and sell the security if repossess" does not prevent the Bank putting would be purchasers of secured chattels on notice if, in order to protect its security, the Bank had good grounds to believe secured chattels were being sold or about to be sold.

But the Bank failed, Ifind, in its duties of care in two respects in relation to the advertisements it placed in newspapers and over radio (but as pleaded in paras.75-79 in this part of this claim Iam dealing only with the radio). First it took insufficient care to make sure that indeed properly secured items were about to be or were being sold; secondly it then did not make sure that the advertisements were accurate i.e. contained correct information as toactual properly secured goods. Both these matters were capable of being correctl y ascertained and/or stated. They were not. Indeed Ilook at the Bank's lending managers Affidavit of 2 June 1994 in support of the first injunction. In para. 13 it is there stated "The Plaintiff is not aware of any proposed sale of these assets ...".

The form of notice oradvertisement over the radio is not as alleged in para.75of the counter claim, I find. That para. (75) is an exaggeration of what was said. The contents (and days numbers (9) and times of broadcast) are set out at Exh.p 266. Subject to what Ihave said as to the failure to properly verify the position which would allolV such advertisement s asappropriate, the general form of advertisement ornotice is, in my view, unexceptionable. The difficulty is in the items claimed to be secured - only 1 of the 3 tractors and some freezer containers were in fact secured (Exh. p 204); the other tractors, sawmill plant and equipment including vehicles and motor-bike were not (but had been at various times onder earlier loan agreements).

The relevant Bank Officers knew full well what was secured - look e.g.at Exh. pp 242 (12 April 1994) 243 (inspection, of actual items, of 20 March 1994 - but report on "Bank'ssecurity" of 28April 1994) and 250- 253(Vava'u manager's report to Head Office

of 19 May 1994 i.e. the day before the first radio advertiseent). But, as I find, they panicked wrongly and unnecessarily in my judgment - an m that state drew u ad authorised the publication of an erroneous statement. In fmal arguments th 1amllf admitted it was careless "in its security verification s and accepts full respons1b1hty ...

The Plaintiff has formally admitted that those 9 broadcasts (over a 7 day period) went to all listeners in all the island groups of the Kingdom. Although no evidence was called from other listeners the Defendants spoke of their discomfiture in being named in such a way. I will return to damages.

In para.80 of the counter claim the Defendants complam of a rather s1m1lar form letter (i.e. similar to advertisements) written by the Plaintiff o a Vava'u shop on 17 May 1994 (Exh. p 248); although again I note that the pleading does not correctly eflect he actual exhibit. The letter was about a meat saw or slicer (as Em. p 251 recordmg a pnor conversation of Bank manager to shopkeeper, makes clear). This item was not secured. Again not due diligence exercised I find - and again I refer to th lendin-g manage's affidavit of 2 June 1994, para. 12: "The plaintiff has also incorrect Y mforrned a potential innoenf purchaser of the Defendat's equipment that it has an interest in a meal slicer. This i incorrect and the purchaser and the Defendants I Jave been informed accordingly".

A form of apology was written by the Bank's lawyer on the 2 June 1994 (Exh. P 267), to the Defendants lawyer (who had protested about some of the events of 20 May and following) and to the shop owner.

In para.83 of the counter claim is the last part of t?1s 3 part claim for 30,000 (para.84). This is a claim of defamation or breach of contract. The complamt is of "malicious and untrue rumours" spread by the Plaintiff "amongst the Defendant's workers people of the Vava'u business community and others ...". Allegations of oral communications to 4 named persons are set out in para.83. Only one of those 4 persons was called as a witness. No evidence was offered in support of the other 3 alleged incidents (and even e.g. Exh. p 251 from the Vava'u manager's report of 19 May 1994 does not support the Sifa Lovo claim). As to the fourth i.e. involving Kililasi Ngata, a worker for the Defendants, Mr. Ngata gave evidence (he is a cousin of the Second Defendant). He said that on the 24 May 1994 certain Bank Officers came to take the tractor because the First Defendant "was running off abroad" (that is how the witness said it was put to him by the Vaya'u manager of the Plaintiff; and later that "Gavin was going to run away"). These words were spoken in the course of the Plaintiff's servants taking a tractor of the Defendants to which they were not entitled (as it was not secured). There was no breach of contract as claimed but there was a lack of due care and diligence over this tractor, as I will come to, soon.

But I am dealing here with defamation - and that is governed by the Defamation Act (Cap.33). S.16(1) provides that only certain classes or categories of.sken defamatory words are actionable without proof of actual loss through the pubhcahon. The words complained of here, if made, and even if defamatory (and I find that they were made nd that they were defamatory, within S.21(1) of the Act) were not spoken of the '.tst Defendant "in connection with his trade business or calling" and nor do they fall w1thm any of the other 3 categories in S.16(1). That being the case this part of this claim must fail as there was no evidence before me establishing that the Defendants "suffered monetary or other actual loss in consequence of the speaking of such defamatory words" - S. 16(2).

Now comes the difficult part. What are those breaches of duties of care, as detailed (para 115- 120 above) worih? They resulted in significant and quite widespread activities and actions, causing damage and distress to the Defendants. But po proof of llJOnetary or other actual loss has been given in evidence. I take account of all the factors I have mentioned, including .the full history of the deteriorating relationship of Plaintiff and Defendants and the defamation findings which immediately follow in this judgment. I set a figure of $1,100 general damages as being appropriate (being $1000 as to the radio broadcasts and $100 for the ti:tter of 17 May 1994 (Exh. p 248).

The second and more significant part of this section of claims is the defamation action (paras. 1 - 94 of counter claim) b;tsed on the advertisements published 9 times on the radio as already detailed and also in 2 Tongan newspapers of 25 and 26 May 1994. The form of advertisements was the same whatever the medium (see e.g. Exh. pp 255, 262, 263, 264, 266) - and is as pleaded in para. 9l(a). Publication was admitted but not the extent of circulation claims (in New Zealand), in para.92 (and no evidence was given to upport that allegation), nor the:claims of "embarrassment, suffering and ridicule not only in Tonga but as well in New zealand", in para.93 (and noevfdence was called to support that either).

It was clajmed that the advertisements had caused "the Defendants considerable suffering and worry" and I find that to be so - and that the First Defendant suffered "damage to his business contacts both in Vava'u and in New Zealand where the Defendant export produce" (para.91) - there was no evidence before me as to that latter aspect however.

The First Defendant's evidence was that on hearing and seeing the advertisements his reaction was of shock and of concern as to the impression given to the whole country of the Defendants not paying their loans and of their possessions bein -. •aken by the Bank.

I find that the advertisements were, in all the circumstances as 1 have go he through them, defamatory - S.2(1) Defamation Act (Cap 33). No privilege is claimed (s.10) nor do I believe it could be so claimed. Truth is a complete defence (s.14) but although some items in the advertisements are true, most are not correct and the background events, I find, did not warrant publication.

The Plaintiff, in final argument put it this way: - "submits in mitigation that the evidence at trial proves no actual malice on the part of the Bank in causi1g publication of the advertisements, and that its actions were occasioned by a bona fide albeit mistaken belief in the veracity of the entire publication".

As to the newspaper advertisements no proof of any monetary or other actual loss is required (s.16(1)) and in respeCt of the radio advertisements nor, I find, does actual monetary or other loss require proof because s. 16(l)(c) does apply - the words used do relate to orare "in connection with' the Defendants trade, business or calling: "Gavin and Siusi Peacock trading as Peacock Marketing".

So again to the difficuli issue: Amount. Well it has to be looked at in the whole at in the whole context and background of the failing Bank/clients relationship and of the Defendants already ailing, if not failing business. No actual losses or figures have been given in evidence. I fix damages here at $7000 (noting a claim - para. 94 of the counter claim, and rather unsatisfactorily mixed in with the assault claim - of $150,000).

Counter claim - Trespass to Goods

These claims are in paras. 81-82 (freezers) and 85-86 (tractor) of the counter claif YI

and $10,000 is claimed for each "trespass conversion and detinue" both events having occured on 24 May 1994.

The Piaintifrsemployees took 3freezers and a refiigerator/freezerof lhe Defendants from a shop in Neiafu on 24 May. The Plaintiff "admits that it was careless in its security verifications ... ano accepts full responsibility for its mistaken assu!f!ption that i t held a security interest in these items ..." (from Plaintiff s closing submi ssions). Gi\·cn the evidence I heard the Plai ntif f co'l1ld do littl e else but admi t such w rongf ul tak ing of these goods. A ga in a l ack of due care and diligence. On the c1iucnce of the Fi rst Defenuant the appliances had not been used since August 1993; the Plaintiff continu ed to hold them until nearthe end of October l994 (see Exh.p 276); and the Defendants subsequentl y sold two of them, after all 4 had been stored and not used by them forsome time &fter recovery.

Again it is quantum of damages which is the difficult question- but I detennine that given the circumstances of this interference in property of others without proper checking and verification, and retention of the goods for some ti me, the damages should be $500. Care and diligence must be exercised if other persons goous arc going to be taken.

A nd now lo the lra<.;lor on lhe road from Longonrnpu The Ba nk httd nol 01ily a registration num ber but, as well, an engine number for the sernred tractor 1-11-l. (See Exit p 243, for exampl e). Y ct nochecks were carried out (of either numher) when the part icular tractor was taken in, as 1 find it, quite high-handed <.;ir<.;u111stan<.;cs. Dul it was lhe wrung trac tor. That coul<) have been ascertained. Instead a measure of verba l "bull ying" or pressuring of the Defendants' employee took place, I find. The tractor was then dri ven, and l a ter towed, away; lo be reclaim ed, only after a considerable degree of asserti veness by the First Defendant a short ti me later. There was no rea l voluntariness about .the handing back by the Plaintiff ; and the ph ysical confronta ti on 1 will come to soon.

A gain a lack of care and dili gence in circumstances w here care and d ili gence were surely required - other persons' goods were being seized. The Plai ntiff, in dosing, admitted carelessness in taking this tractor and, agai n, now "accepts full responsi bili ty". The taking and initial detention were aggravated by the altitude displayed lo the owner, the Defendants, when they tried to stop its conti nued detenti on ; and the Ba nk' servant's performance in not then bothering to go to the Neiaru Police Station as a rra nged w ith the Defendants but instead going off to l unch w hi l st lhe Defendants did allend the Station to try and sort matters out exempli fies much of that alti tude, aggravati ng as I say it was.

Here then I make an award to the Defendants of $I 000 damages.

Counter claim - trespass lo person - assaul t of First Derendan t

In the confrontation over the trac tor, on 24 May 1994, undoubtedl y both the Fi rst Defendant and the Vava'u manager of the Bank became quite irate. The manager (for whose actionsthe Plaintiff accepts responsibility, asbeing in thecourseof his employment) I f ind (and in keepi ng with the attitude of not properl y checking identi fication of secured goods and of the altitude referred to i n paras. 134 & 135 above) did act w i th a degree of aggression towards the First Defendant both at the Ban k's truck window and al lhe tow rope between truck and tractor as the First Derendant tri ed to untie it.

One of the manager's fellow employees admitted (somewhat relucta ntl y) seeing the manager push the First Defendant on hisshoulder; otheremployees were, I find somewhat coy about, and evasi ve of, the issue when giving evidence. I fi nd that the most reliable account was given by the Second Defendant and I find she did not overstate or evade any aspect of what occurred between the 2 men. She described an initial slapping (not heavy

- a sort of brushing away almost) of the First Defendant's chest by the manager at the truck window; and a holding of theshirt and then a pushing away of the First Defendan t. by the manager, at the tow rope.

No injuries we e sustained. The First Defendant himself said that the taking of the tractor shocked him more than the pushing. That perhaps put the matter in context somewhat. Yet nonetheless this was trying to regain or recover somethin g he knew was wrongly taken and over which theBank Officers had been careless whether it should have been taken by them or not.

Para. 88 of the counter claim does overstate the position markedly (e.g. challenging the First Defendant to fight - no evidence of that; the manager having to be restrained - noevidenceof that); but nonetheless I regard the matter asquite serious and as aggravated by' the circumstances and background I have described.

The prayer here is for a part of the $150,000 claimed (para.94) for this assault and the defamatory advertisements. I fix the damages here in the sum of $1000 in favour of the First Defendant. As I said at the start it was these events that set off this litigation and it is worthy of note that First Defendant said in cross examination that it was the Defendants' intention to repay until the events of May 1994. That of course also reflects on the earlier issues of payment of the Bank overdraft (see para. 68 above).

Remaining Issues

Given proper adjustments for the 2 sets of (as I find) unauthorised U.L.Fs there should be judgm ent jointly and severally against each of the Defendants for the proper bala nce and interest at 13.5% on the Marketing account (para 72 above)and for the proper bala nce and interest at 13.5% on the personal account {para *'OT* above). When those figures are calculated and provided formal ju dgments will be entered.

As well I am prepared to make orders in favour of the Plaintiff (as sought) for possessi on of the tractor H 14, the truck H 64, all 10freezer containers, plantation stock and frozen goods (I believe that there may benone of lhe latter left at all). As toplantation stock, I will come back to that.

I have heard argument as to thewords:- Exh. p 204 "loan agreements charging over" which words precede li1e listed chattels. Those words are meaningless. There were no separate loan agreements. All parti es intended that those challels were to be secured by the loan agreement (at Exh. p 204) itself. The agreement more perfectly should read "Security - charge over tractor etc". But thereis no uncertainly. If recti fication is required (and I am not sure that it is) I would grant it (as I am permit led - S.80 Evidence Act - Cap 15). As I say orders for possession, based on thesecurity provisions, should anddofollow.

I have already expressed my view earl ier (paras.21, 57, 74) as to "stock". Given the general penal provision in the Land Act, s.16, I take the view that i n context here, stock means harvested plantation produ ce - not crops still growing. Bui as the matter has proceeded, and as now argued by the Plaintiff, this is of Jillie moment. The earli er injunctions covering lhe 1994 and 1995 vanilla harvests are exhausted. If there is any harvested plantation stock, which I doubt, then it is covered by the orders I have made in para.143.

In fact there is a net loss of some $572.64 from the 2 years vanilla operations - with still some other disputed expenses claimed by the lasl appointed supervisor, Mr. Warbrooke, (under lhi.> i njunction of 25 May 1995). 1 still need lo hear from Mr. Warbrooke about those disputed invoices nos. 9 - 19 (A ug - November 1995) although

I am inclined to think that some may be outside the terms of appointment

Subject to that there should be some small amciunt in ihe 2 Bank of Tonga accounts held in this C se's name (under 02-409394-36 and 02-408871--36) for payment out to the Plaintifr and there wlll be orders accordingly directing payment out to the Plaintiff.

The Plaintiff also seeks an order (or possession of Leasehold 4883 situated at Longomapu, Vava'u.

I am not prepared to make such an Order. Fjrst the securily provision is a pledging of the "registered mortgage" - not the land. The Bank has that mortgage - see E:<h.pp 137K - to 137Q - registered on 28 May 1990 - see fah. p 86.

Secondly the Bank has power to exercise its authority and take possession of the land claimed under the mortgage and pursuant to s.109 of the Land Act {Cap.132).

Th_irdly I have the view that this matter is not; and cannot, come within the civil juri sdiction of the Supreme Court. I refer to s.149 of the Land Act. It is explicil. The Land Act is a code for determining land issues in Tonga. I agree with Dal gety J in Tu'ipulotu v Fau L 134/93 (3 December 1993) as to that - ref. p 4 para .5. I take a different view to Dalgety J as to the "disputes claims and questions" - having to be one of tilie affecting land. In my reading of the section it relates lo juri sdiction to hear and determine:-

660 (a) all disputes affecting any land or interest in land

(b) all claims affecting any land or interest in land

(c) all questions of title affecting any land or interest.in land.

The matter of possession of land under a mortgage is in my view certainly such a "dispute•, 'claim" or "question of title"; and the fact that the Land Act specifically deals with morgages (a whole Part, Part V I) and especially mortgagees taking possession (s. 109) indicates clearly where jurisdiction does lie - and Not in this Court.

The Plaintiff has its rights under s.109. I am not going lo be drawn into making declarations in this civil juri sdiction.

670 The Plaintiff will have judgm ent against the Defendants, jointl y and severally, for the figures to be calculated - refer to paras. 143, 145 and 147.

The Defendants will have judgm ent against the Plaintiff for

(a)	pursuant to para. 123 above	$1100
(b)	pursuant to para. 130 above	$7000
(c)	pursuant to para. 133 above	$500
(d)	pursuant to para. 136 above	$1000
(e)	pursuant to para. 141 above -	$1000 (First Defendant only)

I will now wi sh to hear counsel on any other matters arising and on costs.

Kilisimasi v Malani & Tonga Telecom

Supreme Court, Nuku'alofa
Lewis J
10 C.44/90

29, 30 April, 19 July 1996

Negligence - damages - head injuries - nursing care - foss ojeaming capa city
Damages - heard injuries - foss eaming capa city

This case involved the assessment of damages on a verdict of negligence against the defendants in favour of a (at trial) 86 year old man who sustained inter alia a closed head 20 injury which gave rise lo an organic mental disorder diagnosed as amnestic syndrome (with impairment in short and long tem1 memory).

Ileld:

1. Damages are recoverable for any recognisable psychiatric illness caused by the breach of duty of the defendant.
2. Damages should be awarded for assistance given by the family to the plaintiff whil he was ospitalised, for pa1 and suffering ($4000); for Joss of future eam111g capacity (for 4 years, from age 79) ($3800); the ramily's nursing 30 assistance after hospitalization ($9000 - the proper and reasonable cost of supplying that need); together with interest on the various awards.

Cases considered
Hinz v Berry [1970) 1 QB 40
McDermott v Ramadan ovic Est (1988) 27 BCLR (2d) 45
Rhodes v Canadian Nat. Railway (1990) 75 DLR (4th) 248
Donnelly v Joyce [1974] QB 454
Roach v Cates [1938] l KB 256
House craft v Burnett [1986] I All ER 332
40 Jefford & anor v Gee [1970) l All ER 1202

Statutes considered
Civil Law Actss. 3 & 4

Counsel for plaintiff
Mr Niu
Counsel for defendants
Mr \V Edwards

Judgment

The Plaintiff in this action successfully appealed averdict recorded by th Ina JU e in favour of the defendants. The appellate court ordered that the matterbe rem1ttd to this court for assessment of damages and reversed the verdict recorded by e tnal court concerning liability. The Plaintiff has a verdict against both defendants with no order of contributory negligence.

The claimarises out of a collision between a van owned by the seconddefendant and being driven by the first defendant. Th plaintiff s now approxi'.11tely 86 ears of age. hewas seriously injured in thecollision. His principal source of difficulty anses rom the closed head injury, (now stable) he sustained which is an "organic mental disorder' diagnosed as "amnestic syndrome." - (Dr Puloka Exh. Pl).

The essential feature of thesyndrome isimpairment in short and long term memory that is attributed toa specific organicfactor. A personwith an amnestic syndroehas beth an ongoing inability to learn new material and an inability to recall matenal that was known in the past. Events of the very remote past are better re-called than more recent events.

Associated featuresof thesyndrome, disorientation anq confabulation,(therc1talion of imaginary events to fill in gaps in memory) are often observed but tend to disappear with time. Apathy, lackof initiative and emotional blandness are common. Altough le person is superficially friendly and agreeable his or her affect is shallow. Impairment in occupational or social functioning is usually moderate to severe.

Among other causes amnestic syndrome may result from any pathol?g1cal procss foreitample head Trauma. -[Diagnostic and statistical manual of mental disorders (third edition revised) - Sub-nom 'DSM lllR"].

In the present case the plaintiff presented to Dr. Puloka with a hsoryof hav1 gbe n in a vehicular collision in which he suffered a severe tlosed head mJury rendenng him unconscious for about oneweek. When heregained consciousness hedemonstated loss of memory. There was no evidence of bony fractures and the plamllff was discharged after 25 days of hospitalisation.

No issue is taken with the diagnosis of Dr. Puloka by the respondents nor 1s issue taken with the factual consequences attributable to the syndrome in the patient. I am satisfied that the plaintiff suffered a closed head injury as a direct consqu_ence of e negligent driving of the first defendant who struck n knocked the plamt1ff fro his. bicycle. As a consequence I am satisfied that the plamh ff suffered shock and ass1 ted pain and was rendered unconscious for a period of about ne_wee and was hospitahed forsome 25days. ltisthe sequelof events following theplamtiff sdischargefrom hospital from which most differences arise between the parties.

I take the law to be that "damages are ..... recoverable for ..... any recognisable psychiatric illness caused by the breach of duty by the defendant.• - Hi_nz v Brry [1970] 2QB 40 per Lord Denning M.R. The decision, or more accurately the d1_c1um 1ted, supra, has been the subject of adverse judicial comment and commentators dissent 111 a number of cases _ see : McDermott v Ramadanovic Estate (1988) 27 BCLR (2d) 45 at 53, per Southin J and Rhodes v Canadian National Railway (1990) 75 DLR (4th) 248 at 289. However I am satisfied that the diagnosis of amnestic syndrome in the present case amounts to a psychiatric illness which was caused by the negligc.nce of the defendant on any view of the evidence.

ASSISTANCE GIVEN THE PLAINTIFF BY HIS FAMILY WHILE HE WAS HOSPITALISED

The Plaintiff's son and other members of the family visi ted hospital on a daily basis bringing with them sustenance forhim and clean clothing. The defendant takesthe point that since he was unconscious there was no need for their attendance.

In my opinion there was justification in their attendance. No-one was able to say when or whether the plaintiff would regain consciousness. They had made clothing and sustenanceavailableforsuch an event and hisclothing would haveto be changed whether he was conscious or not.

The evidence supports the inference that what the son and relatives did was reasonable arising as a direct result of the injury the plaintiff sustai11ed be reason of the negligence of the defendants.

I allow $12 per day for visits by the plainti ff s son on 25 days ie 12x $25= $300.00 I further allow $15per day for a family member tobepresentduring every 24 hour period in case the plaintiff awoke or was in difficulty beyond those difficulties which held him inhospital, e.g.fallingfrom bed.Theevidence is that there wasa need (beyond lheregular nursing staff) for the plaintiff to be walked regularly and for people to talk with him on his regaining consciousness. I allow 5 days at $15 per day i.e. $75under this head.

PAIN SUFFERING

That the plaintiff suffered pain as a consequence of the injuries innicted upon him by negligence of the defendant is proved beyond anydoubt. This Court is entitled to infer that pain was a natural consequence of the injuries of the pla intiff. The loss of consciousness of the plaintiff isalsocompensable as suffering of the plaintiff fora period of 5days. Ifthere were to be any doubt about that then the unconsciousness is in my view compensable as being a loss of the amenity of enjoyment of life. The evidence of Poasi Kilisimasi is that the plaintiff was moaning with pain from time to time, was given tablets for pain time lo time and that the plaintiff still appears to suffer pai n al the lime of trial. Prior to the collision the plaintiff was a healthy man who suffered no infirmity.

The quantification of general damages for pain and suffering is a matter for the proper eitercise of the discretion of the court.

In approaching the assessmertt of general damages (those awarded for pain and sufferingand loss of amenity,) I have taken into account the good health enjoyed by the plaintiff prior to the collision, the severity of the closed head injury he sustained and its consequences and in particular that at least to thedate of trial and on the probabilities until his death the amnestic syndrome will continue to disaffect the plaintiff. I award him $4000.00

ECONOMIC LOSS

LOSS OF FlITURE EARNING CAPACITY

When theplaintiff was injured he was employed. Theeitpectation on all sides is that he would have continued to have been employed had it not been for the injury which he sustanined in the intervening collision. Al the dale of the collision he was earning TOP$25, per week. The almost imponderable questions are:- for how long would this elderly man continue to be employed and on what terms and would his wage vary and is so would his wage be increased or decreased?

The wages loss of the plaintiff to the date of this jud gment is easily calculated. It amounts to$25multiplied by the number of working weeks from the dale of the collision.

The evidence is that the plaintiff has not been employable since the collision. Laupele Tupou spoke or the plaintirrs earnings and his duties. He said the plaintiff earned $25.00. I infer that $25 was the plaintifrs weekly earnin g. Tupou searched for documentary evidence of the earnings but was unable to find any. I accept the weekly earnings were *$25*. Thereis no evidence as to whether this is a gross or net sum - (ie before or arter lax). I assess iias a net sum therefore.

Counsel for the plaintiff urges that the evidence or the former good health or the plaintiff together with some other factors raise the likelihood of his continuing in gainful employment with the then employer Gateway Enterprises Limited for a period of some 5yers had he not been injured.

Doing the be t I can from the evidence I would alkJ\Y. the plaintiff (79 years old at the date of collision) 4 further years employment at $25 per week, ie 4 years at $1200 per annum total1i1g $4,800.00. Itreflects his retirement on his attaining the age or 83 years. THECLAIM FOR NURSING ASSISTA NCEBY THEFAM ILY OFTHEPLA INTIFF AFf ER HIS DISCHARGE FROM HOSPTJM,'

Relatives or an incapacitated person may provide h i m with regu lar care and attendanceand so save him the expense of a paid nurse and like care. The Plaintiff in this assessment is such a person and theevidence has been that in the first yea r or his incapacity and to a somewhat reduced amount in later years his son and daughter in law ha ve had the disruptive and trying obligation of caring for his needs.

The loss claimed is the plaintif rs loss and his loss is the existence or the need fora nursing service the value of which - for the purpose of damages - is for the purpose or the ascertainment of the amount or his loss - is the proper and reasonable cost or supplying that need; Donnelly v Joyce [1974) Q.B. 454 at 426A per Megaw L.J.

There isevidence which I accept that the plaintiff lost the control of his bladder and bowels following the injury sustained in the collision. I accept the opinion of Dr: Puloka that there was such a possibility.

The evidence of Dr. Puloka coupled with the evidence from the family or the plaintiff of such occurrences persuades me that the bowel and bladder incidents are directly attributable to the injuries of the plaintiff in the collision and not to declining health with progressing years.

In the year following the collision I find that there were 4 or 5 incidents of wetting and or soiling by the plaintiff per day and the son and daughter in law of the plaintiff chose to clean up after the incidents, that method being the less expensive option. There is a claim for sheeting and clothing the point being that the increased frequency of laundering caused the plainti rrs son and his wife a necessity to replace worn out sheets and clothing more frequently.

Thedefendants arguethatthe wetting/ soiling evidence isspeculative and unreliabl e. Taking into account the whole of the evidence and the submissions of counsel I make an allowance for the increased burden placed upon the son and daughter in law or the plaintiff. They found it necessary to expend sums towards keeping the plaintiff and his environment clean and in so doing were forced to expend monies they would not have spend had the plaintif not been injured. The claim is not that of the son and his family. It is that of the plaintiff.

The expenditure of cleaning materials toilet paper etc. and the wear and tear on sheeting and clothing are properly items of the plaintifrs claim. I treat them as such and

compensate accordingly.

What is a fair amount in all the circumstances for the ex 1enditu11 b son and daughter in law at Vaotu'u b th . efforts on the plaintiff's behalf/ o m money terms and 111 tenns of thei r pl•ysic.1

The law to be applied is that of the common law of E general application (Civil Law Act *25* ss.3 and 4 . The law ngland and the statutes Ci commences with the decision of the Court of *A*) 1 . R , as I am presently advise::! (CA) and later in Donnelly v Joyce [1974) Q.B. 454 CA ppea tn oach v Yates [1938) l KB Housecroft v Burnett [1986] 1 All E.R. 332 (C.A.). (· .) and more 1ece11tly m

The latter is a case where the who it was anticipated would neeec t:il IJUr to a young girl_of 16yt:. mother and some hired outside care O'connor 'd . er e expectancy aided by I. respect of her mother's care:- sai 111 respect of the sum assesse·!

"On e it is understood that this is an element in the award to the plaintiff t:i r vde for te reasonable and proper care of the plaintiff and that a capital su; is o . e ava1 able for that purpose, the Court should look at it as a whole .*wi* consider whetlcron the facts of the case, it is sufficient lo enable t he plai1 iff amongother thmgs to make reasonable recompense to the relati ve So. where the relati:e has gi ven up, gainful employment to look after the 1; 1; I would regard it as natural that the plaintiff would not wish the relati c to tie t1. . ourt would award suffi cient to enable the plaintiff to; iclJievc he

relati st: r et er; 1 : = = = = rtu ; h claim fr nursing aid which t k must be speculative and in an v event the evidence d ecause t e method of assessmect oes no support 1t 1t must necessarily be that any assessment mu t b b d presently is that after his discharge from hospital t:e p ai; if one'; 1dn ce. The e 1: icle 11\ and needed constant attention from relatives. Whereas befor: = II seno,us d1sor '::: l1ad a bicycl and travelled freely about the place, following the collis'1s1n t ie pla m li:. to manage his own affairs nor provide for himself ion Jc was unal» , food cloth: mg lod g ing an d h y giene. and became depe11dant 011 relatil'es f• ·: to his e :sf eefi h tr a teast dring the first year the choices ope'J with them and an allowance for caring for hi::.uca it = the costs of having him

I award the plaintiff a sum for the care provided t h' law and I assess ihe plainti frs loss under this head at $ his son and daughter "' INTEREST

Having considered the submission of c f of Lord Denning M R in Jefro d d A lounse 1 re ern ng as they have to thejudgmen • interest and itemise it against the particular d f d r an not 1er v Gcc (1970] 1 All E R 1202 I will SUMMARY awar s o amages made.

I assess damages as follows:-

1. General Damages For Pain Suffering and Loss of Amenity
   $4,000.00 - plus interest to be calculated at 4% from the date of lh' service of the writ 30 May 1990.
2. Economic Loss

A loss of earnings at the rate of $25 per week from the date of the injury until 5 December 1992 - $3,800.00 plus interest at the prevailing bank rate for investment return on $3,800.00 from the 30 May 1990 until paid.

3. Assistance given by Family during Plaintifrs Hospitalisation
   1. The Plaintifrs Son
      I allow-25 days @ $12 per day travtlling expenses. $300.00
   2. Other Family Members
      I allow $15 per day for 7 days for the 24 hour presence of a person during Plaintiff's hospitalisation while unconscious plus interest at 4%.
4. Care Provided by Relatives in Lieu of a paid Nurse 5.12.88 to present I allow $9,000.00 plus interest @ 4% from the date of service of the writ ie 30 May 199Q to the present.
5. Special Damages
   Expenditure by relatives on sheetin g and cleaning etc. I allow a sum but which is from t .1.89 until the present. To be calculated by Counsel plus interest @2% until 9 August 1996, until paid.

Costs of this assessment to be those of the Plaintiff to be taxed or agreed.

Li v Katoa

Supreme Court, Nuku'alofa
Lewis J
C.72195

16 July, 16 A ugust 1996

Damages· bailee ·breach of duties
Deti11ue ·goods ·writfor recovery .damages
Co11versio11 ·goods ·damages for loss
Bailme;lf .duties of bailee ·damages

The plaintiff sued fordamagesfor breaches of contracts and asan alternativefortheretum of certain equipment. The maller is reported only as to certain aspects relating to the goods.

Held:

L. The claim for possession of goods derives from the Torts (Interference with Goods) Act 1977 (UK) which replaces the issue of a writ of dctinue (which enabled a recovery of the goods themselves, or their value and consequential damages).

2.. Loss or destruction of goods in breach of a duty by a bailee which did not constitute conversion at common law is made into a statutory conversion by the ll.K. .'\ct.

3. The nature of the bailment, whether gratuitous or for reward, or whether voluntary or involuntary, will detennine the scope of the duty owned by the bailee.

4. Here the defendant was a voluntary bailee for reward and was liable for thevalue of the missing goods. His was a statutory convrsion under the UK Act.

5. Judgments were made accordingly, for the plaintiff.

Statutes considered — Civil Law Act ss.3 & 4
Torts (Interference with Goods) Act 1977 (UK)

Counsel for plaintiff — Mr W Edwards
Counsel for defendant — Mr Hola

Judgment

The Plaintiff in this action Kevin Ll. claims damages for breaches of agreements which were made from time to time between himself and the defendant one Havea Katoa. As an alternative head of claim the plaintif(seeks an order for the return of certain identified equipment and/or damages in lieu thereof.

The alternative claim for "possesion" derive now from the Torts Onterference With Goods) Act 1977 UK to which this court must resort as a statute of general application within the meaning of the Civil Law Act Cap_25 ss. 3 and 4. The defendant has filed a defenc-ean d a coun_terclaim in which there is a general denial of liability pleaded in the defence and a counterclaim which pleads that the plaintiff has "unlawfully eized' specifid equipment and tools of ihe defendant Formerly the actions on the claim and counterclaim would have arisen by the issue of a writ of detinue.

A person with a right to an immediate posse$sion of goods could, by way of an action in detinue, recover the goods themselves or payment of their value and consequential damages upon evidence that the defendant had wrongfully refused to deliver up the goods on demand. Loss or destruction of goods in breach of duty by a bailee with did not constitute conversion at common law is "converted" into a statutory conversion by Section 2(2) of the Torts (Interference With Goods) Act 1977.

The nature of the bailment whether it be gratuitous or. for reward or whether it is voluntary or involuntary will determine the scope of the duty owed by the Bailee.

In the present case the defendant did not appeal at trial. No defence witnesses were i>resent nor did Mr. Hola of counsel for the defendant seek to call witnesses. Mr. Hola infom1ed the court that his client was not present and that counsel had received infqrmation from the wife of the defendant that her husband was presently hospitalised in the United States of America, had been so hospitalised for about one month at that time and would not be appearing at trial. No more it seems was known by counsel in spite of counsel's best efforts. The plaintiff presented his case, gave evidence and applied for judgment on his claim and that the counterclaim be struck out in the absence of any evidence on the pa1t of the defendant. Albeit that he defendant had filed proper pleadings by way of defence and counterclaim. (The facts were then set out).

From the evidence before me I am satisfied that the allegations in paras 3 and 4 of the statement of claim are proved. In my opinion Katoa became a voluntary bailee for reward at the moment of execution of the agreements and each of them in respect of which possession is sought and remains so and becomes liable for the value of the missing goods. The loss of the goods in the hands of the defendant becomes a statutory conversion pursuant to the provisions of the Torts Interference with Goods Act 1977 S.2(2).

Having succeeded in establishing right to the mis.sing goods what evidence is there of lhe value of them in order to assess damages?" There is no evidence before me of the value of the mi ssing items. Since no value of the goods has been proved I am unable to assess loss. I award nothing under this head of claim.

SUMMARY

1. A gref.ment 8.12.93
   There being no evidence of the value of the goods converted by the defendant from the plaintiff it is ordered that the defendant return to the plaintiff those items of personalty listed at page _ Jf this judgment.
2. Aglecment 6.6.S..

It is ordered that the defendant pay to the plaintiff the sum of $19,200.00 by way of damages for unpaid hire char_ges (vide page 8 of this judgment).

3. Agreement 11.7.94
   It is ordered that the defendant pay to the plaintiff the sum of $4208.00 by way of damages for unpaid hire charges. (vide page 7 of this judgment).
4. A greement 10.10.94
   It is ordered that the defendant pay to the plantiff the sum of $J 2,600.00 by way of "damages for unpaid hire charges. (vide page 8 of this judgm ent).
5. Claims set out in paras.32 and 33 of the statement of claim
   It is ordered that the defendant pay to the plaintiff the sum of $1410.00 by way of damages for the assessed value of the missing items.
6. The truck
   I allow the Plaintiff 15 loan repayment instalments at $450 less the amount paid by Katoa namely $1,350.00 = $5,400.00.
7. Advances by the plaintiff lo purchase Mokohunu
   It is ordered the defendant P.ay to [he plaintiff the sum of $56,463.40.

It is further ordered that the defendant pay the costs of these proceedings to be taxed.

Bank of Tonga v Liava'a

Supreme Court. Nuku'alofa
Lewis J
C.644193

24 April, 23 August 1996

Ba11king Law - duties of borrower - joi111/iabilite
Contract - banking - security offered - privily.

The plaintiff sue<l lhe representative of the defendant deceased estate for rcpi1y111enl of moneys claimed to be owed on and drawn form the deceaseds account.

Held;

I. The deceased had agreed to and assumed joint and several liabilit y, with his son under a loan agreement, with the dcceased's house being security.
2. The drawing of a cheque at the bank, when the drawer knows there are not sufficient funds in the account to meet it, may be taen as a request for an overdraft, and even when the drawer is not, as he should nonnally be, aware of the lack of funds.
3. Where the banker is in possession of a document where the client agrees to repay on demand, the banker would normally be entitled to take any action necessary tosafeguard its interests, even if it preju diced thoseof its borrower.
4. A banker, when agreements provide for it, is normally in privily of contract with each joint account holder.
5. The non-joinderof theother borrower (theson) therefore did not invalidate the proceedings.
6. The deceased must be seen as a borrower who was allowing his joint and sever (co-borrower to have the full access and operation of the loan accounts to whi ch he was a party. The deceased gave the securily jointl y with his son on that basis (of further advances by the plaintiff) on a number of occasions. There was nothing inequitable or oppressive about the circumstances leading to the loan agreement, although the consequences to the defendant may be dire.

(A successful appeal from this jud gment is reported in 1997 Tonga LR).

Cases considered Catlin v Cyprus Finance Corp [1983] QB 759

Counsel for plaintiff Mr Appleby
Coupsel for defendant Mr Niu

Judgm ent

The Plaintiff is a banker and the Defendant conducts these proceedings as the representative of the estate of thedeceased who died on 16January 1993. The deceased is hereinafter referred toas 'Tongotongo". The Plaintiff and the Defendant agree that the followi ng narrative represents the factual basis for the application of legal principle in this acllon.(The facts are not set out in full here).

Siosiua Tu'iono Liava'a (Tu'iono) is the son of Tongotongo. He operated a cheque account with the Plaintiff on 24 August 1987. The account was numbered 01 200133 02019.

On 24 August 1987 Tu'iono requested from the Plai ntiff a temporary overdraft facility [Pl]. On 25 August 1987 a loan agreeme nt and recei pt were signed by Tu'iono and Tongotongo for the amount of T$6,000.00 plus interest at 10% for the purpose of an overdraft facility - (the first overdraft).

Counse l have defined the issues for determination. The i ssues are defined by the following questions:-

!. Is the Defendant liable for cheques presented lo the account between 30 October 1987 and 6 November 1987?
2. Is lhe Defendant liable for:-
   (a) Drawings and
   (b) Interest
   Debited to the account after 16 November 1987?
3. Is the Defendant liable for:-
   (a) Drawings and
   (b) Interest
   That exceeded the amount of $15,000.00 in the loan agreement dated 6 Nove mber 1987?
4. Is the Defendant liable for:-
   (a) Drawings in excess of the agreed limit of $25,000.00
   (b) Interest thereon?
5. ls the Defendant liable for:-
   (a) Amounts debited to the account up to $15,000.00 plus interest less payments; or,
   (b) Amounts debited to the account plus interest less payments, plus further amounts debited to the acocount up to a limit of $15,000.00?

The nature of the liability of the estate of the Defendant will derive from the terms of the agreements which the deceased entered with the Plainti ff. The evidence of the dealing between the plaintiff and Tongotongo is as follows.

Tongotongo was first drawn into the matters before the court in an interview recorded in the Plaintifrs diary note dated 24..8.87 [Exh Pl]. Thereafter Tongotongo appears to have freely entered into the overdraft arrangements by signing the loan agreement [Exhibit P4 - PS ON] 25 August 1987.

There is no doubting that Tongotongo assumed liability equally with Tu'ionoin the loan agreement Exh P4.

On 30 October 1987 the two men made an application for bridging finance of $15,000.00 for thepurchase of the hotel tobe cleared by 16Nove mber 1987. Both signed

Both assumed joint and several liability.

Loan agreements P4, P5 and P6 provided that Tongolongo's dwell ing at Tofoa was security against performanc e by the borrowers under the loan agreements.

It is su bmitted at least by some commentators that "providing that the banker is in possession of a document by w hich the customer agreed to repay on demand, the banker would normally be entitled lo take any action necessary to safeguard h i s interests, even if it prejudiced those of his borrower. The drawing of a cheque or the accept i ng of a bill payable at the bank, when the drawer knows there are not suffi cient funds in the account to meet it, may be taken as a request for an overdraft and also when the drawer is not, as he should nonnally be, aware of the lackof funds." [Paget's Law of Banki ngTenlh Edition 1989 PP.182, 183.]

I take the Jaw to be as presently advised that a bank where agreements provide for it, is "normally in privity of contract with each joint account holder." [Paget° Supra 186).

In Catlin v Cyprus Finance Corporation (London) Ltd. [1983) QB 759 Bingham J among other thing said (when considering the liability of a banker charged with negligently failing in its duty tonot pay monies toa husband and wifej ointly and severally deposiiing in their accunt without theirjointly signi'ng a withdrawal application{

> "Thedefendants agreed to honour instructionssigned by both account holders. This no doubt imported a negative duty not to honour instructions not signed by both account holders. This duty also could, in theory, have been owed jointl y, but it must (to make sense) have been owed to the account holders severally because the only purpose of requirin g two signatures was toobviate the possibility of independent action by oneaccount holder to the detment of theother. A duty on the defendants which could only be enforcedjointly with the party against the possibility of whose misconduct a safeguard was sought and where the occurrence of such misconduct through the negligent breach of mandate by the defendants would deprive the innocent party of any remedy, would in practical terms be worthless. Indeed, it would be worse than worthless, because a customer would reasonably rely on the two signatures safeguard and refrain from active supervision of the account, only to find when loss (allegedly irreparable) has resulted that the reliance was misplaced."

In the present action there has been a non-joinder of Tu'iono. As the commentator notes (Paget Supra 191) the adoption of the so-called Catlin solution disposed of an obj ection taken by the defendant bank in Catlin that the non-j oinder of Mr Catlin invalidated the proceedings. In my opinion the absence of Tu'iono in the present proceedings has its parallels in Catlin.

The immedia te distinction betwee n Catlin and the present case is that whereas in Catlin the plaintiff was suing the bank , here the bank is attempting to enforce joint and several liability against Tongotongo who was never contemplated as a joint venturer or cheque signatory. He merely put up his house as security against Tu'iono's loan arrangements. The second distinction is that ju st as one may have expected , there was never mention of the necessity or plain need to have Tongotongo as a joint signatory to the agreement P4-P5 Indeed theagreement makes no ment ion of how advances under the agreement were lo be moved about. Tongotongo therefore must be seen as a borrower who was allowing hi s joint and several co-borrower to have the full access and operation of the loan accounts to which he was a party.

The plaintiff advanced funds on the basis that there was security. Tongotongo must be seen to havegiven the security jointly with his son on that basis not once but on a uumbe of occasions n the facts as I have them before me. Although this court is bound toconsider nddoeqmty I am unable tosee that there is anything inequitable oroppressive about the circumstances leadmg to and the existence of the present loan agreement although the consequences to Tongotongo may be dire.

.1 have considred the arguments which counsel have placed before the court. ummg o_the questions asked by Counsel. On the facts as Ihave them before me and IIImy optmon the answers ought to be and are as follows:-

1. Yes
2. (a) Yes
   (b) Yes
3. (a) Yes
   (b) Yes
4. (a) Yes
   (b) Yes
5. (a) No
   (b) Yes

Moala & anor v Minister of Police (No.1)

Supreme Court. Nuku'alora
Lewis J
C.998/96

24 & 25 September 1996

Habeas corpus - summons - true meaning - Tongan version
Constitution - co111empl - habeas corpus - absofllle privilege
Parliament - contempt - absolute privilege

The two applicant journalists sought release from claimed unlawful and unjustifiable restraint of detention imposed upon them on 19 September 1996 by order of the Chairman of the Legislative Assembly, form days for contempt of the llouse. for publishing an article as to a „lotion to impeach the 1llorney General which was "nut correct" and was "disrespectfu l lothe Legislative i\s embly". Each complained about the procedure of and the summons to the Assembly.

Held:

1. The argument of the applicants was that they neither spoke nor acted disrespectfully in the presence of the Assembly. Thal was so. However cl.70 does not creates an offence for that behaviour alone, but creates a number any one of which will render a person liable for imprisonment.
2. The summons against them referred lo thearticle not being correct; and cl.70, in the Tongan refers to "lohiaki'i" meaning to lie lo or to deceive. S.21 Interpretation Act applied (upon the trial of any person for an offence against any law of Tonga) and the court should be guided by what appears to be the true meaning and intent of the Tongan version (and not the English version).
3. Parliament is entitled to absolute privilege over its internal proceedings and, in that sense, it is properly entitled to determine what words or actions will amount to contempt and the sauclion it should impose.
4. The applications were refused.

NOTE Applications nos. 2 & 3 are reported immediately hereafter.

Case considered — Fotofili v Siale (Privy Council 38/87)

Statute considered — Constitution cl.70
Interpretation Acts.21

Counsel for applicants — Mr Tu'utafaiva and Mrs Taufaeteau

Hon Minis\er of Police in person

Judgment

Filokalafi 'Akau'ola and 'Eakalafi Moala make application lothis court for the issue of writs of habeas corpus pursuant to SCR 0/28.

Each applicant seeks an order that they be released from unlawful and unjustifiable restraint or detention imposed upon him at 5.00 pm on 19 September 1996 by order of the chairman of the legislative assembly.

The grounds advanqd by the applicant Filokalafi 'Akau'ola are that the detention is unlawful and unjustifiable on grounds which he set out in a petition lo the legislative assembly. It bears interpolation into these reasons

Filoka lafi 'Akau'ola
Cf - Taimi 'o Tonga
PO Box 880
NUKU'ALOFA

16th September 1996

TO: The Legislative Assembly

Nobles

PETITION LEGISLATIVE ASSEMBLY OF TONGA

Reference lo summons dated Wednesday 1lth September 1996, No.2-1996

With respect I confirm receipt of the Summons to me, the Assistant Editor and Advertising Manager of the newspaper Taimi 'o Tonga, ordering me toattend the Legislative Assembly of Tonga on 19September 1996because of complaint made lo your Honour regarding me, all ging that l act disrespectfully lo the Legislative Assembly and reminding me that I may be imprisoned if I do not llend as required.

I Apologize to your Lordship and the Honourable Members of the Legislative Assembly, because the declaration of Freedom by virtue of the Constitution. I petitio11you Lordship by virtue of clause 8of the constitution. On my understanding that the summons of your Lordship directing me to attend and if I refused I will be committed of prison. I believe withou t any doubt it's an infringement of my legal right because there is no law or authority for your Honour to Order my attendance at the Legislative Assembly. If you were lo write and ask for my attendance I would be happy to oblige your Lordship with any assistance you may require.

The Summons affects my legal rights and I need advice from my lawyer, this Petition for.-

1. To require particulars of the charge against me in the Summons as provided by clause 11of the Constitution, namely, "Noone shall be tried or summonsed. to appear before any court or punished toappcar before any Court orpunished for failing to appear unless he have first received a written indictment ...• Therehas been nodecision by the Legislative Assemblyabout me before upon

which I may be said to act disrespectfully to the Legislative Assembly.

2. And if there i a pripr decision then you have already adjudged me to be punished. Thequestion would be which authority allowed the Constitution to legalise the decision by the Legislative Assembly because clause 10 of the Constitution provides that "No one shall be punished because of any offence he may have Committed until he has been sentenced according to law before a Court ha_vingjurisdiction in the case." You have not specified any provision in law that Ihave breached and upon which Imay be punished as for the said Summons.

3. My legal rights whilst under the protection of the Nationa l Rag which is the cornerstone of the freedom provided by the Constitution, Iof very your authority tojud ge this matter:

   a. Dohave any rightto be protected by clause 75of the Constituti on regarding this Summons in yourauthority in my defence asIam not a member of the Legislative Assembly of Tonga because clause 84 of the""constitution is the authority k:i judge anyone who is not a member of the Legislative Assembly, it is for a Court established According tolaw..This issupported by clause30of theConstitution specifying the manner of ruling this country:

      i. King, Privy Council & Cabinet
      ii. Parliament
      iii. Court

   Tome, it is Parliament whoenact the law but for the Court tojudge according to that law is breached by any member of Parliament.

   b. Will be havingany legal right under your authority to elect trial by jury orjudge alone, or is it the Legislative Assembly who would be judging my case, because judges take the oath to carry out their duties impartially injudging cases and that is supported by clause 15of the Constitution, or will you be judging me in accordance with clauses 75 and 69 of your authority under the Constitution.

   c. Will Ibe judged in your presence or will it be at a forum enabled by law for me to explain freely without fear of justice being affected, for it is Parliament which summoned me but Iam not a member of Parliament in accordance with clause 14 of the Constitution, not to force liberty, and my adjudi cation be impartial as provided by clause 15of the Constitution.

   With respect to your Honour and the Legislative Assembly of Tonga, it would appear that Iam threatened and convicted by the Summons and I have lost my freedom and liberty as set out in clause 14.

   I submit that the power tojudge and punish me is with the Courts of Tonga, and not in the Legislative Assembly of Tonga. In the Summons I have received it does not charge me of breaking any law in this Country. If there is any member in the Legislative Aesembly who is unhappy with my performance_of my duties I believe it is open in law to claim his right in Court.

I hope.that you would accept my petition and wish to have response from you within two days so that I may prepare my defence.

Yours faithfully,
Filokalafi 'Akau'ola

On his part, 'Eakalafi Moala enumerates he grounds upon which he makes complaint of his detention as follows:-

8. I am now in prison and honestly believe that my imprisonment is both unlawful and unjustifiable because:-

   (i) Iam not a member of the Legislative Assembly
   (ii) The said article was not published in the presence of the Legislative Assembly.
   (iii) The Legislative Assembly cannotlawfully invoke the power under clause 70 of the Constitution against me.
   (iv) The Legislative Assembl¥, who have a vested interest in this matter, was the body who charged, adjudged, me to be gmlty and sent me to 30 days detention in prison.
   (v) The procedure adopted byt he Legislative Assembly was unfair and unjust.

Jn her affidavit, Paluvava'u Taufateau, junior counsel before me and counsel for both applicants before the legislative assembly narrates the procedures adopted by the assembly. The affidavit is neither challenged as to fact nor is it criticised. Itis however, impliedly rejected by therespondents as totheclaimsof unlawfulnesstheaffidavit makes.

Clause 70 of the Constitution provides as follows:

70. If anyone shall speak or act disrespectfully in the presence of the Legislative Assembly it shall be lawful to imprison him for thirty days and whoever shall publish any libel on the Legislative Assembly, or threaten any member or his property, or rescue any person whose arrest has been ordered by the Legislative Assembly, may be imprisoned for not exceeding thirty days.

The argument of the applicants is that they neither spoke nor acted disrespectfully in thepresence of the legislative assembly. On any account of events that is so. Hqwever the clause does not simply create an offence for that behaviour alone. Itgoes on to create a number of transgressions the performance of any one of which will render the person liable for imprisonment.

The summons which brought Filokalafi 'Akau'ola to the assembly is indeed in the broadest terms it says:-

In the Legislative Assembly to Tonga
Nuku'alofa No.2 of 1996

To: SUMMONS

Filokalafi 'Akau'ola of Kolomotu'a
Nuku'alofa
TONGA

There isa complaint to the Legislative AssemblyofTonga regarding the Newspaper "Tai mi 'o Tonga" whereby you are the A ssistant Editor and Advertizing Manager, published on Vol.8 No.36 on Wednesday-I or September, 1996. l lpub!ishes article on Impeachment by the Legislative Assembly which is not correct and it is disrespectful to the Legislative Assembly .

You are hereby summoned to attend the Legislative Assembly at Nuku'alofa Thursday 19th of September 1996 at 10 o'clock in the :norning.

A nd ta ke Not ice if rail lo comply with thi su111111011s a nd)'l>ll do not allend, you will be commi tted to prison .

Dated Wednesday 11 of September 1996

Chairman of the Legislative Assembly

In his submissions to the court regarding this application, the Honourable l\.linister of Police makes a point which bears consideration. The submission is that the word used in clause 70 in the Tongan language copy of the constitution i s "lohiaki'i". ll means "to lie to or to deceive". Section 21 of the Interpretation Act Cap l provides:

> 21. If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions·of the section which the accused person is charged with violating differ in mean ing, then, in deciding the questionof theactused person's guilt or innocence the court shall be guided by what appears to be the true meaning and intent of the Tonga version. (Amended by Act 20 of 1978).

Given the wording of the section it can be een that in the Tongan version the Constitution clause 70 plainly contemplate s a usage of the word lohiaki'i to mean to deceive or to lie. The English usage of the word to libel also contemplates a usage which may mean 'to publish a false statement so damaging ... reputation'.

The law in Tonga is well settled. Itwas plainly spoken in the decision in Fotofili -v- Siale (unreported 3 August 1987) there the Privy Council said:

> "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that itspassage through thehouse was attended by any irregularity. The same isnot truein Tonga where there is a written Constitution. If , on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwiseof the validity of a supposed law, itfollows thatthe question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.
>
> Again, a statutory provi sion can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the house was not attended by any irregularity."

It must be clearly understood that parliament is entiUed to absolute privilege over its internal proceedings and in that sense it is properly entitled to determine what words or actions will amount to contempt and the sanction which it should (subject to the provision s of clause 70) impose upon a person whom it finds to have committed a contempt of the house,

The applications for the issue of writs of Habeas Corpus are refused.

Moala & ors v Minister of Police (No.2)

Supreme Court, Nuku'alofa
Leu1isJ
C.938, J()l:'i & 1 0461 96

4 & 7 October 1996

Habeas corpus - co11te111pt of Parlia111e111 - close of Parlia111e111
Co11stit11tio11 ·habeas corpus ·co111e111pt of Parlia111e11t
Parlia111e11t - co111111i11al for contempt - close of - habeas corpus

This was the second application for habeas corpus by the two journali sts Moala and 'Aau'ola nd the first by a pa rl iamentarian, Pohiva (although he appl ied for judi cial review w l11ch the Court held was i nappropriate and treated as an applicati on for habeas corpus).

Held:

1. The laim Iha the.detention was unlawful and t11tjustifiable was a repeat of the previous application, and failed.
2. A new ground was argued - that Parliament having closed (on 3 October 1996) they should now be released.
3. The Order of the Assembly was clear and unambiguou s they were not to be released until after the expiration of 30days orotherwise ordered by Parliament for a shorter time.
4. Parl arnent must be presu med to mean what i t says. The Order does not say that 1f Parliament ends (in anyway) then the applicants should be released. The Parliament had expressed its will in specific tern1s and the court may not interfere.
5. All 3 applications were declined.

Cases considered

Stockdale v Hansard (1839) 9 Ad & E 114

R v Richards exp. Fitzpatrick & Browne (1955) 92 CLR 157

Counsel for applicants Mrs Taufaeteau
Hon. Minister of Police in person

Judgment

These are three applications for writs of habeas corpus. Two arplications, those of 'Akau'ola and Moala are second and subsequent applications to earlier applications for the issue of a writ of habeas corpus which were denied.

The third application is that of one 'Akilisi Pohiva. Putting it shortly, his application is by hand-written letter couched in lay-language and not in the form prescribed hy R.S.l. 0.28. The application of Mr. Pohirn is for "Judicial re,-iew nf the imprisonmnl >enally awarded against me by the assembly" ..... and .... •,\ Court Order Term1nat1ng the Imprionment Penalty".

Mr. Pohiva makes an allegation that he ought not he held 111 custody s111ce the Legislative Assembly which imposed the committal to pri son order "is already closed".

I hold that this court is not bound by matters of form in these circumstances. The authority holding all three men at the direction of the Speaker of the House, is the I Ion. the Minister of Police and Prisons, W.C. Edwards doing so at the direction of the chairman of the Legislative Assembly to Tonga.

The Hon. the Minister undertook to appear in person, to make subm1ss1ons and to produce all three men from pri son in order that they may b heard. S it was. . .

Havin g read the application of Mr. Pohiva and havmg hear his subn11ss1ons I conclude that he has taken a course not open to him in choosing judi cial review. R.S.C. Order 27 makes no provision for such an application to be made against the Legislative Assembly in the context of this application or at all.

Next, I treat his application for release, or, as he puts it "A Court Order tenmnating the imprisonment penalty" as simply an application for a writ of Habeas Corpus - the only recourse open to him at law.

I tum to the applications of Messrs 'Akau'ola and Moala. Each man adva11ces two grounds in this his second application for the issue of a wri t:-

(i) That their detention in unlawful and unjustifiable. This ground appears to repeat their application to this court for a writ on 25 September. A ccordingly, as on that occasion, their application fails.

(ii) Since the parliament which committed them to prison is no longer is session, they should be freed. This second ground requires further consideration.

The decision of His Majesty in Council of 27 September 19% is as follows:-

"The 19% session of the Tonga Legislative Assembly is to be officially closed by His Majesty on Thursday 3rd October 1996".

Judicial notice may be and is taken of the fact of the closing of the session.

By letter dated 29 September 1996 the chairman of the Legislative Assembly wrote to the Minister of Police, the respondent to this application, stating.

'To the Minister of Police
Nuku'alofa

The Legislative Assembly Ordered ot imprison:-

1. 'Eakalafi Moala
2. Filokalafi 'Akau'ola
3. 'Akilisi Pohiva

for 30 days commencing 5o'clock on the afternoon of 19 September 19% by virtue of the power vested in the Legislative Assembly by clause 70 of the Constitulion and the judgment of the House on this day regarding their i111r1isonmenl.

They are not to be released until afler the expiration of 30 days or otherwise ordered by Parliament for a shorter time. ·

I ask to immediately give effect to this Order.

CHAIRM/\N OFT! IE LEGISLATI VE A SSHIBL.Y -

Thus the argument 1t111 b) lhc lhree applicanls is that the) canm,t lan-full) be held by the Minister or indeed anyone, once Parl iament ceases to be in sesion. They argue that since Parliament is no longer in session they must be immediately released.

The f\,linister submi 1s in answer to the lhree applications that the order of llH: Legislatile Assembly is not indeterminate but clear and unambiguou It is indeed clca1 and unambiguous. II concludes with the admonition -

"..... They are not to be released until after the expiration of 30 days or 01herwise ordered by Parliament for a shorter time".

Parliament must be presumed to mean precisely what i1 says. What the speaker's direction does not say is - if Parliament be brought to an end by dissolution, by prorogation or by, (as happened here), the decision ofl Is l\lajcsty in Council looffici:illy close ii, then the three applicants shall be released.

In England the I louse of Commons appears no longer to ha\e power to detain offenders in pri son beyond the period of a session.

> "The privilege of com milling for contempt is inherent in every deliberative body invested with authority by the constituti on. Bui, however nagrant the contempt, the House of Commons can only commit t till the close of the existing session. Their privilege to commit is not bette r known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence bei ng committed the day before a prorogation, if the House ordered his imprisonment for but a week, every court in Westminster lrnll and every judge of all the courts would be bound to discharge him by habeas corpus".

Stockdale v Hansard (1839) 9 AD & E l 14 per Lord Denman CJ.

The most recent practice had been for the Commons to commit during i ts pleasure until the offender had expressed contrition for his offence or the house was satisfied on motion that it was proper to release him.

In R v Richards Ex parte Fitzpa trick and Browne (1955) 92 C.L.R. 157 the Australian House of Representatives (which has the same pri vileges as the House of Commons), impiisoned two men for a specified period, the house directing that they be "Kept in custody until 10.9.55 or until earlier prorogation or dissolution un less this house should sooner order his (sic) discharge•.

In this case the Legislative Assembly has expressed its will in specific terms. The direction of the speaker makes no mention of prorogation or of dissolution. It is specific.

In my opinion the direction here given lo the Minister of Police is unambiguous and legitimate as a command of the Parliament. It is that the th1ee men shall be imprisoned for thirty days commencing 5.00 pm in the afternoon of 19 September 1996 ..... and that they are not to be released until after the expiration of thirty days "or otherwise ordered by Parliament for a shorter time". There is no Order of Parliament is existence which

shortens the time of the duration of the sentences.

I conclude that this court may not interfere with this direction and Order of the Legislative Assembly. I find that the Order is neither unlawful nor i n any technical sense unjustifiable cbncerning the comrnital of these two men.

As to the prisoner'Akilisi Pohiva, he makes no complaint or'the unlaw fulness of his committal to prison nor the 'tfuration of it. He says nothing of those matters. He argues thal lhe 1996 Legislative Assembly session having officiall y closed, he shoul d be freed. There may have been merit in Mr. Pohiva's argument lhat since lhe Order of Parliamenl contemplates thal Parliament may decide lo order a shorter time, that event in now an impossibility. At the time at which Parliament rose, Parl iament made po order of release and must be taken to have intended no release otherwise it would have said so.

I am, for the reasons given unable lo meet the request for release. A ll three applications for habeas corpu are denied.

Moala & ors v Minister of Police (No.3)

Supreme Court, Nuku'alofa
Hampton CJ
C.10761 6

14 October 1996

Habeas Corpus - Parlia111e11t - contempt - due process
Co11stitutio11 - dueprocess - Parliame nt - contempt
Parliament - contempt - due process - Co11stitutio11

This wasthe lhird appl ication for habeascorpus - seethe reportsimmediately above. This time an altack was mounted, against lhe 30 days imprisonment, on the basis of Constitutional provisions.

Held:

1. The writ of habeas corpus does not in gene·a l lie in respect of a person in custody, duty committed by Parliament for contempt.
2. The court's concern was not whefher there was a conlempl or not. Thal was for the Legislative Assembly lo decide. In England and Auslral ia it is for the courts lo jud ge of the existence in the H.ouse 9f a priv ilege, but given an undou bted privilege, it is for lhe House lojudge of the occasion and of the manner of its exercise. The judgm ent of the House is expressed by its resolution and the warrant of the Speaker. If the warran t specifies the ground of thecommitment lhen thecourt may deterrnine whether it is sufficient in law as a ground to amount to a breach of pri vilege, but if the warra nt upon its face is.consistent with a breach of an acknowledged pri\rilege il is conclusive and il is no objection lhat the breach of privilege is stated in general terms.
3. Herethecourthad(aspartoftheretumontheWritofHabeasCorpus)anorder or Warra nt under the liand of the Speaker stating a contempt in general terms and that could not be gone behind.
4. Although this was a third application by 2 of the applicants and a second by lhe lhird, a fresh ground had been advanced (lhe constitutionality of the procedural processes) and only that aspect would be considered, because although decisionson such previousapplicalionsare not resjudi cata, continued applica lions should not be allowed to become an abuse on the process. And so the question of the effect of closure of Parliamenl (see ju dgmenl No.2) above reported) would not be ruled on again .
5. Thecourt does not sitasacourt of appeal from Parliament; lhe roleoflheCourt was as a court of conslitutional proleclion, based on cl.90.

6. Tonga has anunique LegislativeAssembly (amixtureof Lordsand Commons) created by a uniquely Tongan document.the Constitution.
7. The Legislative Assembly is created by the Constitution and it's members take oaths that they will act in accordance with ant'i uphold the Constitution.
8. Although the Assembly shail make itsown prQCedural rules, those rulesmust be in keeping with, and not contrary to the Constitution.
9. Cl.90 provides that the Supreme Court shall l1ave juri sdiction in all cases in law and equity arising under the Constitution and that plus the written Constitution itself, make the position in Tonga different to the position in the U.K. Parliament. If on a true construction of the Constitution, some event or circumstanceis made a condition of theauthenticexpression of the will of the legislature, then the question whethertheevent or circumstance has been mel is examinable in the Court, notwithstanding that the question may involve internal proceedingsof the Assembly. The Assembly in Tonga does not have the privilege of supremacy over the courts enjoyed in the U.K.
10. The Supreme Court, in determining its jurisdi ction to inquire into internal proceedingsof the Assembly, must apply the English common law regarding theprivilege of Parliament todetennine the regularity of itsown proceedings, provided of course the Assembly has not acted contrary to the provisions of the Constitution, for in such a case cl.90 gives juri sdiction.
11. Cl.70 contains two general categories of contempt, 1 class committed in the Assembly; the second outside it.
12. Clauses such as els. 10, 11, 13and 14 applied to a charge of contempt under cl.70 such as was brought here. They lay down a constitutional framework of minimum requirement s, a constitutional protection of due process.for any hearing or trial: i.e.a formal Wlitten accusation setting out the charge and the groundsof; a trial or hearing only on that charge; a trial where the accused is brought into the presenceof the accuser and hears thecase against him or her; a right to give and call evidence; a ,lawful and fair hearing.
13. That v iew was reinforced by the Crown relying, i 11 argument, 011 s.2 1, Interpretation Act.
14. In addition the Assembly had provided a framework for such a hearing., in its own rules (rr.88A - 88K inclusive), prescribed under cl.62 Constitution, lo provide for a procedurally fair hearing that complied with the requirements of the Constitution as to hearings and the requirements of natural justice.
15. The summons or warrant issued to the applicants to attend the House did not properly state the offence charged, the grounds of the charge and the nature of the contempt. It did not give notice that it's recipient was charged with contempt under cl.70.
16. The House did not follow it's own rules of procedure particularl y under R.88 D (a hearin g before the select committee) and R.88 E (the Select committee of privileges to decide if a contempt has been committed and report to the House) but instead took upthe processat R.88G (i.e.issuinga warrant tohave the person come before the House toanswer the allegation made) and issued such a warrant, in sufficient in any event to give proper notice.
17. The procedures and hearing did not comply with the Rules designed to accommodate the provisions ofthe Constitution and to provide fair hearings in contempt matters.
18. Therefore the applicants were deprived of their Constitutional protection of due process. The proceduresadopted were unfair, not in accordance with the Constitution or the Rules and the applicants succeeded.
19. Orders made that their detention was unlawful and that each of theri1 be released.
20. NOTE. The Privy Council decision in Fotofili *v* Sialeis reported immediately following. as an appendix to this judgment, it not appearing to ha\·e been otherwise reported in Tonga.

(An appeal from thisjudgment is reported in (1997] Tonga LR)

Cases considered
Middlezex Sherrirs Case (1840) 11 A da El 273
R *v* Richard sexp. Fitzpatrick & Browne (1955) 92CLR 157
re Tarling (1979) 1 All ER 981
Fotofili *v* SialeV 987) S.P.L.R 339& f 1996]Tonga LR227
Armstrong *v* Budd (1%9) l NSW LR 649
Touliki Trading *v* Fakafanua & KOT (1996) Tonga LR 145

Statutes considered
Constitution
I nterpretation Act s.21

Counsel for applicants 1\lr Wilson & Mrs Taufaeteau
Hon. Minister of Police in person

Judgment

I will preface this jud gment by saying that I have sat all day in relation to these applications and havedetermined that I should give ajudgment and reasons forjudg111c111 tonight so that everyone can know the position, bearing in mind the importance of expedition or speed in rela tion to habeas corpus proceedings. I Iowe\'er because of that very reason thejud gment I am about to give may not be as nuenl or as full as 1 might otherwise deliver.

I start by remindin g myself of a general proposition or principle which I take from 1-lalsbury Fourth Edition Volume 37 paragraph 584 "On the other hand the Writ of Habeas Corpus does not in general lie in resperl of a person in custody ... who has been duly committed intocustody ...by Parl iament for a contempt or breach of privilege"; and the authority cited for that is the 1840M:ddlesex Sherriff's case (1840) J J Ad & El 273.

Secondly, I say at the outset that my concern is not as to the merits or thejudgment as to whether there was or was not a contempt of the Legislative Assembly committed by the three applicants. That in my view, is for the Legislative Assembly to decide and I do notintend (nor as I apprehend itdo I have thepower, or would wish totake thepower) to interfere in that. The statement of principle in that regard I lake from a convenien t summa ry in the High Court of Australia in thecaseof R v Richards: Ex parte Fitzpatrick and Browne, (1955) 92C.L.R. 157. ThecJttracls which I am going to refer loareat pages 162 - 163. It isajudgm ent of the High Court of A ustralia, delivered by no less an authority

than then Chief Justice Dixon. Page 162: "It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by it's resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with cases by which it was finally established, namely, the Case of the Sheriff of Middlesex".

Then the High Court of Australia went on to discuss a United Kingdom Privy Council decision which I will simply call the Glass case and cited from that case this passage, at page 163: "Lord Cairns says: "Beyond all doubt, one of the privileges - and one of the most important privileges of the House of Commons - is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been staled, been well established in this country" - that is in the United Kingdom - "that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that conlempl by a warrant, staling that the commitment is for contempt of the House generally, without specifying what the character of the contempt is". His Lordship a little later on, on the same page, describes the privilege in these terms: "the privilege or power, namely, of committing for contempt by a warrant slating generally that a contempt had taken place.•

Here, on the Return to the Writ of Habeas Corpus, I have been given (and I had earlier been given as an exhibit to one of the applicants' affidavit), the order or warrant under the Hand of the Speaker in relation to these three men and in translation into English, it says:

"To the Minister of Police
Nuku'alofa,

The Legislative Assembly ordered to imprison (I) 'Eakalafi Moala. (2) Filokalafi 'Akau'ola, (3) 'Akilisi Pohiva for 30 days commencing 5:00 o'clock on the afternoon of 19 September, 1996 by virtue of the power vested in the Legislative Assembly by Clause 70 of the Constitution and the judgment of the House on this day regarding their imprisonment.

They are not to be released until after the expiration of 30 days or otherwise ordered by Parliament for a shorter time.

I ask to immediately give effect to this order."

When I look at that order, and look at the terms of both the general propositions described in Halsbury and in the High Court of Australia in the passages I have just cited, I have come to the view that this indeed is an order or warrant under the hand of the Speaker, stating a contempt in general terms and it is one that I should not, and indeed cannot in my view, go behind.

My concern, therefore, in this case as I see it is the other part of the argument on behalf of the applicants, and that is really as to the process used leading to that judgment of the Legislative Assembly (to that order that I have referred to) and whether the process

was in keeping with the Constitution i.e. whether the events and circumstances leading to that judgment and order of the House were constitutional even although that may lead me into an inquiry into the validity of the Legislative Assembl 's internal proceedings.

Before I go on to deal in a little more detail with that aspect, I should deal in these initial stages with a submission made by the Minister, the Honourable Mr Edwards, as to the fact that this is, in two of the applicants' cases, the third applicant, Mr Pohiva, his second.

In general terms the proposition is this. That although the decisions upon the previous applications are not to be taken as res judicata, concern has been expressed in the authorities that the continued application for Habeas Corpus should not be allowed to become an abuse on the process. In 37 Halsbury at paragraph 585, this passage is found, •,.\ second or renewed application, still less successive applications, for a Writ of Habeas Corpus will not be allowed to be made by or in respect of the same person on the same grounds and whether to the same or any other court or judge unless fresh eridencc is adduced in support of any renewed application.· .\ mongst the authorities the case of Re Tarling, which was cited to me in argument, is mentioned in l-lalsbury. Re Tarling (1979] lAll E.R. 981.

I stress one phrase in that quote. II is the words "on the same grounds." It seems to me thnl in these applications a fresh ground has been ath:inccJ and that is the constitutionality of the procedural processes. II is only that aspect, as I have said, that I will look at in detail in this judgment. I will not return to what seems lo have been Iraversed in some detail in the second application (which was the first that tvlr Pohiva was a party to) and that is the effect of the closure of the session of the Legislative Assembly. That has been argued; ii has been ruled upon.

I should also mention one or two other prelim inary matters. I am not here as a court of appeal sitting as it were on appeal from Parliament. My role here, as I understand it, is in effect as a Court of Constitutional protection, basing that role on a clause I will come to in the Constitution, Clause 90.

The Writ of Habeas Corpus issued last Friday has had return made lo it by the Honourable Minister, that return saying, amongst other things, that the three applicants are held, detained under the Minister's control and supervision, al l-lu'alolitoli prison pursuant to the Order of the Speaker (which I have already referred to) and pursuant to the decision of the Legislative Assembly under clause 70 of the Constitution. Clause 70 of the Constitution is at the heart of the matter and my judgment here requires consideration of the events and circumstances leading to the Order that was made in the Legislative Assembly.

Tonga has a unique Legislative Assembly. It is a mixture of what might be described as Lords and Commons. II is created by the Constitution, which is in itself a uniquely Tongan document.

Clause 30 provides that the government of the Kingdom is divided into three bodies, first, the King, Privy Council and Cabinet (Ministry), second the Legislative Assembly, third, the Judiciary. Clause 31 goes on to say that the form of Government in the Kingdom is a Constitutional Government.

The second arm, the Legislative Assembly, is the arm that initially I turn to look at because it is the actions of the Legislative Assembly that have been called into question.

Claue 56 spells out the powers of the Legislative Assembly. Clause 57 gives the

Assembly it's full title, the Legislative Assembly of Tonga. Clause 59 outlines the composition: 'the Legislative Assembly shall he composed of the Privy Councillors and Cabinet Ministers, who shall sit as nobles. the representative of the nobles and representatives of the people.'

I also refer to clause 83of the Constitution which sets out the oaths which must be take by membersof the Legislative Assembly. Members of the Privy Council have totake an oath which amongst other thingssays that they "will keep righteously and perfectly the Constitution of Tonga '.The Ministers' oath includes this, that they "will keep righteously and perfectly the Constitution of Tonga.' The oath of the nobles and representatives of the people includes this, that they 'will righteously and perfectly conform toand keep the Constitution of Tonga." So not only is the Legislative Assembly created by the Constitution, but its members take an oath-that they will act in accordance with, and uphold, the Constitution.

Clause 62, I refer to now and come back to later. Clause 62 prescribes that 'the Assembly shall make its own rules of procedure for the conduct of its meetings." As a general rider, one would comment that the ability to make rules must haveoneoverriding consideration, namelythat those rules mustthemselves he in keepingwith theConstitution and not contrary to provisions of the Constitution.

On behalf of the Respondent it has been argued in front of me that the Supreme Court of Tonga hasno power to inquire into the proceedings of the Legislative Assembly, particularly in this matter. But for the reasons which I am about to embark on, I have formed a different view.

The third am1 of government that was mentioned in clause 30 is the Judiciary. Clausesays "TheJudicial powerof the Kingdom shall be vested in the Court of Appeal, the Supreme Court, the Magistrate's Court and the Land Court.'

Clause 90 is the important provision. It reads, "The Supreme Court shal\ have jurisdiction in all cases in law and equity arising under the Constitution and Laws of the Kingdom: and I stop there because I do not have to gofurther in relation to clause 90. That is, as I see it, the keystone of this jud gment. It is that provision, appearing as it does in thewritten Constitution-thosetwothings, theprovisionitself plus the written constitution -thatmake the position in the Kingdom of Tonga quitedifferent tothe position that applies in the Houses of Parliament in the United Kingdom.

In the case that has been cited to me of Fotofili and others Siale which for convenience I will refer to the report in the (1987) South Pacific Law Reports page 339, and in particular to passages that appear at page 344 and then at pages 347 to 349. The passage atpage 344was in this court. A judge at first instance, havingconsidered various authorities in both the United Kingdom and in other Commonwealth juris dictions, and after having also considered various sections of the Constitution then said 'Insofar as these statutory provisions are relevant to an issue raised before the court, the court is entitled to - indeed must - consider whether what has been done in the House is in accordance with Tongan Constitution and statute. No claim to privilege can alter that. That is clear on principle, and from a number of cases cited by counsel for the plaintiff.'

In the Privy Council, these passages are tobe found. At page347, after citing Article 9of the Bill of Rights of.1689, the Privy Council said this, 'It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that it's passage through the House was attended by any irregularity. The same is not true in Tonga where

there is a written Constitution. If, on a true construction of the Constitution, some event or circumstance is made a condition of the authentic expression of the will or the legislature, or otherwise of the validity of a supposed law, it rollows that the question whether theevent orcircumstance hasbeen met isexaminablein theCourt, notwithstandi ng that thequestion may involve internal proceedings of the Assembly. Jgain, a statutory provision can be examined and struck down if it is contrary toan express prO\·ision of the Constitution although its passage through the Ilouse was not attendl'd hy any irregularity The position is then that the Assembly of Tonga, and indeed any parliamentary lxidy based on a written constitution, does not have the privilege of supremacy over the courts enjoyed in the United Kingdom."

There follows then reference lo the situation in the L'nitcd 1-Cingdorn i ncl uding the case discussed and argued before me, the Pickin case, which is rather dirfcrent and distinguishable from the position here in Tonga. The Privy Council the111Ve n t on, at page 349, as follows,

> "What then in the position in Tonga? The Constitution itself is silent on the role the courts might play in inquiry into proceedings in the Assembly and simply provides in A rticle 62 that 'The Assembly shall make its 01ln ruks uf procedure for conduct of its meeting'.

"A court in Tonga faced with a plea that it should inquire into the i nterna l proceedings of the Assembly will obtain no help from any Act or Ordinance in force in Tonga in determ ining itsjuri sdiction so to do. In such a delicate constit utional situ:it ion the Court would look for a clear mandate to proceed. We arc of the firm opinion that in that situation the Civil Law Act (Cap 14) must be called in aid. That Act provides in short that in the absence of relevant provision under any Act or Ordinance of the Kingdom. the common law of England shall be applied. It follows that in determining i t s jurisd iction to inquire into internal proceedings of the Assembly, it must apply the Engl ish common law regarding theprivilegeof Par!iament todetermine theregular ity of i ts Oll'n proceedings. provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings, for in such a case the Court is gi1en juri sdiction by Article 90 of the Constitution, which reads.as far as is relevant:

> "The Supreme Court shall have jurisdiction in all cases i n law and equity arising under the Constitution and laws of the Kingdom ... \Ve conclude then that there is no ju risdiction in the Court to inquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution.•

It is those provisos which are the important ones in so far as this case in concerned. Thequestion is whether there has been any breach of the Constitution. In argument I have been referred, as an example of such jurisd iction in such matters, to a case outside of Tonga, namely that of Armstrong v Budd, in New South Wales, Australia, reported in (1969] J NSW L.R. 649 where the Chief Justice of New South Wales said that the court had ajurisdiction to determine whether, in a particular case, the House had exceeded the power conferred on it by the constitution.

This matter as I have said relates to clause 70of the Constitution. That is the clause that is referred to in the Order or warrant under the hand of the Speaker. Clause 70 says this: 'If anyone shall speak or act disrespectfully in the presence of the Legislative Assembly, itshall be lawful to imprison him for thirty days and whoever shall publish any

libel on the Legislative Assembly, or threaten any member or his property, or rescue any person whose arrest has been ordered by the Leaislative Assembly, may be imprisoned for not exceeding thirty days.•

It seems to me reading that provision that there are two general categones of contempt referred to in clause 7 0. Those committed in the presence, that is in the face, of the Assembly and those in effect committed outside of the Assembly by some sort of publication or threatening or some other act which might be seen to impede or impair or interfere with the Assembly or a member of the Assembly. Now before I proceed further and examine what happened, I wish to look at some other provisions of the Constitution.

There is in the opening provision of the Constitution a considerabl emphasis on the matters of liberty or freed"om of the individual person. Clause one starlS' with a ringig declaration to that effect. In its first sentence which reads "Since it appears lo be the will of God that man should be free a He has made all men of one blood therefore shallie people of Tonga and all who sojourn or may sjou rn in this Kingdom b free forever.' Those opening provisions of the Constitution were considered recently 111 the ourt of Appe'al of Tonga in the appeal case No.3/95 Touli ki Trading Enterprises v the Kingdom of Tonga. From page 12, and following, this passage:

> The Constitution of Tonga opens (in the first sentence of cl.l) with a profound philosophical concept linking the inhabitants of the Kingdom with the whole of hu'man kind as inalienably free and equal. The concept may be seen, not only as the fundamental basis of all that follows, but also as a constitutional guarantee against both slavery is concerned, cl.2 goes on to provide a. more specific guarantee.'

Then a little further on;

> "To see clause l of the Constitution as concerned with establishing the foundation of the Tongan State in such an affirmation is not to see it as less, but as more, important. The Constitution itself does not place first the possessions of Tongans. but their liberties. In subsequent clauses, the Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the Slate. Bt beforedoingso,it gives concrete application, in a series of clauses, to the basic statement with which it opens.·
>
> "Clause 2 directly forbids the instituti on of slavery, and makes a proclama tion of freedom for all who live under the nag of Tonga.' I leave out a small passage.
>
> "Clause 4 renecls the equality implicit in cl.I (we are all "of one blood") by requirin g the general law of Tonga apply equally to all, while cl.5 establishes freedom of religious worship and practice subject to the law and peace of the land. Succeedingclauses protect freedom of opinion and speech,• (I interpolate clause 7) "freedom to hold peaceable political meeting,• (I interpolate clause 8), "freedom from arbitrary arrest,• (clause 9), "(secured by the constitutionally guaranteed availability of Habeas Corpus), freedom from arbitrary punishment and freedom from double jeopardy. Each of these early clauses of the constitution is primarily concerned with the implication of the constitutioal entrechment of human liberty. Only indirectly is any of them concerned with questions relati ng to property.'

> "It is in his context, after no less than five clauses securing the protection of Tongans against abuses of the Slate's power lo instituie criminal proceedings, that cl.14 is found in the Constitution. There follows cl.15 concemed with the fairness of trials and ·cl.16 ensuring a search warrant shall only be issued "according to law". In this context it is plain lhat cl.14 is not a provision about th resumption of citizens' properly, or about planning restrictions or anyother regulatory measures affecting the use of properly. It is a constitutional guarantee against arbitrary criminal procedures leading to capital punishment, a fine or confiscation of property, or imprisonment. But the clause is not directed against legislative action, for its proh ibiti'on is "except according to law.'
>
> "In clause 17, the Constitution turns to tile topic of government, while continuing to be concerned also with lhe liberties of Tongans. Cl.17 requires the King to govern impartially and for the good of all.•

I have set out that extract in full becauS'e that passage is, in my view, important I come then to look, in the light of that commentary, at some of these provision s of the Constitution, these early proviions themselves. I do not intend to discuss clause 7, the freedom of the press or freedom of speech provision beca use that is, in my view, tied with the merits of the judgment made in the House of the Legislative Assembly and for the reasons I have already indicated I am not involved in this jud gment in that aspect. •

I come then lo clause 10, ("accused must be tried"). "No one shall be punished because of any offence he may have committed unti l he has been sentenced according to law before a Court having jurisdiction in the case.• I stress the words "according to la w". In my view that includes in accordance with constituti onal safeguards.

Clause 11, the relevant parts I will read are these;

> "No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a wrjtten indictment (except in cases of impeachment or for small offences within the jurisdiction of the magisirate or for contempt o(court while the court is sitting). Such written indictment shall clearly stale the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him except according to law and he shall hear the evidence and sha!I be allowed to question them and to bri ng forward any witnesses of his own and to make his own statement regarding the charge referred against him

It is the first 2 sentences of cla.use 11 to which I have particular reference. First to the requirement of a written indictment and I will deal with the exceptions in a moment. An indictment being no more, in my view, than a written accusation in documentary forrn. And such a document to clearly state the offence charged and the grounds for the charge.

Jn my judgment that clause of the Constitution does have relevance to the proceed ings under clause 70.

An exception is made for impeachment, ("except in cases of impeachment "). Impeachment is provided for under clause 75 of the Constitution and impeachment takes place before the Legislative Assembly. Indeed in clause 75 itself there is prov ision that the impeached person should be given a copy of the accusation in writing seven days before the day of trial. But leaving that aspect aside (and it is important because, again,

there is recognition of the need to fonnally gi'l'e notice of the charge) the fact that impeachment ismentioned as anexception toclause Uis recognition that the Legislative Assembly is indeep.a Court. That would accord withthe long held view in the Common Law that the Legislative Assembly is "the High Court of Parliament", "the fi_rst and Highest Court in the Kingdom" ashasbeen expressed from timeto lime and ascanbe seen and cited iitthe Erskine May text Indeed in the Fotofili case, towhich I havereferred, at page 348, there is a long citation from the Pickin case-in" the House of Lords i·1974 in the United Kingdom where referenceis made to Parliame_nt in tne United Kingdom being "the High Court of Parliament.•

I deal witti another eiception as well because it seems appropriate to e that I should. In clause 11 there is reference to an exception "for contempt of court while the coli.rt is sitting.• Using the expression court in its widest meaning and as I have ju sl referred 11s including the High Court of Parliament, that would except cases of contempt in the face of Parliament ju st as it would except cases of contempt in the face of this Supreme Court Sothat exception would apply tochargesof contempt under that first leg of clause 70 i.e. acting or speaking disrespectfully in the presence of the Legislative Assembly. A contempt in the face of the Assembly.

Here as I understand the position.such a contempt was not and could not be, facutally, alleged in the cases of the three applicants. ll was contempt under the second leg i.e. of publishing a libel (or when I come to it in the Tongan, an untruth or falsehood) about the Legislative Assembly (outside the Assembly). So I have concluded that that exception would not apply to the type of proceedings that were involved in this case.

I move on to some subsequent provisions of the Constitution. Clause 13says, inter alia, "no O!le shall be tried on any charge but that which appears in the indictment, surilmons or warrant and for which he is being brought to trial ....."

Clause 14 ("trial to be fair"). "No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law."

I stop there. I do not intend to deal with other provisions that have been raised by Mr Wilson for the applicants. Clause 15, for the reasons discussed ih the course of argument, I do not see as being applicable in these circumstance and nor do I see clause 73,which was also mentioned by Mr Wilson in argument, as being applicable. Clau se73 contains the immunity of members of the Legislative Assembly from arrest andjud gment while the House issitting. That provision is not designed tocover a situation of contempt but rather to cover matters of arrest in civil suits and indeed being brought as a witness or summoned as a juror whilst the House is sitting.

In m y judgment, those provisions which I have referred to can be seen as laying down, as it were, a constitutional framework of minimum requirements, a constitutional protection of due process, for any hearing or trial. A statement clearly setting out the offence charged and ground for the charge, i.e. a fonnal written accusation in effect. A trial or hearing that takes place only on that charge. A trial where the accused person is brought into the presence of the accuser or accusersand hears the case against him orher. A right for the accused person not only to call evidence on his or her behalf but to give evidence himself or herself if he or she so wishes. A trial or hearing not only tobe lawful, but to be fair.

·The fact that those minimum requirements should apply in a hearing under clause 70 is, in my jud gment, reinforced by the prosecution's reliance ort section 21 of the Interpretation Act (Cap. 1). Section 21 says this: "If upon the trial of any person for an offence against any law of Tonga it is inanifest that the Tongan and English versions of the section which th accused person ischarged with violating differ in meaning then, in deciding the-question of the accused person's guilt or innocence, the court shall be guided by what appears tci be the true meaning and intent of the Tongan version.•

Here, that section has been raised (and was raised in one of the earlier applications for Habeas Corpus in relation to the provisions of clause 70. In the English translation it says:"Whoevershall publish any libel on the Legislative Assembly.• In the Tongan it provides in the equivalent place of the word "libel", the word "lohiaki'i". That word means, in English, not to libel but to lie or to deceive. The argument of the Respondents is that that meaning should prevail under section 21 (and Mr Wilson, as·lund<!rstooclhim, accepted that meaning). That seems to me to be the clearest acceptance, therefore, that the hearing, these procedures under clause 70, in front of the Legislative Assembly were indeed a tri al for an offence against a law of Tonga. Therefore as I have said those minimum requirements for a fair trial set out in the provisions of the Co 1stitutio which I have referred to are applicable.

Having set out that framework, I now look at the framework provided by the House itself in terms of its own rules. These arc the Rules for Proceedings and Standing Orders of the.Legislative Assembl y of Tonga. Up until September of this year, as I understand it, the rules in relation tomatters of contempt were thosecontained in provisions84 to 88, Part XVII. Those rules give no assistance at all as to the procedures for the hea ring of a matter of contempt before the House. They arc more in the nature of prescribing types of conduct that may be seen as being contemptuous.

Obviously, given the commencement uf these particular proceedings against these three applicants (and indeed on the chronology given to me it would seem that the proceedings may well have been afoot by then), the Housedecided that it should laydown some further rules as to the procedures to be followed in contempt proceedings.

!have been provided with a copy of those rules, apparently brought into being on orabout the 12 Septemberof this year. They are contained in rules 88A to88K inclusive.

88A is a general provision reflective of clause 70 of the Constitution and goes on tosay that if the Houseresolves such action to be in contempt of the Legislative Assembly the person "shall be lia_ble to the punishment under clause 70 or to such other punishment that House may resolve in accordance with the rules for proceedings relating to contempt."

88B provides for the lodging of a complaint with the House. 88C provides that a complaint so lodged is referred to a Select Committee of Privileges. 88D provides that witnesses and evidence may be callt;J bef ore that Committee 'and the alleged offender shall also attend to help the committee in its work" and may bring his counsel with him.

88 E after the evidence has b.en heard and after due consideration the Select Committee shall decide whether a breach of pri vi lege or a contempt has been committed and report .to the House accordingly with its recommendations. I should add I am not citing these in full, this is my summa ry of the provisions as I go through them.

88 Fon receipt of the recomrr.enc'ation from the committee, the House "may decide to act upon it as it deems appropriate."

88G if the House resolves that tht:alleged offender has breached the privileges or

had committed a contempt of the House it "may resolve that a warrant in the form set oul below be issued and signed by the Speaker against that person setting out generally lhr nalure uf the conlempt and requiring such pe1,on to come before 1he llouse at a ti1111 certain to answerthe allegation made. Such a person may bring his counsel to help him.'

88H •After hearing the proceedings and the answers given, the House shall reach a decision by resolution and such a decision shall be given effect immediately." I and J are not relevant from this judgment's point of view. 88K provides the form of the warrant which I will return to later.

It seems to me that those provisions prescribed under clause 62 of the Cons!itution are designed to accord with, to take account of. and to provide for the minimum requirements for a fair hearing or trial contained in the Constitution and as I iave already referred to. They clearly allow a two stage process, first in front of the Committee of Privileges; then in front of the House; with appropria te notice at both stages and in particular at the second stage in front of the House (i.e. a warrant "setting out generally the nature of the contempt"). And processes designed to provide for a fair hearing as to whetl)er a contempt has been committed, and as to lhe penalty to be imposed if indeed a contempt has been committed.

It seems to me, as I have said, that those provisions in the rules of the House, prescribed in terms of clause 62 of lhe Constitution, are indeed prescribed to provide for a fair hearing, procedura lly fair, a hearing that could be seen to compl y with not only the requirements of the Constitution as to hearings, but also the requirements of natural justice.

It is withlhose two frameworks in mind, i.e. the framework contained in clauses 10 to 14of the Constitution and the framework contained in rules 88 A to 88 K of the Rules of the House that I then look at what has taken place here.

The firstapplicant before me isthe Editor and Publisher of a newspaper, the "Taimi 'o Tonga"; the second applicant is the Deputy or Assistant Editor of that paper and in charge of marketing; the third applicant is the Number I People's Representative (in the Legislative Assembly) for Tongatapu.

Put shortly it is said that the People's representatives in the Legislative Assembly decided to seek the impeachment of the Attorney General. It is claimed that notice was given, to a clerk of the Assembly, of that motion to seek impeachment. I am not going to go in thisjudgment (because it is not relevant from my point of view) into what is said to have happened with that motion other than tosay that some twoweeks orsosubsequent to that, and before any motion for impeachment was debated, letalone decided on, in the House, a copy of the motion for impeachment was made available by the third applicant to the second applicant and thence to the first applicant and on the 4th of September 1996 an article was published in the Taimi 'oTonga Volume 8Number 36 commenting on that motion for impeachment and setting out the body of the moti on.

It is that publication which has been said to be in breach of clause 70 of the Constitution. After publication, the Article was made the subject of a complaint under Rule 88 B of the Rules of the House. There is controversy as to the path followed that brought these three applicants in front of the Legislative Assembly on the 19th of September this year.

Two of the Applicants seem to c;laim that they did not receive any summons of any sort. That is disputed by the Respondent. One of the Applicants, Mr 'Akan'ola, received

a summons and that is in the form that was annexed to his affidavit as exhibit Dand also can be seen attached lo the return to the writ of Habeas Corpus It is interesting to note 11ia1 form which the Respondenl alleges wa sgiven to each of lhe 1hree applicanls follows lhe form of warra nt that was referred lo in Rul e 88 G and prescribed in Rule 88 I< of lhe House. Thal is lhe fom1 that is referred to in 880 as beinga warrant signed by the Speaker selling out generally lhe nature of the contempt and requiring the person to come before the House. That is lhe form of warrant prescribed for use at, what I will describe as. the second stage of the procedures.

I propose dealing with this aspecl on the basis lhat each of the applicantsdid recei\"C, al some slagc a copy of lhe summons similar lo the one referred to by Mr 'i\kau'ola. The English lranslation of the form that he received reads in this way:

"In the Legislative Assembly of Tonga
Nuku'alofa
No.2/ 1996

Summons

To, Filokalafi 'Akau'ola of Kolomotu'a, Nuku'alofa, Tonga

There is a complaint to lhe Legislative Assem blyof Tonga regardi ng lhe newspaper "Taimi 'o Tonga" whereby you are the Assislant Editor and Advertising manager, published on volume8Number36on Wednesday4of September 19%. ll publishes article on impeachment by the Legislative Assembly which is nol correct and it is disrespectful to the Legislative Assembly.

You are hereby summoned to attend the Legislative Assembly at Nuku'alofa, Thursday 19th of September, 1996, at 10:00 o'clock in the morning. And take notice if you fail to comply with the summons and you do not attend you will be committed to prison.

Dated Wednesday 11th of September, 1996
Chairman of the Legislative Assembly.•

I will come back to the content of that form shortly but it is lo be compared or contrasted with the form of the order or warrant which I have already referred to which was directed to the Minister of Police to take these men into custody pursuant to "clause 70 of the Consitutiton and thejudgment of the House.•

It is apparehtly a matter of controversy also as *tb* what occurred before the House, but before I get that far I should refer toanother matter that is relevant and is raised by Mr 'Akau'ola in his affidavit. I read this:

2. "On or about 11 September, 1996 I received a summons from the Legislative Assembly of Tonga ordering me to attend the Legislative Assembly on 19 September, 1996. Attached marked "B" is the Summons with it's English translation.
3. On 16 September, 1996 I wrote a petition to Parliament under clause Bof the Constitution raising issues which I was not happy with regarding the said summons. Attached marked "C" is a copy of that petition and its English translation.
4. I never received any response from the Legislative Assembly regarding my petition."

Clause 8of the Constitution allows for petitions to the Legislative Assembly. This is what this applicant was purporting to exercise. His petition. in English translation, refer to a number of matters. It starts by refen 1ng to the summons -.vh 1ch he has recein"I.

"Becauseof a complai nt made .... regard ingmealleging that I act disrespectfully to the Legislative Assembly."

It goes on then to say "This petition is for:

1. To require particulars of the charge against me in the summons as j)rov ided by clause 11 of the Constitution . ...."

It sets out clause 11 and goes on;

"There has been no decision by the Legislative Assembl y about me before, upon which I may be said toact disrespectf ull y to the Legislati ve Assembl y.

2. A nd if there is a prior decision then you have already adju dged me to he punished. The question would he by whic h authori ty a llowed the Constitution to lega lise thedecision of the Legislative Assembly because clause 10of the Consitution provides" and it then sets out clause 10.

He goes on then to say:

"You have not specified any provision in law that I have breached and upon which I may be punished as for the said summons."

I leave that document there. In my view the author of it, the applicant 1v!r'A kau'ola was clearly raising and seeking particulars as towhat it was he was actually bei ng cha rged with.

Whatever the position, on the 19th Septem ber, all three applicants appeared before the Legislati ve Assembly. A gain it would seem i t is a matter of some controversy as lo some of what took place. The applica nts allege that it was not unti l they were in front of the Assembl y that they learnt that they were bei ng charged with contempt under clause 70 of the Constitution.

The Applicants' respective accounts of what occurred are to be found in their affidavits. Mr Moala's at paragraphs 6 to 18of his affidavit. Para graph 6:

"It was only When I arrived at the meeti ng of the Legislative Assembly on the 19th September that I was advised that I was being charged under clause 70 of the Constitution of Tonga."

A nd he goes on to set out the explanations he gave to the Assembly; of how his law yer then attended after he had give his explanations; of how he withdrew (or that he and his lawyer wi thdrew); that he was never advised that he was found guilty; that he was not given the opportunity to speak in mitigation before sentence was decided and passed.

Mr'Akau'ola, paragraphs 6to22of his affidavit, says somewhat similar things about the procedure followed. As indeed does the lawyer w ho appeared for each of those two applicants in front of the Assembly.

The complaints that they makeare that they were not told in advance that they were being charged with contempt; that they did not therefore have theopportuni ty to properly defend themselves and have a fair hearing; that the hearing itself was not fair in that it was a simple one part hearing and without the opportunity, if they were found guilty of contempt, for them to be heard on questions of penalty.

From the Bar, I have been told on behalf of the Respondents of this procedure said by the Respondents to have been followed. That a complaint having been made in terrns of Rule 88 B, that complaint was referred to the Select Committee of Privileges where

there was some general discussion. That it was decided to leave the mailer to the House and it was returned to the House.

In terrns of Ru i c 88 D there was 110 hearing before li1e select commillci No witnesses and evidence called. The "alleged offender", and those are the words used in Rule 88D, was not summoned IQ attend to help the committee in its work.(f he Rule ays h shall also attend to help the committee in its work and the alleged offender ma y bring his counsel to help him).

hat fir t step in the procedure, a first step that can be seen as en uring a fair trial or a fair heanng, and that the alleged offender is put on full notice, did not take place. There was no hearing or such a nature.

. Not only was 88 D therefore not followed nor was 88 E w hich snys that "arter ::ill evidence has been heard and after due consideration the Select Co111111ittce of Pri1·ilc•'c shall decide whethera breach or privilege or a contempt of the House has been com111itt:I and report accordingly to the House with its recommenda tions".

I 111 told that there were not only no hearing as I have al ready referred to. the re 1:1s no dec1s 1on as to whether there was a con tempt committed or nol. There ll'erc recommendations made to the House. It was simply left or referred back to the full I louse for the House to deal with. .

. It seems h t the H?us lavi ng 1ad the matter referred back to i t. (a nd if this may ha1·c been surf1c1ent, wl11ch 1t 1s not) instead of holding, itself. a preliminary hearing a is contem lated in 88 C, D and E, simply took up the ma tter at 88G and resolved to issue a warran t 111 the form prescribed in Rule 88K.

So not on ly were the necessary Constit utional protections, required also in tem1s or the Rules of the H?us, disregarded but the House determined to sta rt part way through the procedrues by 1ssu111ga warrant which, on the materials before me, I find insufficient 111.any event to put all three applicants on proper notice of the charge (and (am decidi ng this case on the supposed basis that the applicants were given those wan-ants).

. But that warra nt, i n any event, was not sufficient to give all three applicants proper notice or the charge of con tempt being brought against them. I t did not properly state the offence charged and the grounds for the charge (as is rcrtcctcd in clause J l of the Constitution) and did not state what was req uired in 88G i tself of the Rules, generall y the nature of the contempt The fom1 of summons or warran t which I ha ve read, exhibited lo Mr 'Akau'ola's affidavit, contains no reference to clause 70, contains no reference to contempt. In my view it does not give any, or any proper, notice, to a recipient, in it's wordm g that that person was going to be charged with contempt under clause 70 of the Constitution.

In that context it is not insignificant then that the second applicant, Mr 'Akau'ola, should .have written that peti tion I have referred to already which is attached to h is affidavit and dated the 16th September, inquiring amongst other thi ngs as to the charge that he was actually fac111g. The words used in the summons·

.... publishes an article on impeachment by the Leslative Assembly which . is n t correct and it is disrespectful to the Legislative A ssembly".

ere not 111 my Judgment sufficient to comply with the provisions of the Constitution or mdeed to comply with the provision of Rule 88G.

Indeed there is some force to the submission made by Mr Wi lson on behalf of the applcants that the reference in the summons or warrant to the word disrespectful could

well be misleading because that is a word that is used in the first part of clause 70 which isnot t heappropriatepart given thefactual situation here.(As an aside: there may be some force to what Mr Wilson has said, that given that reference to "disrespectful , and if thal summ ons or warrant be seen as being sufficient in any event, (and I say it is not), that indeed on the material befo.re me, these applicants were tried on a charge that did not appear in the summons or warrant i tself. But that matter is a sidewind, is not crucial to my judgme nt in this matter).

On eitheraccount therefore of what took place here, both in termsof noticeof charge and in terms of what too place, it is in my view clear that the procedures and the hearing did not compl y with the Rules; and Ru les w hich were properly m ade \')ithin clause 62 of the Consti tution, w hich were designed to accomodate the earli er provisions of the Consti tution as to fair hearings and weredesigned to provide fair hearings i n contempt and breach of pri v ilege matters.

It seems to me therefore, sitting as I have said in effect as a Court of Constitutional protection , a court which has the power (from the authority that I ha ve referred lo and from clause 90) lo look into breaches of Constitutional matters, that these applicants were deprived of their Constitutional protection of due process. Even if one were to discount entirely their accounts of what took place (and I note the only affidav i ts before me on procedures are ·theirs) one i s left with the situat ion of the Legislati ve Assembly, not complying with or not following its own rules designed, as I have said, to ensure the constitutional protections of a fair hearing.

The conclusion I havereached, therefore, is that the procedures adopted were unfair. They were not in accordance with the Constituti on or wi th the Legislative Assembl y's own Rules made under the Constitution. I have reached theview that the Applicants must succeed in the applications which they have made lo me.

That being so, it follows that I determi ne that the detention of theapplicants in these circumstances is not lawful and I make an order that each of them be released forthwith from detention.

(A fter hearing further argumen ts from counsel the question of costs was reserv ed, for memoranda of counsel lo be submitted).

Fotofili v Siale

Privy Council

App.142/87

20 July, 3 August 1987

Co11Stitution - pr-ivilege - scope of courts enquiring
Parliament - privilege - courts enquiry - co11stit11/ionality

Thi important case concerning the.issue of Parliamen tary ri ghts an pri vileges and the abd1t y.of the Supreme Court to enqutre 111loa decision of the Assem bly is reported in full, nd wi thout headnote, as an appendix to the Moa la & ors v Minister of Police (No3) udgent_ reported above. It has not been officiall y reported i n Tonga thus far, and the 111lenhon 1s lo remedy that omission. It can be found reported al (1987) S.P.L.R. 339. Sufficient extracts of principle from the ju dgment are set out in the Moala headnote-at numbers 9 and 10 for present purposes.

Cases considered

British Railways v Pickin (1974] l All ER 609
Stockdale v Hansard (1839) 9 Ad & El l
Bradlaugh v Gossett (1884) 12 QBD 271
Roberts v Hopwood (1925] AC 578

Statutes considered

Constitutio11
Sales Tax Act 1986
Legislative Assembly Act s.17
Bill of Rights 1689
Civil Law Act

Counsel for appellants — Mr D.Tupou & Mr C Edwards
Counsel for respondent — Mr Niu

JuQgment

This is an appeal and cross appeal against thejud gment of Martin J delivered on the 9th January 1987 in a case concerning the important issue of. Pai l iamentary rights a11d privileges.

On the 23rd October 1986'lpeni.Siale, described as •11 Tongan subject by birth and a substantial citizen resident in the Kingdom of Tonga• issued proceedings out of the Supreme Court, purportedly on his own behalf •and on behalf of all Tongan subjects', against the Hon. Kalaniuvalu Fotofili, then Speaker of the Legislative Assembly, Noble Malupo, Chairman of the Committee of the House, seven named Nobles (being representatives of the Nobles in 'the Assembly), five Cabinet Ministers, two Governors and nine people representatives : Only three members of the Assembly were excluded from the action.

Tle crux of Siale's claim against them was that each had knowingly and unla wfully received payments by way of parliamentary allowances for their services as members of the Assembly to which they were not entitled. He sought the followi ng orders:-

1. A declaration that the Hon. Fotofili as Speaker had knowi ngly and unlawfull y signed payment vouchers whereby members of the Assembl y had been paid in excess of their proper entitlements.
2. A declaration that the Hon. James Cecil Cocker as Minister of Finance (the 12th A ppellant) had unlawfull y paid such excess sums out of Treasury.
3. A declaration that each of the 25 Defendants had lmowingly ai1d unlawfully received sums in excess of their entitl ement.
4. An order for repayment to Treasury of the excess by each Defendant.

The Defendants filed Statements of Defence challenging the jurisdiction of the Supreme Court to adjudicate on the issue, and moved foran order that the action be struck out on that ground, it being argued that the issue of the alleged unlawful payments was a matter protected by Parlimentary privil ege not open to review by the Court. After reviewing the law in otherjuri sdictions MartinJ considered the state of the law in Tonga and concluded that it was for the Assembly and the Assembl y alone to decide what remuneration and allowance its membersshould receive, and that its decision in that regard was part and parcel of the "internal proceedings• of the House and not reviewable by the Courts.

However, Martin J did not regard that conclusion asjustificati on for striking out the proceedings, apd for this reason: it was pleaded in the Statement of Claim that the Assembly altered the rates for salary and allowances for members as presented by the Minister *9f* Finance in the Annual Estimates for the year ending 30th June 1987. Martin J concluded that it was open to the Court to enquire whether there had indeed been a prior decision of the Assembly fixing the rates forsalary and allowances for the relevant period, and whether what was actually paid to the members conformed with that decision. He did however conclude that no action would lie against the Speaker for signing the payment vouchers, or against the Minister of Finance for making payment out of Treasury and struck out the passages in the Statement of Claim bearing on those issues.

The specific grounds of appeal will be referred to later but in essence the Appellants challenged Martin J's conclusion that the Court could enquire into whether there had been a decision of the Assembly and whether the payments confonned; while the Respondent on his cross appeal argued that the reasonableness of the decision itself was open to review. There was a further ground of cross appeal relating to the·striking out of the separate causes of action against the Speaker and the Minister of Finance but thi s was abandoned, Mr Niu accepting that their reinstatement would serve no good purp"se.

A t the commencement of the appeal hearing Mr Edwards sought leave to introduce a further ground of appeal, namely, that the Respondent was not, as he claimed, a Tonoan su_b ect but citizen of the United States. it is not clear what was hoped to be gained by ra1s111g that issue for there is no restriction on non-Tongans issuing proceedings (A rticle 4 of the Constitution) al though different considerations may appl y i n a proceedi ng such as the i nstant one, but in any event leave was refused with leave reserved to raise the issue in the Supreme Court should the case proceed .

The background to the disputed payments is that the Sales Tax Act 1986 came into force on the 1st July 1986 and the Assembly resolved that i t should be explained to the general pu bl ic by members holdi ng 'fono' meetings in their electoral distri cts. These took place between the 21st July and Isl A ugust 1986.

The authority reli ed on for the payments is s. 17 of the Legislati ve A ssembl y ,\cl (Cap.4) which reads:-

" 17. When the A ssembly has been con voked the Premier shall makeall arrangements as to the arrival and departure of the members of the Legislative A ssemblv and the Assembl y shall have the power to make such provi sion as i t thin ks f it for the members during the session."

It is, as Marlin *1* said, "a very wide power". The extent of the "prov ision" is left in the absolute discretion of the Assembly, with no guidanceas tohow it should beexerci sed.

'.he grounds of appeal and cross appeal can be dealt with more expeditiously if the ighls and rivileges of the Assembly and its supremacy are considered in a general wa.y 111 the first instance; the more particularly ils w hat we have to say in thi s apeal i s relevant lo one which follows.

The starting poi nt is the Bill of Rights 1689afler the "revolution " agai nst theclai med powers of James I. The omn icompetence of Parliament, at least i n the Uni ted Kingdom, was established by the Bill.

In British Railway s Board and another v Pickin [1974] l A ll ER 609, Lord Reid said at p. 614:-

> "I must make i t plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded i nsofar as i t wa s contrary tot he law of God or the law of nature or natural justice but since the supreman cy of Parliament was finally demonstrated by the revol ution of 1688 any such idea has become obsolete."

Article 9 of the Bill of Ri ghts reads:-

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned i n any Court or pl ace out of Parliament."

It follows that in England the validity of an Act of Parliament i s not open tochallenge on the ground that its passage through the house was attended by any irregularit y. The same i s not true in Tonga where there is a written Constituti on. If.on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law. i t follows that the question whether the event or circumstance has been met is exam inable

in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.

Again, a statutory p1ov ision can bee1lan 11ned and struck do\\"n if it is contrary tu <111 express provision of the Constitution although its passage through the house was not attended by any irregularity.

Theposition is then that the Assembly of Tonga, and indeed any parliamentary body based on a written Constituti on, does not havethe privilege of supremacy over the Courts enjoyed in the United Kingdom.

Apart from the question of supremacy there are other privileges and immunities which must be available to a legislative body, which are incidental to its existence and status, or necessary for the reasonable and proper exercise of the functions vested in it.

In the United Kingdom thecommon law recognises the Parliamentary privileges of freedom of speech in debate and freedom from arrest while the House is in session and these priv ileges are embodies in Article 73of the Constitution of Tonga. One of the most important privileges available to Parliament in the United Kingdo is theellclusiv nght to deiermine the regularity of its own internal proceed ings. There 1s ample authonty for the proposition that when a matter is a "proceeding" of_ the House beginning and terminating within its own walls it is outside thejurisdiction of the Courts (see Stockdale v Hansard (1839) 9 Ad & El l; and Bradlaugh v Gossett (1884) 12 Q.B.D. 271).

In the Pickin case ([1974) l All E.R. 609) Lord Morris said al p.619:-

> "The conclusion which I have reached results, in my view, not only from a settled and sustained line of authori ty which I see no reason to question and which should I tl1ink be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the:: procedures which are lobe followed before a bill can become an Act. It must be for Parliament lo decide whether its decreed procedures have in fact been followed. Itmust be for Parliament to lay down and toconstrue its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Ace It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice toembark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular casethose procedures were effectively followed".

What then is the position in Tonga? The Constitution itself is silent on the role the Courts might play in inquiry into proceedi ngs in the Assembly and simply provides _In Article 62 that "The Assembly shall make its own rules of procedure for conduct of its meetings."

A Cottrt in Tonga faced with a plea that it should mqu1re mto the internal proceedings of the Assembly will obtain no help from any ct or Ord na ce in ore in Tonga in determining itsjuri sdiction o todo. In such a delicate constituhonal situation the Court would look for a clear mandate to proceed. We are of the firrn opinion that in

that situation the Civil Law Act (Cap.14) must be called in aid. That Act provides in short that in the absence of relevant provision under any Act or Ordinance of the Kingdom, !he common law of England shall be applied.

It follows that in detennining itsjuri sdiction to inquire into internal proceedings of the Assembly it must apply the English common law regarding the privilege of pa rliament to determine the regularity of its own proceedi ngs, provided of course the Assembly has not acted contrary to the provisions of the Consti tution in the course of those proceedi ngs, for in such a case the Court is given ju risdiction by A rti cle 90 of the Constitution, which reads, so far as is relevant:-

> "The Supreme Court shall have jurisd iction in all cases in law and equity arising under the Constitution and laws of the Kingdom ....".

We conclude then that there is nojurisdiction in the Court toinquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution.

Turni ng now to the present case, it is convenient to deal with the cross appeal first. Marti n J did in factcorrectly apply the English common law prusuant to the Civil Law Act, and determined that whatever the House had decided in i ts collective capacity regarding the payment of allowances came w i thin the Assembly's "interna l proceedings" which the Court had no power to investigate.

Mr Niu's first submission was that the Learned Judge erred in applying the provisions of the Civil Law Act because therewas nocommon law in England to the effect that Parliament had unlim ited power to determine its own allowances. The submission misconceives the issue. In Tonga there is express power in the Assembly to fi); its own allowances, and the real question was whether the court could inquire i nto the decision process. Itis at that point that the common law of England is brought to bear. For reasons already stated the submission must be rejected.

Mr Niu's next submission was that as the Assembly's discretion to fix allowances was unfottered, it was open to the Court to enquire whether the allowances fixed were "reasonable", applyingsuch cases as Roberts v Hopwood [1925] A.C. 578. That case, and others cited by Mr Niu, relate to remuneration payable to officers and employees of local government and can have no relation toa supreme authority under the Constitution. The notion of the Courts enquiring into the "reasonableness" of Parliament's decisions does not warrant serious consideration. It was for the Assembly to determine its allowances, and only self restraint, influenced by fair mindedness and expediency are available to prevent abuse of its privilege not to have its decision investigated.

Mr Niu next relied on Article 90 of the Constitution as giving juris diction to the Supreme Court toinvestigate. The substance of that Article has been set out earlier in this ju dgment. If, in the process of making its decision concerning allowances the Assembly had breached a provision of the Constitution then we agree that the Court would have jurisdiction, but that is not the case here.

Mr Niu's final point was that indeed the Assembly had breached the Constitution, and in particular Article 78, which deals with the passingof estimates of expenditure for the public service. Itprovides inter alia that Ministers shall be •guided" by theestimates. Mr Niu's point was that in the Tongan version the wording is such that Ministers •must act in accordance" with the estimates, the inference Mr Niu would have us adopt being that once theestimates are fixed there can be nodeviation from them in theway of excess expenditure. Such an interpretation is not in accod with long established custom, and in

any event the English interpretation prevails.

Turning now to the Appellant s submissions. Martin J held that while he could not inqui re into the Assembl y's decision regardin c: allowances, hecould i nquire into whclh.:r a decision had in fact been madeand whether the allowances paid were in accordance with the decision.

Al this point we must part company from Martin J.

This is the Learned Judge's reasoning for his decision on this aspect of the case:-

> "The court isentitled toascertain, as a fact, whether there has been a collective decision of the House on this issue; and if so, what i t i s. Itcannot question that decision. But it can look at that decision as it would a statute. It must accept the decision as a binding authori ty. Starting from there, the Court can i nvestigatewhethertheallowances in fact paid to each member were calculated correctly in accordance with that decision. The actions of individual members in claiming and receiving their allowances have nothing to do with the basic function of the house. They are not 'i nternal proceedings". In the words of Stephen J in Brad laugh v Gossett, these are "rights lo be exercised out of and i ndependently of the House". Accordingly these matters are open to investigation by the Court. They are not the subject of par liamentary privilege."

It is not disputed, and indeed the Respondent alleges as much in his Statement of Claim, that lhe Speaker of the Assembly signed lhe vouchers authorisi ng the payments tomembers and the Minister of Finance, who was himself a recipient of an allowance, (as was the Speaker) paid the allowances from Treasury.

The only inference open on those accepted facts, and the fact that the allowances were paid only to Fono meeting attenders, is that the payments made to members were made pursuant to a decision of the Assembly, which Martin J rightl y accepted \vas not open to review by the Court. Further, the Trial Jud ge held that he had noju risdiction lo investigate the acts of the Speaker or the Minister of Finance but such an investigation would necessarily result i f the Court embarked on an inquiry as to whether a decision was in fact madeby the Assembly. When one considers that thevouchersauthorising payment were signed by the Speaker, who is traditionally the guardian of the privileges of the House,rnd the interpreter of the House's rules and procedure the inquiry Marlin J proposed would inevitably have amounted to an inquiry into the internal proceedings of the House.

What we have already said concerning the facts and law in this case cover the grounds of appeal of the Appellants and it is unnecessary to refer lo them in detail. Counsel on their beha lf referred to the common law principle that internal proceedings of the House cannot be inquired into an submitted that what Martin J had proposed amounted to such an inquiry. We agree. Lord Morris said it all in this passage, earlier cited, from the Pickin case:-

> "It would be impracticable and und esirable for the High Court of Justice lo embark on an inquiry concerning the effect or the effectiveness of the internal procedure s in the High Court of Parliament or an inquiry whether in any particular ase those procedures were effectively followed".

We therefore allow the Appellants' and dismiss the Responden t's cross appeal and rder that the substantive proceedings be struck out As for costs, tllere was some suggestion made on behalf of the Appellants that the action was fri volous, vexatious nd an abuse of the Court process. We do not agree. The issue raised were of importance ::11d the Respondent "as entitled to his day in Court. We 111;11.;e no order for cost•.

Primary Produce EXports Ltd & ors v Masima & ors

Supreme Court, Nuku'alofa
Hampton CJ & Lewis J.
C. 1089/96, 1090/96, 1001196

18 & 21 October 1996

Con.rtitulio1 ·discriminatory law ·I.And Act ·void
I.And .discriminatory pr ovision - inconsistent with constitution
contract .growing, crops .unlawful .uncon.rtimtiona1
Practice and procedur efull Court ·impo.rtance

The plaintiff s, squash exporters, took proceedings to enforce growing contracts with. certain not the defendants and to restrain those defendants from selling their squash to other exporters the defendants. Interim injunctions restraining defendants were granted and on application todischarge thoseorders itwas argued that the effect of s.16La'nd Act, making it unlawful for a Tongan subject to mortgage pledge charge or sell his growing crops, made the contracts "void for illegality" and therefore the growers were free to sell to whomsoever they wished.

Held:

1. Because of the matter's importance the Court sat, for the first time, as a full Court.
2. The Crown, although not a party, were invited to take a part and argue the matter because of its importance.
3. S.16 may well be a protective piece of legislation rather akin to the now repealed Contracts Act.
4. Cl.l of the Constitution did not, and could not, affect this matter.
5. Cl.4 did however. S.16 refers to only to "any Tongan subject". So a non-Tongan squash grower would be bound by such a contract as here, although on the defendants'argument a Tongan would not be bound.
6. Cl.4, renecling some of what preceded i t in cl. l, spells out classes of persons as Tongans and non Tongans, and as chiefs and commoners and that the law shall be the same for all classes, all people.
7. S.16 does discriminate between classes and does enact a law for one class (fongans) and not for another (non-Tongans) whereas the preceding sections in that part of the Land Act and creating various other offences did not (i.e. offences by land holders who by definition can be Tongans and aliens (non-Tongans).
8. Therefore s.16is inconsistent with the Constitution (cl.14) and lo the extent

of that inconsistency is void (under cl.82).. So the .hole of s.16was Void as the inconsistency affected all of the section.

NOTE: '}'heCrown later squght leaye toappeal, which was refused. (A short rt:port as to that follows immediately).

cases considered
P.P.E.L. v Lauti & ors (C.?28/95 Lewis J)
Touliki v Fakafanua & K.O.T. [1996] Tonga LR .145
Fotofili v Siale (1987) SPLR 339 & [1996] Tonga LR 227

Statuteccnsidered
Land Act ss. 16, 2, 12, 13, 15
Constitution
Interpretation Act, ss 34, 2(1)
Nationality Act; s 2

Counsel for plaintiffs — Mr W. Edwards
Counsel for defendants — Mr Tu'utafaiva (C. 1089 & 1091
Mrs Vaihu (C.1090)
Counsel for Crown — Mrs Taumoepeau

Judgment

We start by thanking the Acting Solicitor General for commgon such short notice and providing us with the helpful submissions which she has. J}tis mom ng on a mattr of some importance.

Some general matters. .First, p_rpceedings have been taken (3 actions in C.1089, C.1090. C.1091/96) by two coniies we will de11crjbe as Squash Exporte to nforce contracts entered into earlier this year with individuI Squash Growers,(bemg m the_se proceedings each of the first efendants and in 1091/ the second defendan as well).

Secondlylheactios-are notonlytoenforce the contracts but alsc to restra1? gm er::i from selling their 1996 Squash loofhei:exporters who are also name m the proce mgs.

Interim injunctions have beeri granted and the essential tenns of all th_e orders restrain e growers from selling and disposing of their squash tQ the other-exporters, and restramm g those other exporters frQm buying and/orobtai'ning,rfrom the contract d_grow_ers, squas .

The defences' filed and the applications made to discharge the tnJUnctions (and m particular the applications arid the defences of the grqwers) raise questio s.as to Section 16 of the Land Act (Cap.132). An instance of that is in 1090/% whc;re 1t_1s pleaded by the grower ihere that Section 16 of the Land Act makes the contract "void for illegality".

I should add that these matters before us were argued on the basis tat the growers are Tongan subjectii and that, therefore Section 16 of the Limd Act applies to them. I will come to the importance of the expression "Tongan subject in Clue ourse. .

The·importance of the matter led, w_ith the consent of all parties, to this question (which will be read shortly) being referred to the full Bench of this Court: As I u 1derstand it this may well be the first time that a full Bench of this Court has sat m relation to any matter arid it underlines the importance that this particular question has. It shows the importance that the matter may have in relation to the whole squash industry in the Kingdom.

The question itslf is framed in this way: "Upon hearing counsel, this bemg a question of importancg and urgency, it is ordered that the following question be referred for the consideration of, and the interpretation of, the Full Bench of the Supreme Court namely: do the provisions of the Land Act, Cap 132, being an Act rela ng to_Land an_d in particular section 16 of the Act", and I will not set out the body of this section at this stage, "render agreements and formal contracts made between growers and exporters of buttercup pumpkin squash containinga clause or clauses which _compel rower to ell to the other cmtracting party in exchange for plant seeds chemicals fertthzers and hke commodities void?".

It is that question and that question alone, which is in issue before us he e. In fct we havebeen asked toruleon thequestionas partof the hearings before Mr Justice Lewis, i.e. as part o(the applications made to discharge the injunctions. The urgency and importance attached to the matter is because the squash harvest is in full swing and we were told that shipments are at wharf awaiting export.

If Section 16renders the contracts which the growers entered into unlawful, that would be theendboth of the Interim Injunctionsand, ineffect, of the litigation aspresently framed before the Court. Because if the growers are right then there would, in effect, be nothingfor theexporters (the plaintiffs) totakeaction on and try and enfo_rce in thi Court.

We received written and oral arguments from Counsel for the parties on Fnday the 18th October and then adjourned until today, Monday 21st, because, as it became apparent

in the course of argument, there were serious matters here touching on the con.si!Jtern:y or inconsistency of Section 16 with the Constitution. Constitutional matters were in issue. Mr Justice Lewis and I tcilithe view that,.in that situation the Crown should be put on notice and the Crown askedif itwanted totakeastancein relation totheargumentsbefore s Court As was indicated, we heard Mrs Taumoepeau for the Crown earlier this day.

The Court unanimously has come: to a clear. ie\\i. Itis important that that view be expressed immediatelynotonly sothat tht1p1iftiesknow where they are with this litigation but, as well, irecause of the possible r;1.mifications for the Squash industry generally and the marketilltf and exporting of squash in this year.

.,, Section Y6 of.the Land Act is at the heart of the matter and it reads in this way:

> "It shall be unlawfulforany Tongan subject t9 make any mortgage agreement or other document pledging .or charging or selling hi growing crops of coconuts, yams or other produce or any part thereof. Any person acting in contravention of this Section shall.on conviction be liable to a fine not exceeding $100 or to imprisonment for any period not exceeding 6months.'

The Land Act was enacted in 1927. Nothing has been put before us as to the history of the section, Section 16, or as to how it may have been discussed in debate before the Legislative Assembly. The reasons for its enactment remain unclear although it may well be, as has been suggested by various counsel before us, including the Crown, that it is a protective piece oflegislation ratherin the same light as the Contracts Act, Cap 26, which as we know, was repealed in 1990. It may well have been a somewhat paternalistic and protective piece of legislation, trying to protect Tongan er growers.'''

yve do know that the section contains a significant penalty provision and that that must have been seen as a substantial penal provision at the time of the enactment in 1927. As we understand the position this ection Has not been amended since its first enactment.

Sofaras we are aware there has been no previouslitigation in relation to the section, with one exception. Thatexception related to a matter that came before Mr Justice Lewis last xear in C928/95 Primary Produce Export Ltd -v- Lauti and others. There, as in these cases, there was an application to discharge an lnterim Injunction. It was an application based on a variety of arguments.

On of the arguments put before Mr Justice Lewis which was the subject of some comment in his ruling in November 1995 was as to the effect of Section 16 of the Land Act. There, in that ruling, Mr Justice Lewis referred to the matter in this way (page 4):

> There next argument advanced by the Respondents to the Injunction i s that the socalled Contract offends against Section 16of the provisions of the Land Act" (he then set out the provision of Section 16 itself and went on) "Parliament has clearly placr.d a sanction upon the proscribed activities in Section 16and the sanction i extensive and clearly embraces squash pumpkin, the subject of the present application. On any reading of the statutes there is no saving section for pumpkin squash.. Pumpkin squash must be read as being produce within the meaningof Section 16. The clear and unmistakableobject of the contractual relations between the sellers and buyers in this case is to pledge or charge a growing crop. I conclude that it is not to strain the legislation if one is to construe the provision of Section 16in this way".

That ruling is a renection of the argument that was put in front of Mr Justice Lewis and is a further renection of the arguments that are being put in front of this Court, on

behalf of the growers. But we do note this. That in the case before Mr Justice Lewis last year there was no point raised, let alone argued, as to the now alleged inconsistency bCtwcen Section 16 and Ya rious provisions of lhe Constitution itst lf, so that the posi ti• ·11 here is clearly different.

The question before us, ashasbeen said, relates to Section l6of the Land Act. There was raised in argument (and in one of the Statements of Defence at least) a question as to Section 13of the Land Act and its potential to render these Corttracts uniawful. We will notset out Section 13in full. Itis not thequestion before us and we donot intend toexpress any final conclusion in relation to that. But we do note in passing that, it seems to us in the contel\t of the Land Act, section 13 relates to ensuring that all landholders use proper prescribed forms, (i.e. documents in the manner prescribed in the Land Act) to register and secure their holding or interest in land, whatever that holding or interest might be. Section 13 seems to us to have nothing at all to do with these matters. It relates to all landholders (as that term in defined in the Land Act, and we will corhe to that later i n tl\is judgment) .

To tum then to Section 16. First the agreements or contract s themsel ves have been produced, attached to affidavits in these proceedings. Put shortly the agreements, in effect, say that it shall not be lawful for the growers to sell or dispose of the squash other than to the Plaintiff companies.

As has been said the contracts are with Tongan subjects, (the growers), and the question is whether they, (the growers), can be held to the contracts assuming, for the present purposes, that the contracts are otherwise validly entered into. Can the growers be held to the Contra cts hy theexporters who have, in fact, provi ded the growers with seeds and fertilisers or are the contracts unlawful by the terms of Section 16 and the growers therefore free to sell to whomsoever they wish?

On the one hand the growers say "look at the clear words of Section 16, they apply to us, we are able to ignore the contracts that we have entered into as the contracts themselves are illegal and we can·sell to whoever we like". In fact, that is the same argument as put before Mr Justice Lewis in the case last year.

And we would add that if the growers are right, and the contracts are illegal or unlawful, then it would seem to us that that illegalitygoes to the heart of the contracts so itwould not bea caseof the Court being able toseveroffthe unlawful part. If it isunlawful, it goes to the heart of the contract, the whole contract must fall.

In answer to that the plaintiffs, the exporters, raised the claim that Section 16 is inconsistent with the Constitution and the section itself therefore is void. So it is claimed that section 16cannot affect these contracts and that the question asked of this Court must be answered to the effect that Section 16does not render these contracts void.

The plaintiffs raised 2 arguments based on the Constitution, (and we will deal with them briefly). Thefirst is based on the meaning which Mr Edwards in particular said could be given to the last sentence in Clause 1of the Constitution (and torelated later provisions in the Constitution). In effect, an argument that the State could not, and should nol interfere in private property and contractual arrangements, which are protected under the Constitution .

Itseems tous that that argument is a reworking of the matter which was decided, in a binding fashion in so far as this Court.is concerned, by the Court of Appeal in the case of Touliki -v: Fakafanua and the Kingdom of Tonga. Appeal No.3of 199.Judgment 31

May 1996, (1996] Tonga L.R.145.

That issue was dealt with al some length in the Court of Appeal Judgment at pages I I 1_8and we do 1101 1ntend lo cover that ame ground in this Judgmcnt. That argument is rejected.

. _Te second argument raised, as we understood it, was a claim that Section l6would d1scnm1nate, and therefore offend, against Clause4 of the Constitution. Discriminat · effect, between a··· grower of squash who could not afford seed, fertil iser and s· other than by cntenng 111to a Contract such as a contract in the fom1 underdiscussion here and therefore would be affected by Section 16; as opposed to a "well off" or "well to do" grower, wh could afford his own seed, fertil izer and so on and therefore would not be trammelled 111 the same way by having lo enler inlo such a Contract in advance and then be faced w ith Sectton 16.

• gain we se no force in that argument and, indeed, to try and draw distinctions of. class on that basis 1s something that was commented on in the Touliki de ·· 18 where it was said: —— cist on a page 1

> "It remain of the Clauses on which the Appellants rely to consider the terms of Cl use 4._ This is a provisi_on relatin lo legislation. The Appellants argue that i t forbids a law affecti ng a particular group i n the community and expo1ter of squash (genera lly, or to Japan) are groups entilled to the consttut1011al protection. But it would not be a normal use of language to desc be rowers as a "class" or exporters as a "class Ram -v- Minister for lm1rn grat1011 and Ethnic Affairs (1995) 130 A .L.R. 314. The Law about the export of squash, in the present matter, applies equally toeveryone who wishes to grow or export squash. The law is "the same"; only the activities towhich t t attaches are different. It follows that Clause 4 is of no assistance to the appellants".

So tl1at second basis on which lite matter was argued is also rejected by us.

But 111 the context of dis.cusion and argument about Clause 4 a nd discrimination, a.furt 1er argue 1t was ra1.sed.111_th1s_Court going toanotherand more fundamental aspect 111 lhts Courts v1 w) f d1scnmmat1on. And that is in the use in Section 16of the words an Tongan Subject . (We note in passing that a Tongan subject is defined in terms of Sectton 2 of the Nationa lity Act, Cap 59).

Section 16relatesonl_y to Tongan subject sand purports to make unlawful agreements or other documents pleg111g or charging or selling crops by Tongan subjects.

So o? the face of tl a non-Tongan subject could arrange to have some land, grow squash on 1t under contractual arrangments simil ar to lhe contracts before us and be held to thos c011tractual arrangements (if necessary i n a Court). But a Tongan subject in the sa_me s1tuat1on cuild say 'I thumb my noseat this agreement. Itis unlawful and I can deal with whoever I hke".

The Tongan growers here argue a breach of Clause 4 of the Constitution. Clause 4 says:

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

It argue lat_Set1 n l ts ot a law that is thesame forall the people of this Land. Th_e Court s JUnsd1ction m this matter is to be found in this way.

Clause 90 of the Constitution says: "The Supreme Court shall have jurisdiction in all cases in law and in equity arising under the Constitution and Laws of he Kingdo ···.".

Clause 82 says: "This Constitution is the supreme law of the Kmgdom and 1f ;i ny other law is consistent wit this Constitution that other law shall to the extent of inconsistency be void".

In the Privy Council in 1987 in the case of Fotofili -v Siale a1d Others (which for convenience can be found in 1987 S.P.L.R. 339 at 347) this was said:

> "It follows that in En gland the validity of an Act of Parliament is not open to challenge on the ground that its passage through the House was attende by any irregularity. The same is not true in Tonga were. there 1s a wntten Constitution. If, on a true construction of the Const1tut1on, some event or circumstance is made a condition of the authentic expression of the will of the legislature or otherwise of the validity of a supposed lav, it follows tht the question whether the event or circumstance h s been n:iet 1s exammabl 111 the Court notwithstanding that the question may mvolve mternal proceedmgs of the Assembly. Again a statutory provision can be examined and sti:uck down if it is contrary to an express provision of the Constitution, although its passage through the House was not attended by any irregularity".

That view in the Privy Council has been commented on, and acted upon, 111 vanous cases and was re-affirmed by the Court of Appeal in the Touliki case at pages 10 and 1.

We return then to the Constitution. It is important to look first to Clause l which says this:

> "Since it appears to be the will of God that mari should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may .us their lives and perons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will", (emphasis added).

Clause 4 again:

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

It seems to us that that Clause, amongst other things, spells out "classes" of persons as "non-Tongans" and "Tongans" and as "chiefs" and "commo ers". Clause 4 dearly reflects some of what preceded it in Clause l as we have emphasised, and that agam can be found underlined by the passage which occurs in the Toulild case in the Court of Appeal which can be found at pages 12 and 13.

Perhaps we should add that, that fundamental freedom or liberty declared in Clause 1 of the Constitution is not only entrenched but it would seem completely protected from amendment by Clause 79 of the Constitution which says inter.alia: .

> "It shall be lawful for the Legislative Assembly to discuss amendments to the constitution provided that such amendments shall not affect the law of liberty .....".." (we stop there; it goes on in relation on other matters).

I now return to the passage from Toulild which starts on page 12:- .

> "The Constitution of Tonga opens (in the first sentence of cl.l) with a profound philosophical concept linking the inhabitants of the Kingdo111 with the whole of human kind as inalienably free and equal. This concept may be seen, not only as the fundamental basis of all that follows, but also as a constitutiona l guarantee against both slavery or serfdom and the aritrary or despotic rxercise of power. So far as slavery is concerned, cl.2 goes on to provide a more specific guarantee. But cl. l itself contains a second sentence referring to the right of all to "use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they wi ll ". Historically, as emerges clearly from S. Latukefu on The Tongan Constituti on at pp 20 -34, this sentence seems to have been added in order to put it beyond question that customary rights of chiefs ove the property and labour of other Tongans, rights analogous to those of the lords over their serfs in feudal Europe, were forever abolished. It is significant, as an indication of the role of the second sentence in cl. I, that it i s introduced by the word • And". It is not an independent guarantee with respect to property rights - cls. 14 and 18 provide that - but a statement of a corollary of the opening affim1ation of human liberty and equality.
>
> To see cl. I of the Constitution as concerned with establishing the foundation of the Ton gan State in such an affirmation i s not to see it as less, but as more, important. The Constitution itself does not place first the possession of Tongans, but their liberties. In subsequent clauses, the Constitution proceeds io deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State. But before doing so, it gives concrete application, in a series of clauses, to the basic statement with which it opens.
>
> Clause 2 directly forbids the institution of slavery, and makes a proclamation of freedom for all who live under the n ag of Tonga. In the original fonn of the Constitution of 1875, an additional clause, cl.3 (since repea led), took the same theme one step further by making provision to deal with the then prevalent practice of indentured or forced labour procured from other Pacific islands. Clause 4 reflects the equality implicit in cl.1 (we are all "of one blood") by requiring that the general law of Tonga apply equally to all".

It seems to us that Section 16, of the Land Act does discriminate between classes, does enact a law for one class (ie. Tongans) and not for another (non-Tongans).

For the Crown today, Mrs Taumoepeau said, in effect, that we should look at the Land Act generally. That Act, she argued, was created under the Constitution to interalia, protect the right of Tongans to Tongan land, and that Section 16 was part of that general intention. In that regard she referred to Clause 104 of the Constitution. Clause 104 it seems to us does not say that. The effect of that Clause is to emphasise that all Tongan Land will always be vested in the Crown.

Mr Edwards, in reply to that submi ssion of Mrs Taumoepeau (about the Land Act protecting the rights of Tongans to Tongan land and Section 16 being part of that general intention), rightly in our view, said that Section 16 however is not about land, but is about crops.

We come back, despite Mrs Taumoepeau's arguments, to the clear words of Section 16, vis-a-vis Clause 4 of the Constitution which says the Law shall be the same for all the people.

Indeed it is worth looking at the scheme of the Land Act. Under that Act an alien, that is a non Tongan (see Section 2(1), Interpretation Act, cap 1 - a person "other than a naturalised or native-born Tongan subject") can in fact hold land. That is the effect or Section 14 of that Act which says:

> "It is unlawful for any alien to hold or to reside upon or to occupy any land without having first obtained from the Minister of Lands a permi t so to do issued by him in exercise of the pwoers conferred under section 19(4) of this Act Any alien who contravenes the provisions of this section shall on conviction be liable to a fine not exceeding $20 or in default of payment to imprisonment 'for any period not exceeding 3 months.

So aliens can hold land. It seems to us that such a person is a "landholder" within the meani ngs given that expression in Section 2 of the Land Act; where 'landholder' is defined, inter alia, as being f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise".

Indeed when one looks at some of the alternative definitions of 'landholder' in Setion 2, aliens could well Pe landholders under, for example, paragraph d) or paragraph e) it seems to us. So non-Tongans (aliens) can be .landholders.

One turns then to Division II of the Land Act. It contains five Sections which deal, as the heading to the Division puts it, with "penalties for unlawfully dealing with land". Two of those Sections, Section 14 and Section 16, we have already referred to. Section 12, 13 and 15 create various offences which can be committed by "landholders", that is offences which can be committed by Tongans and non-Tongans alike.

That is to be contrasted with the language used in Section 16. It speaks of 'any Tongan subject'. Section 16, as opposed to the other three Sections we have mentioned, clearly discriminates between Tongans on the one hand and non-Tongans on the other. The use of the word 'landholder' in the previous provisions underlines, in our view, that discrimination.

That discrimination may have been promul gated with the view to it being in the best interests of Tongan farmers at that time (as argued, out or some protecti ve interest) but it is still, in our view, discriminatory. It nie in the face of Clause 4 of the Constitution.

Therefore, using the terms of clause 82, section 16 is inconsistent with the Constitution and, to the extend of that inconsistency, is void. It is further our view that the whole provision of Section 16 is void.

It was argued by Mrs Vaihu, using the tem1s of Clause 82 itself, and reinforced by Section 34 of the Interpretation Act., Cap 1, that the whole provision should not be struck down but ratherthat we should take out what shewould term the offending words 'Tongan subject' and replacethem with a neutral word such as 'person'. So that the prov ision would read "It shall be unlawful for any person to make any mortgage agreement or other document .....•

We reject that submission. That would mean that this Court was in effect acting as the Legislature. Not only that, but we would be givi ng to the Section a meaning quite different to the one obviously intended by the Legislature. Thal would be wrong. There is no such jurisdiction in this Court.

As has been said, it seems to us, that the whole or Section 16 is inconsistent with Clause 4 (and reinforced by relati ng back to that portion of Clause l or the Constitution we have earl ier referred to). Insofar as that inconsistency affects the whole section, that whole Section is void.

To turn then to !he question posed to this full Bench, we answer that question in this way: That the provi ions of the Land Act, and in particular Section 16, do not render agreements and c_ontra_cts between growers (whether Tongan or otherwise) and exporters of squash pumpkin vmd, on the ground that Section 16 itself is void as being inconsistent with the Constitution.

That is the fom1al ans\er which we give. We go no further than to say·that the ba_l<1:nc of he litigation is_ remitted to Mr Justice Lewis for determination, in the light of thi s ruling, 1.e. forthe determi nation of the applications made to discharge the Injunctions and anyother hearings, interlo_cutoryorsubstantive, which may foilow in these proceedings.

. We also add that, pendmg that further argument before, and determination_ by, Mr Justice Lew_1s on the applications to discharge the Injunctions, the Injunctions that have been made 111 each of these actions shall continue in force in the meantime.

(Counsel for the parties were invited to make submissions on costs. None wished to be heard).

The matter of costs is also remi tted for detem1inatio 11 in front of Mr Justice Lew is that being more appropriate as he will be dealing with theoverall issues and he being full; conversant wi th all matters.

(Equiry was then made as to theCrown's position on costs. Mrs Taumoepeau replied that her instrncti on from the A ttorney General was to help the Court and that noquestio of costs was to be raised).

Primary Produce Exports Ltd & ors v Masima & ors (No.2)

Supreme Court, Nuku'alofa
Hampton CJ
C. 1089/96, 1090/96, 1091/96

7 February, 1997

Practice and proceedure - leave to appeal - criteria - case stated
Appeal - leave - criteria - case stated

Th Crown, having been granted retrospective leave to intervene in the matter reported immediately above, sought leave to appeal.

Held:

1. The Crown had been granted leave to intervene given the issues of public law and policy which might have arisen.
2. The Crown were refused leave to appeal as
   (a) no satisfactory explanation was given for its delay
   (b) no party wished to appeal
   (c) substantive trials might be delayed and unnecessary costs mcurred
   (d) certainty for the 1997 squash season would be affected.
   (e) the Crown's concerns were related to general matters of the Land Act and the Constitution.
   (f) and those concerns were irrelevant to these cases.
3. No case could be stated to the Court of Appeal, as the Crown alternatively suggested as the question of law had already been decided in the Supreme Court.

Statutes considered — Land Act ss.16, 43; Court of Appeal Act ss.3, 10

Rules considered — Court of Appeal Rules, r.4

Counsel for Crown — Mr Taumoepeau
Counsel for plaintiffs — Mr W Edwards
Counsel for defendants — Mr Tu'utafaiva (Cl089, Cl091); Mrs Vaihu (CI090)

Judgment

Crown granted leave, retrospective to 21 October 1996, to intervene in these causes (given the issues of public law and policy which may arise);

Crown refused leave both to appeal out of time (0.4 r. l Court of Appeal Rules 1990) and (even if that leave were given) to appeal against the interlocutory judgment of this Court of 21 October 1996, (s. lO(l)(b) Court of Appeal Act (Cap.9) as:-

(a) There is no satisfactorary explanation of delay - formal application by Crown to ratify it's position as an intervener could have been made at any time, and earlier; but more importantly, and, in any event;

(b) None of the plaintiffs or defendants in any of the 3 causes wish to appeal (defendants) or have the matter go on appeal (plaintiffs);

(c) the substantive trials of these (and other similar) actions may be affected and/or delayed; and unnecessary costs incurred by the actual litigants in these causes;

(d) certainty for the forthcoming (197) squash season, and contracts between exporters and growers, would be affected;

(e) the Crown's concerns, as pleaded and argued, relate to general concerns about the implications of the judgment of 21 October 1996 about "the land tenure system of Tonga and the constitutionality of certain sections of the Land Act" (particulary s.43 Land Act and whether e.g. it could be claimed to discriminate against female Tongans, or male and female non-Tongans and therefore be in breach of the Constitution) rather than to the provisions of s.16 Land Act, the subject of the said judgment;

(f) such matters of Crown concern are not now, and cannot be, part of, or relevant to, the litigation in these 3 causes - issues such as the Crown are concerned about relating to e.g. s.43 Land Act properly should await determination in this Court and/or in the Court of _Appeal if, but only if, such issues are before the courts, appropriately, in relevant other litigation.

The application (made oally) by the Crown that this Court should state a case to the Court of Appeal on the issues determined in the said judgment of 21 October 1996 is refused for the reasons as in 2(a) to (f) above and, in any event, on the basis that the "question of law" has already been decided on in this Court and is not, therefore, able to be the subject of a case to be stated "for consideration of the Court of Appeal" (s.3 Coul1 of Appeal Act, Cap.9).

Palavi v Cocker & Minister of Lands

Land Court, Nuku'alofa
Hampton CJ
L2 16/94

5 & 6 November 1996

Land - public works - exhausted - reversion
Practice & procedure - deceased defendant - estate
Land - mistake - set aside lease

A small piece of land on a corner in Kolofo'ou was voluntarily surrendered to the Crown in 1933 for the purpose of building and running a community water tank. What happened to that land when that purpose was exhausted or completed - should it revert to the original holder (or his descendants, the plaintiffs here) or could the Crown lease to someone else (as here, to the first defendant)?

Held:

1. That question did not need to be answered here, in the circumstances.
2. The plaintiff (and family) had been trying to lease back the piece of land for some years.
3. In January 1989 the plaintiffs tried again, with the Minister, to lease the land. No response was made to them, but the Minister received an application from the first defendant to lease the same land in May 1989 and granted that.
4. The lease to the first defendant should be set aside because the decission to grant it was made by the Minister in mistake in ignorance of the earlier application by the plaintiffs. The plaintiffs' application was not considered, the plaintiffs had no opportunity to make representations or be heard and there was a breach of the rules of natural justice.
5. The matter was referred back to the Minister, for him to decide on the competing claims (and some comments were made as to those claims).

Cases considered — OG Sanft v Tonga Tourist Co. [1981-88] Tonga LR 26
Hakeai v Min. of Lands [1996] Tonga LR

Statutes considered — Land Act s.141

Counsel for plaintiffs — Mrs Vaihu
Counsel for first defendant — Mr L Foliaki
Counsel for second defendant — Ms Bloomfield

Judgment

I record at the start of this judgment that at the commencement of the proceedings an amendment or rather amendments were made both to the entitulement and to paras 1 and 12 of the statement of claim to show that the second plaintiff should properly have been named as Sione Feleti Palavi.

Secondly, an amendment was made in relation to the named first defendant. In the original pleadings the first defendant was named as Roy Cocker. Mr Cocker has died after the commencement of these proceedings. Under Order 9 rule 6 subrule 1 of the Supreme Court Rules (which I am entitled to have regard to in terms of Order 2 r.2 Land Court Rules) the action brought against the first defendant continues, the action being treated as if it were against the estate of the first defendant. Properly the first defendant now being the administrator of the estate of Roy Cocker deceased.

This case involves a small piece of land situate right on the corner of Wellington Road and Fatafehi Road, Kolofo'ou. The area of land, if one looks at the documents which have been exhibited, is a somewhat variable amount it having being described at various times as 8 perches, at another time as 9.77 perches, yet other time as 8.05 perches and another time as 7.35 perches. Certainly it is this small area of land right on the corner and it is well deliniated in the various plans which have been produced in front of this Court.

This area of land seems to have been voluntarily surrendered (and not compulsorily taken). but voluntary surrendered to the Crown possibly somewhere back in 1933 or thereabouts. It is an open question in my mind whether the land was surrendered under the provisions of section 138(1) of the Land Act or, perhaps more appropriately given the evidence I heard, was resumed by the Crown following a voluntarily relinquishment for public purpose under ss 3 of section 141.

The land is part of the government estate. It is clear that, whatever section it was done under in the Land Act, it was resumed for a specific purpose that is for the buiding (and then the running and maintaining) of a public or community water tank for Kolofo'ou. The question, as it initially seemed to this Court and as the case was argued, seemed to revolve about what could or should happen to such an area of land if the specific purpose for which it was surrendered was completed or exhausted. Did the government continue to hold the land and therefore was the government able to lease the land to someone else, as happened here in relation to the first defendant or, as claimed by the plaintiffs, did it in effect, or should it in effect, revert to the original land holder or to the descendants of that original land holder, who are the plaintiffs in these proceedings?

That seemed to be, initially, the question for determination. but as the evidence unfolded a second question has arisen, which in my view means that this Court in this case does not have to determine the various arguments which have been put forward as to what should or could occur on the exhaustion of the specific purpose as I have outlined. From what I am told it may well be that that question will arise at some date in the future in relation to other litigation and other pieces of land taken for specific public purposes.

Here, on the evidence before me, I find that one of the predecessors or the plaintiffs, Lisala Fatai, was registered as the land holder of all the area of land that ran along the frontage of Wellington Road between Fatafehi Road and 'Unga Road.

It would seem he was registered as the holder in 1928 (and I refer to exhibits 18 & 21). The plan in exhibit 21 shows part of Lisala Fatai's original holding being surveyed off and leased off to someone else in March or April 1933; and that plan shows also that

the small area in the comer at Wellington and Fatafehi comer was already surveyed off, or was surveyed off at that time, and marked as a government tank.

-The evidence I had from the second plaintiff, who is the father of the first plaintiff, who is the present lessee of the land immediateIy surrounding this disputed comer piece, is that he (the second plaintiff, who is now 65 years of age and was born on this holding) was brought upthere havingin mind the understanciingof the family that the corner(water tank) piece of land was still the family's; they still maintained it because the water tank which was constructed did not occupy all of the disputed area of land. The evidence, which is uncontraverted, is that the family has continued to maintain that area of land and indeed, once the tank fell in to disuse (as it has for the last 30 years or so) the Plaintiffs have taken what might be described as a public safety stance to try and secure the tank from persons such as children getting into it. The second plaintiff described in evidence being brought up to believe that, although the government owned the water tank itself the belief was (and this may well have been a traditional belief in that situation, in family legend orhistory asit were), within the family, that the land on which the tank was situated was -still part of the family land holding. The tank use as a community water tank seems tohave tocome toanend in the early 1960s and it may be, as was pleaded by theplaintiffs, that that was about the time of the establishment of, the Tonga Water Board.

The last of the family holdersof this whole area of land between Fatafehi and 'Unga Road, along the Wellington Road frontage, on the evidence, was Siaosi Palavi who was, respectively, the great uncle and the uncle of the two plaintiff s. In 1976 it would seem that he, Siaosi Palavi, surrendered the land holding and then three persons, all members of the family, applied forand obtained lease-hold int'!rests in this subdivided land holding. Three separate lots were created as can be seen on the plan produced as Exh.17. Two of the holdings, i.e. the lots two and three, went to cousins of the second plaintiff ; the third, lot one, which is the area ofland surrounding thedisputed water tank area went to thefirst plaintiff. The three lots are clearly shown on Exh.17, as is the tank.

Eventually in May of 1992 the lease no. 3690 (Exh.3), a lease of 99 years. from March 1981 to March 2080,was entered into by the first plaintiff as lessee. Itis clear that the tank was separate and was not included in that lease.

On the evidence I have heard, from that time on the Plaintiffs and theirfamily have been trying to find out what was to happen to the water tank no longer in use and to the land it was on. On the evidence, again uncontraverted, it would seem that what they got over the years from the Minister of Lands, the Second Defendant, and indeed to some extent from officials in the Ministry, were a series of reassuring noises indicating that the Minister would try to get it back to them at some stage, that is try to get the disputed land back to them at some stage.

It is worth looking at some of the documents which went to and from the Minister and/or the Ministry over the years parti cular through the 1980s it being accepted by all Counsel that those documents did in fact come into the possession of, or originate from, the Ministry of Lands.

In 1982 it is apparent from Exh.4 that the plaintiffs were trying to find out from the Ministry of Health what was happen to the water tank. Later, in 1982, and it can be seen from Exhs. 5 & 6, the plaintiff s were trying to achieve some sort of agreement with the Ministry of Lands that the tank should be destroyed and the land go to the Plaintiffs, so that tby cpuld build on it or extend onto it the building that were intending to place on

the area of land surrounding the disputed area and already leased by the first plaintiff.

Building was i n fact commenced by them, that is on the surrounding land. It is clear from Exh.7 that the was still making attempts to try and achieve the return to them of the comer disputed area, and in fact Exh.7 is notable as setting out their view tothe Minister, or the view of the first plaintiff to the Minister, that there had been a mistake made in the lease no.3690, that is the disputed land had not being included.

Iti s evident from Exh .8and the plan which was allached to it, that in fact the building which was erected, (and which is now is use in Wellington Road as the German Medical Clinic) but its stairway and a landing and a light on it encroached on orextended over the separate area of land on which the water tank was situated. The Ministry advised the plaintiff s of that and they amended their building accordingly.

In 1985, and this is apparent from Exhs. 9 & 10, the plaintiffs suggested a compromise whereby they could have leased back to themjust a very small portion of the disputed area (0.52 perches) to enable them to satisfy the problem with the overhang of the building that had encroached on the disputed area.

Part of Exh.19 is a recommendation from the Ministry of Lands about that application stating, inter alia, that this application is "not recommended fora government cistern is located on this site". Also is should be noted that theapplication which had been made for the 0.52 perches would not have interfered in any way with the government cistern, the water tank. Itstopped short of the water tank, deliberately so.

The result was, however, that on 9th July 1985(Exh.11) the plaintiffs were advised, or thefirst plaintiff was advised, that his application to lease that very small area had been refused.

The plaintiffs did not give up and in January 1989 (and I refer to Exh.12) the second plaintiff wroteadetailed letter tothesecond defendanl sellingout considerableinformation as to, or in support of, the applications which were being made yet again to try and lease the entire disputed area.

On the evidence, and this is important, there seems to have been no response made to that application and no opportunity presented to the plaintiffs to be heard in support of that application or further that application.

The next step was that in May 1989the first defendant Mr Cocker applied to lease the entire disputed area for use as a car park and, despite the argument of Mr Foliaki on behalf of the first defendant estate, I do not accept that that can be seen as being a public purposewithin theunderstanding of that expression as used in part IX if the Land Act. The application by the first defendant and then the treatment of that application can been seen in the various Exhs 13and 13A - 130. It would seem that his application was approved on the 24July 1989 (50 year lease of the area the purpose being described in the formal approval as being for a garage). Whether a car park or a garage it would seem that, from the evidence, the first defendant has not formally used the land in any way.

That decision to grant the lease to Mr Cocker was confirmed and resulted in a lease 4974 which is Exh.15. The evidence I have heard satisfied me that the plaintiffs, having heard of this lease being granted to Mr Cocker, made attempts torectif y the position from their point of view. Approaches were made to the Minister of Lands and then with Mr Cocker himself but again, on the evidence I have heard and again not contradicted, they were repeatedly put off by reassuring noises being made to them. On the evidence I find the Second Defendant did what the second plaintiff said he did namely the Plaintiff was

told that in effect Mr Cocker would be got to sign a release of the lease and then itcould be leased to the first plaintiff. The letter Exh.16 written on the behalf of the plaintiffs is again an indication of first.the Plaintiffs continued concmandaltitudeabout this land and seoondly the attemp\S they were trying to make to have.the.position rectified.

In effect the second plaintifrs evidence is the only evidence in relation to these matters. With' the one exception of the Land Registry Clerk or employee called, Mr Moala, who gave evidence on behalf of the first defcmdant. His evidence dbes not take me any further on this particular issue; and indeed on one other_ issue which 1 will come toshortly it assists the plaintiffs. In general termstherefore, I concludethat tothe greatest extent the allegations made by the plaintiffs in this statement of claim aremade out on tl1e evidence.

Those allegations .are supported in very considerable extent by the documenla'}' exhibits, some of which I have already referred to. The only qualification might be that the evidence does not, to quite the extent pleaded, fulfill the second part of para.8 of the Statement of claim. And indeed to some limited extent para.11 of the statement of claim. Those matters, however, do not affect the point which I will come to, which decides the matter in thisjudgment.

It is claimed on behalf of the plaintiffs, both in the statement of claim and in argument today, that the land having been voluntarily surrendered or relinquished by the plaintiffs' family for the specific public purpose of a community water tank and that purpose now being exhausted that the land should revert tothe plaintiffs, because in effeel the land was given in trustto the government forthe particular purpose and on completion of that purpose it should revert.

Mrs Vaihu forthe Plaintiffs traversescertain of tl1e provisions in part IX of the Land Act and in particular section 141. The Crown, 111rough Ms Bloomfield, and Mr Foliaki for the oilier defendant argue in relation to 111at, that there is no room in the Land Act for such a notion of trust and therefore of reversion on the exhaustion or completion of the purpose. The argument is fuat theland in dispute had been lawfully resumed back in 1933 or thereabouts; that it was part of the government estate in any event; it is held properly and lawfully by the Crown; that part IX of the Land Act is silent on any question of reversion of resumed land; that part IX isa completecodeand that notions of equity should not, and caruiotintrude intoit, (findingsupportforthose propositions, in the Privy Council decision in 1981 of 0.0. Sanft -v- Tonga Tourist Development Company. [1981-88] Tonga LR

I have set out the arguments in a little detail because it may be helpful to do so from two points of view. The first from the point of view of fue Ministerfor the reasons which I am going-to go on to shortly. The second from the point of view of possible future litigation which I have said may be in the pipe line regarding such mailersas water tanks. But I am not going to decide that issue in this case.

I have determined that the decision of the Minister to lease the land to the first defendant should be set aside, in any event, and, therefore, that the lease No.4974 to the first defendant should also be set aside. I am not however (as Mrs Vaihu seeks) going to make an order substituting in effect the first plaintiff as the lessee of disputed area of land. I am satisfied that thedecision tolease thelandtothe first defendant was made in mistake, in ignorance of theapplications made earlier that very same year by theplaintiffs forthem to lease the disputed area. Made in ignorance of the repeated efforts which seem to me

had been made by the plaintiffs to secure that area foi: themselves.

On the evidence I conclude that the Minister did not consider the plaintiffs'January 1989application to lease, and did not hear any representations from the plaintiff sor give them any opportunity to be heard in support of their application to lease the land. The evidence of Mr Moala supports the view that, indeed, the Minister in making the recommendation on Mr Cocker's lease when submitting it to Cabinet was unaware of the application by the plaintiffs of that same year, because Mr Moala said thai he believed, from his experience as an officer in the Ministry of Lands, that if the Minister had been aware of both applications (i.e. the plaintiffs and Mr Cocker's) then both would been submitted to Cabinet.

It has long been recognized in thi Land Court (and upheld on appeal) that there is ground to set aside (orjurisdiction to set aside) the decision of the Minister of Lands if a mistake has been made. On the evidence I consider su h was the position here. I am reinforced in that view by that ivas said recently in the Court of Appeal in Siaosi Hakeai -v- Minister of Lands & others [19%]Tonga LR Appeal 50/94Judgment 11 May 1996. And I read from page 3 of that judgment this passage -

> "It is clear law that a person whose rights interests or legitimateexpectations are imperilled by anofficial'sconsideration of someotherperson's applications will generally be entitled to a fair opportunity to be heard before a decision adverse tohim is made. This is what isknown asnaturalju stice. Here although the official of the Ministry of Lands knew the surrender had been arranged to enable him to apply for a grant of the allotments, he was not given any opportunity to argue that he should have priority before the parported grant was made to the Appellant. That was legally wrong. Ifhe had been given the right tocomment this whole matter might well ha.ve ended then. It is to enable both sidesofacase to be considered thatthe principleof naturaljustice exists".
>
> "But the Minister, on learning what had happened made the same mistake gain. He should have given the Appellant an opportunit y toanswer the claim that his registration was wrong. Instead the Minister simply cancelled it and registered Manuao. That too was wrong. Whenever the Minister has competing claims for the same land, he should be careful to ensure that both sides get a hearing - not of course as in a Court, but an opportunity to put each point of view before a decision is made".
>
> 'In the present case the successive errors of the Ministry of Lands must lead to an order setting aside the actions taken by the Minister, and referring the matter back to him to enable the appropriate decision to be made, after a considera tion of the contentions of both sides".

That passage in my view can be fitted to the case before me. There were competing claims. It was important that the plaintiffs were given the opportu nity of making their representations in support of their claim. That did not happen.

I therefore set aside the decision made to lease the land to Mr Cocker and refer the matter back to the Minister to enable him to make the appropriate decision after consideration of all the contentions from both sides. If , as it seems. the public purpose or purposes for which the land was originally resumed isorare exhausted thenhe will have to consider the competing claims or applications on their merits.

Itwould seem to me, but it is of course a matter forthe Minister, that, there are some

factors here which mi ght be seen as supportive of the plaintiffs' claims. First, ther\! was the history of the plaintiffs' family with thi land. Secondly, there is the cntinuing and documented efforts maJe by that family to try and have the lane! made available to them again. Thirdly, there is the fact that they seem to have put effort into maintining the land notwithstanding the fact i t ha been resumed by the Crown. Fourthly, 1t 1s a small area of land adjoined or surrounded on twosides by the first plaintiffs own leasehold land and that would indicate (the physical layout would indicate) that it is land far more appropriately useable, one might think, by the plaintiffs than by some other personsju st leasing the very small comer piece.

I donot intend to say more. As I say it will be for the Minister. But, perhaps, I would also add this. That the learned Assessor sitting wi th me has indicated that it would be certainly in keeping with Tongan tradition and custom, and certainly as Tongan persons generally would see it, that land voluntarily given for public purposes should go back to, or revert to, the original landholding family when the purposes are expended; rat the very least that that family should have the first opportunity.a s it were the first opllon, to have back that land. It seems to me that there might be a deal of common sense in that view.

The formal orders of this court then are that the lease No.4974 in favour of the first defendant should be set aside and that the competing claims (the application to lease by the plaintiffs and the application to lease by the first defendant) be referred back to the Minister to be dealt with by him according to law.

Pahulu v Mottini & anor

Land Court, Nuku'alofa
Lewis J
L.201196

21 October, 5 December. 1996

Land - Tongans - non Tongan cannot hold
Nationality - take another - loss of rights

The plaintiffs, citizens of the U.S.A .. were father and son, the father bei ng registered as the holder of a town allotment on which the first defendant ran a business. The second defendant. a younger hrother, of the first plaintiff, had held a lease from his mother over the allotment, from her widow's interest in the land. She died in May 1995. The second defendant applied for the land, as heir, in July 1995 and leased to the fi_rst defendant (who had been leasing from the widow since March 1994). The first plaintiff was granted the land, and registered, however.

Held:

1. The question was whether the first plaintiff was a lawful registered holder of the allotment.
2. The first plaintiff (and by operation of law, his son the second plaintiff) became US citizen(s) in 1971 and by s.4 Na tionality Act they ceased to be Tongan subjects and that the rightsaccrued by opera tion of the Land Act were extinguished for both father and son. Only Tongan subjects cari hold tax and town allotments.
3. Upon the voluntary taking bya Tonga subject of the nationality of another stale that personceases lobea Tongan subject and whi lethe obligations asa Tongan remain with the person the rights he formerly possessed as a Tongan are extinguished.
4. The registration of the first plaintiff should be cancelled and the second defendant registered instead.

Statutes considered — Land Act s.82, 2, 80, 42, 11, 87
Na,tionality Act ss.5, 59

Counsel for plaintiffs — Mr L Foliaki
Counsel for defendants — Mr Niu

Judgment

The facts in this land case are not in dispute. The plaintiffs Me citizens of the \J1111t:d States of America domiciled in Pasifica < alifomia The tlelcndant is a resi<lc111 1Jf Nuku'alofa Tonga and is the owner of the "Fasi Moe i\fi Guest House" and the "Italian Restaurant" at Fasi Moe Afi.

The first plaintiff is the registered holder of a town allotment located in Fasi Moe Afi . The first defendant carries on business from a building on the allotment. An issue in this case is whether the first plain ti ff is the lawful registered holder of the allotment. The first defendant alleges that the first plaintiff may hold the deed of grant but he does not hold the allotment legitimately since he is now not a Tongan subject. Lata-i-anamanu Pahulu held a widow's interest in the subject land following the death of her husband Paula ahulu. Lata died on 31 May 1995.

A "Residential Lease" dated 14.394 between Lala and Feleti A lani Kupa Pahulu her son, is exhibited to Feleti's affidavit. Feleti the second defendant is the second eldest legiti mate son of son of Lata adn the deceased holder Paula Lava Pallllu. The first plaintiff Sione Folaumoelau Pahulu was at all material times the eldest leg1llmate son of Lata and Paula Lava.

On 6 July 1995 Feleti filed an affidavit of heir in respect of the la 1d.in questio 1. His mother having died on 31 May 1995, the affidavit of Feleti was w1th111 the hm1ta11011 imposed on heirs claims by The Land Act Cap. 132 S.S. . .

On 7 July 1995 the second defendant Feleti and the first defendant Mol\1111 executed a document entitled "Agreement to continue tenancy agreement". The document appears to be intended to secure the tenancy of the first defendant on the subject land by -

Accepting and endorsing the terms of the "Tenancy A greement" dae 14 March 1994 (between 'Anamanu Pahulu and the first defendant Mott1111) as their own Agreement, and,

By recording the payment of certain rents and making arrangements for further payments or rent due, . . .

Thereby purporting to affirm the continuation of the tenancy and nghts of the parties pursuant to the agreement of 14 March 1994 until 30 June 1997. On 19 Mrch 1971 the first plaintiff became naturalised as a citizen of the United States of America. At that time, the second plaintiff, his son was under the age of 16 years and by operation of the Jaw of the United States of America acquired American Citizenship.

The issue arising from the facts of this case is one of law. The question which the facts pose amounts to this:- . . .

"Does a person born to a father who has relinquished his Tongan nationality lose rights he possessed while a Tongan subject to succeed to his father's town allotment pursuant to the Land Act Cap 132 Section 82?"

The Land Act Cap 132 Section 82 provides as follows:-

82. Subject to the life estate of the widow. the succession to a tax or town allotment shcill be as follows:

(a) descent shall be traced from the last lawful male holder;

(b) only persons born in wedlock may inherit;

(c) the inheritance shall descend in the first place to the eld st son of the deceased holder or if such son is dead to the eldest male heir of the body of such son. If the eldest son of the deceased holder be dead without leaving any male heir of his body the succession shall devolve upon the ne:11 eldest son of the holder or if such son is drad to the eldest male heir of such son's body. II the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest holder or the eldest ma le heir of his body and so on taking all the deceased holder's son in succession in order of their ages;

(d) if the holder dies without leaving any son of heir male of the body of a son him surviving then any unmarried daughter of the deceased holder shall inherit for the life and if there are two or more unmarried daughters they shall inherit all together jointly for their lives. The life estate of any daughter shall terminate on her marriage or upon proof in proceedings against her in the Land Court to recover such allotment (after the manner provided in section 81) that she has committed fornication or adultery;

(e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body as such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed or if he be dead the eldest male heir of his body and soon taking the deceased holder's brothers in succession in order of their ages;

(f) if the holder dies without leaving any brother or heir male of the body of a brother him surviving the inheritance shall go to the eldest brother of the deceased holder's father or if such brother be dead to the eldest male heir of the body of such brother. If the eldest brother of the deceased holder's father be dead leaving no male heir of his body then the next eldest brother of the deceased holder's father shall succeed or if he be dead the eldest male heir of his body and soon taking the brothers of the deceased holder's father in succession in the order of their respective seniority;

(g) in default of brothers of the deceased holder's father or male heir of the body of such a brother the allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof;

Provided always that the failure of the deceased lawful male holder of any tax or town allotment to register the same under the provisions of Division II or Part V III of this Act shall not of itself be a bar to the grant to his heir under this section, and that provided the Minister of Lands is satisfied upon enquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the heir".

The Nationality Act Cap 59 S.4(1) provides as follows:-

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

(2) A female Tongan subject who married an alien, and exercises her right to

acquire the nationality of her husband, and does in fact acquire the nationality of her husband, shall cease to be a Tongan subject from the date on which she acquires foreign nationality".

Section 5of the Nationality Act provides:-

"5. Where any Tongan subject ceases to be a Tongan subject he shall not thereby be discharged from any obligation duty or liability in respect of any act done before he ceased to be a Tongan subject".

Itseems taum that the plain effect of section 4 f the Act is to bring to an end any rights enjoyed by a Tongan subject by reason of his being a Tongan subject prior to his acquiring another nationality. Section 4 "deems" him to be no longer a Tongan subject by operation of law without any other act taking place. Itis an Act designed lo havequite profound consequences including the preservation of liability with the destruction of rights.

I conclude that the first plaintiff ceased tobe a Tongan subject as and from 19March 1971. I conclude and find that as of that date his rights accrued as a Tongan subject by operation of the Land Act were extinguished as were those of his son and first heir the second plaintiff . The second son Feleti (the second defendant) remained a Tongan subject.

The plaintiffs argue that the Land S.82 does not preclude any person who is no longer a "Tongan Subject " from having rights which may devolve tolegitimate successors provided that they quality in accordance within the provisions of the Land Act.

The plaintiffs submit that the intent of the legislature was not to exclude former Tongan subjectsfrom the operation of the devolution provisions of the Land Act. There is, the plaintiffs claim, no differentiation for present purposes in the Land Act scheme of devolution of allotments between Tongan and former Tongan subjects.

The defendants submit that this dispute concerns both a town allotment and a tax allotment, that the Constitution has since 1875 always draw a distinction between Tongans and 'Non-Tongan" subjects - (Foreigners or Aliens) and that only a Tongan subject may be a lawful holder of a Tax allotment. Those submissions are correct.

The Land Act (hereinafter "The Act") Section 1)0 makes provision for vents upon the death of the lawful male holder of any town ortax allotment. Asthe defendants point, out a lawful male holder is a person who holds or is granted a town and tax allotment in accordance with the provisions of the Act.

As can be seen from the provisions of S82of the Act (Supra), descent shall be traced from the last lawful male holder and the defendants submit that if the deceased was not the lawful holder then no right of succession from him may be secured by a person claiming under him virtue of the provisions of S.82 of the Act.

Division II of the Act makes provisi on for the devolution of hereditary estates. And clear proscription is written around the part in Section 42. Which provides -

"42. Nothingin this part of this Act shall apply to toany person not of Tongan nationality".

The Defendants point out that S.11 of the Act enables the King in Council to grant hereditary estates to any person who may not be a Tonga subject, whereas the intention of Parliament is plain and unambiguous - only Tongan subjects may hold tax and town allotments.

In his closing submission Mr Niu emphasises that Parliament has drawn the Act in such a way so as to enable a choice to be made by Tongan male subjects in the taking up of tax and town allotments - S.87 of the Act enables a lawful heir to choose not to take up an allotment and if within the passageof twelve months he has not taken up the allotment which may legitimately be his then the allotment reverts to the crown. The defendants draw an anology between the provisions of S.87of the Act with the free choice exercise by a Tongan subject who decides to beome a national of another state.

I conclude that Parliament in enacting the Nationality Act, has spoken in clear and unambiguous words. Upon the voluntary taking by a Tongan sub ct of the national ity of another state the person ceases to be a Tongans subject and while the obligations as a Tongan remain with the persoh I concludethat the rights he fom1erly possessed asTongan areextinguished. I so rule. I will hear counsel as to theappropriateorders in consequence of this ruling.

Later, in Court (after argument)

It is ordered that:-

1. The Hon. the Minisier of Land cancel the regis tration in respect of the land the subject of this claim and in place of the First Plaintiff, Register the Second Defe11dant, Feleti 'Alani Kupa Pahulu as holder forthwith.
2. The Costs of these proceedings be thoseof thefirst and second defendants to be taxed or agreed.