TONGA LAW REPORTS 2017

Editor : Neil Adsett BA LLB SC

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Court of Appeal

Lord President Owen Godfrey Paulsen;
Hon. Justice Michael Moore (Australia) (Vice President);
Hon. Justice Kenneth Handley (Australia);
Hon. Justice Sir Peter Blanchard (New Zealand);
Hon. Justice Rodney Hansen QC (New Zealand).

Supreme Court

The Lord Chief Lord Justice Owen Godfrey Paulsen;
Justice Charles Bentley Cato;
Justice Michael Dishington Scott (part time until September 2017).

Land Court

The Lord Chief Lord Justice Owen Godfrey Paulsen;
Justice Charles Bentley Cato;
Justice Michael Dishington Scott (part time until September 2017).

Magistrates' Court

Chief Magistrate Sione Folau Lokotui;
Principal Magistrate Salesi Mafi;
Principal Magistrate Paula Tatafu;
Senior Magistrate Frederick Tuita;
Senior Magistrate Similoni Tu'akalau;
Magistrate Penisimani Ma'u;
Magistrate Manamo'ui Kaufusi.

Attorney General

'Asipeli 'Aminiasi Kefu, Acting Attorney General.

Solicitor General

Sione Finau Sisifa.

Director of Public Prosecutions

'Asipeli 'Aminiasi Kefu.

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R v Vaikona Takapu

Supreme Court, Nuku'alofa
Cato J
AM 16/2016

13 January 2017

Sentencing —discharge without conviction — no power to order no criminal record if fine paid — Crown must be accorded right to make submissions if a discharge may be granted

The defendant was convicted of the possession of a small number of low calibre bullets which he said he used for fishing. The Magistrate fined him $200 and ordered that if the fine was paid in time there would be no criminal conviction recorded. The Crown Appealed.

Held –

1. The Magistrate erred in law by ordering that if the Respondent paid his fine then his conviction would be discharged, because there was no provision under Part IV of the Criminal Offences Act which permits a Magistrate to make such an order;
2. The Magistrate should have approached sentencing under section 204 of the Criminal Offences Act for a discharge without conviction, if he believed that was an appropriate sentence;
3. The Magistrate erred in law by not giving the Crown an opportunity to be heard in consideration of a discharge of conviction under section 204 of the Criminal Offences Act.

Statutes considered –

Criminal Offences Act, section 204
Arms and Ammunition Act, 2012

Counsel for the Crown : Mr. Lutui

J U D G M E N T

[1] The Crown appeals against a sentence imposed by Principal Magistrate Mafi on 8th March 2016 in the enhanced jurisdiction whereby the Respondent was found guilty and convicted of possession of ammunition without a licence contrary to section 4(1)(2) of the Arms and Ammunition Act, 2012.

[2] The Respondent was sentenced subsequently to a fine of $200.00 to be paid within a month, in default the Respondent imprisoned for 2 weeks. Further, if the Respondent managed to pay the fine within one month then no criminal conviction would be entered into his record.

[3] The Crown appeals against this sentence; first on the basis that the Magistrate erred in law by ordering that if the Respondent paid his fine then his conviction would be discharged, because there was no provision under Part IV of the Criminal Offences Act which permits a Magistrate to make such an order; secondly that he should have approached sentencing under section 204 of the Criminal Offences Act for a discharge without conviction, if he believed that was an appropriate sentence; and thirdly, that he erred in law by not giving the Crown an opportunity to be heard in consideration of a discharge of conviction under section 204 of the Criminal Offences Act.

[4] The accused, after a trial, had been acquitted of unrelated charges. He made a submission on the possession of ammunition without a licence charge for which he had been found guilty after, at the conclusion of the Crown evidence, admitting this. He said he used this for fishing. He asked for lenient sentence and one that did not ruin his record due to the responsibilities he said he carried out for King and Country or hinder his travels abroad. The police found seven, 5.5 mm air gun bullets at the accused's home.

[5] The judgment of the Magistrate following his acquittal on the unrelated charges was to this effect;

> "I find the accused guilty for the possession of ammunition without a licence which I sentence him to pay a fine of $200.00 within a month, failure to do so would result in two weeks imprisonment. If fine is paid, the accused shall not bear a criminal record.".

[6] I add that it does not appear that the Prosecution was given any opportunity to make a submission on sentence.

[7] In my view, the Crown is correct in relation to all its submissions. First, the Magistrate had no jurisdiction to make the kind of order, he did. Had he sought to discharge the accused without conviction, he should have proceeded under section 204 of the Criminal Offences Amendment Act as the Crown submitted. Such a sentence is justified where the conditions of section 204(1) are met involving situations of lesser criminality having regard to the circumstances, including the nature of the offence and character of the offender, that renders it

inexpedient to inflict punishment. Such a discharge operates as an acquittal under section 204(2) of the Act. A Court may in addition to a discharge make an order for payment of costs or the restitution of any property and in appropriate circumstances compensation, under section 204(3) of the Act. What the Magistrates does not have is the jurisdiction to impose an order of the kind he did following a conviction and imposition sentence and should not be lightly granted. The Crown should be given an opportunity to make such representations as it thinks appropriate before a discharge is granted because the discharge operates as an acquittal. It was this last aspect that Mr. Lutui rightly, in my view, emphasised in his submissions.

[8] I am informed that the Respondent has paid the fine. I considered whether in the light of the fact sentence was imposed in March 2016, (the record not arriving in this Court until early October, 2016) I should quash the sentence and consider an alternative sentence in this Court including a possible discharge without conviction. However, I consider it better that the Respondent be resentenced before Principal Magistrate Mafi. Magistrate Mafi plainly had a discharge without conviction in mind when he sentenced the Respondent though irregularly in March 2016, and may proceed to regularly dispose of the matter under section 204 after further consideration, and considering possible Crown submissions, should he consider this appropriate perhaps ordering that $200 or such sum as he thinks appropriate is paid towards the cost of prosecution, as is not uncommon elsewhere in these kinds of case. I was informed the Respondent has no previous convictions and the amount of ammunition was not large; nevertheless, offences under the Arms and Ammunition Act carry heavy penalties and are serious. This was, however, plainly at the lower end of offending of this kind. I consider the matter should be fully ventilated before the Magistrate and the Crown given an adequate opportunity to advance any objection it may have to this course of action taking into account the nature of the offence and the public interest.

[9] I quash the existing sentence and remit the matter to Principal Magistrate Mafi for resentencing to take place. The Respondent is to next appear in the enhanced jurisdiction of the Magistrates' Court on the 7th February 2017 at 10 am in Court room 3 before Magistrate Mafi for sentence then or on a date suitable for the Magistrate. His bail is extended until then. A bailiff of this Court is to serve a copy of this judgment on him and bring to his notice the time of his next appearance before Principal Magistrate Mafi.

R v Hurrel

Supreme Court, Nuku'alofa
Cato J
AM 18/2016

13 January 2017

Interpretation — precedence of Tongan version over English — need for expert translation evidence — settled understanding for 80 years not to be upset lightly — fakalotokovi — does this require mens rea?

This was an appeal by the Crown against a judgment of the Magistrate submitting he had misapplied section 21 of the Interpretation Act by looking at an old version of the section.

In a drunken episode the accused was invited to shoot his friend and did so. The Magistrate looked at the old version of the law and found there was no aspect of ill-will as required in the Tongan version so there was no guilt.

Held –

1. The Magistrate should have looked first to see if a clerical error caused the difference in meaning between the 2 language versions before applying what he thought was the meaning of the Tongan. He should also have taken wide expert evidence on the correct Tongan translation;
2. Remitted to Magistrate to reconsider the law to be applied as elucidated by judgment;
3. To conclude that the basic law of Tonga and the common law was changed to go beyond mere *mens rea* requires clear words in the law;
4. *Obiter* regarding consent being a defence to intentional harming, or robust horseplay.

Statutes considered

Interpretation Act section 21

Cases considered

Aitken [1992] 1 WLR 1006

Counsel for the Crown	:	Mr. Lutui
Counsel for the Defence	:	Mr. Pouono

J U D G M E N T

[1] This was an appeal brought by the Crown against a judgment ruling of the Principal Magistrate Mafi submitting he had misconstrued and misapplied section 21 of the Interpretation Act to mean that, when there is a discrepancy between the Tongan version and English version of word in a statute, that the Tongan version of that word shall take precedence. Originally, I had part heard the matter on Monday 9th January 2017, but the Respondent had signified his desire that his trial counsel attend to make submission on his behalf, so the appeal was adjourned until the 13th January 2017 for Mr. Pouono to appear. He did so and advanced submissions seeking to uphold the Magistrate arguing that he had approached the matter correctly and the Appeal should be dismissed. This is another case where there had been a delay in forwarding the appeal to this Court. The appeal notice had been filed by the Crown on the 31st May 2016. The record did not arrive in this Court until mid-October 2016. Delays have been systemic in the Magistrates Court. Systemic delay in the administration of justice and the orderly disposal of appeals may be a factor for a Court to take into account in mitigation of sentence.

[2] The Crown contended that the Magistrate had incorrectly gone on to dismiss a charging of causing serious bodily harm on the grounds that wilful in the English section 107(1) and 2(c) of the Criminal Offences Act was not represented by the Tongan word included in the Tongan version of the legislation, "fakalotokovi". As a consequence, because he considered that "fakalotokovi" meant ill will and did not mean wilful, on the facts before him the charge should be dismissed because the Respondent had not acted "wickedly" when, during what seems to have been a drunken evening, the complainant had asked the respondent to shoot him after the complainant had held the gun towards his chest. The Respondent had obliged and, although the pellet had lodged in the complainant's chest, mercifully no further harm than allegedly serious harm had eventuated.

[3] Mr. Lutui, who argued the case for the Crown, pointed out that Magistrate Mafi had applied the approach that existed under the former section 21 of the Interpretation Act that read;

> "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 meaning, then in deciding the question of the accused's guilt or innocence, the court shall be guided by what appears to be the true meaning and intent of the Tongan version.".

[4] Mr. Lutui contended that the Magistrate had overlooked the new provision contained within section 8 of the Law Revision (Miscellaneous Amendments) Act 7 of 2009, that reads;

> "Where it appears to a court that the Tongan language version of a provision in an act differs in meaning form the English version of that same provision –
>
> The court may give the provision its correct meaning and act accordingly if it considers that there has been a simple clerical error or error in translation; or
>
> The court shall treat the Tongan language version of that provision as giving the true meaning of the law if it considers that the difference in meaning goes beyond a simple clerical error in translation.".

[5] Applying the English version of the Act, wilful means no more than intentional or purposeful. It is not required to constitute a successful prosecution that there be present any blameworthiness, *male fides* or moral obloquy accompanying the act. This point was made by Professor JC Smith in Smith and Hogan, "Criminal Law" 10th ed, at page 70 where it is said that, "the word 'rea' refers to the criminality of the act, not its moral quality." An example of this given by Dr Smith was R v Kingston [1994] 3 ALL ER 353 which had followed Yip Chiu-Cheung [1994]2 All ER 924. Yip had upheld a charge of conspiracy to export drugs where the accused had conspired allegedly with an undercover officer to export drugs from Hong Kong to Australia. Albeit that the undercover officer's motives were good that is to entrap criminals and he was acting on superior orders, neither would have been a defence if the undercover officer had been charged. Thus, the appellant's defence was that he could not be a conspirator with the undercover policeman failed. In Kingston, the fact that the accused, a man with paedophiliac inclination, who had indecently assaulted a 14 year old boy said that he would not have given way to his inclinations and committed the offence but for drugs secretly administered to him with intent that she should do so, was no answer to the charge. Professor Smith went on to say;

> "An *actus reus* generally is, or includes, some very undesirable result – killing, wounding, theft or damage to property etc and an intention to kill, wounding, theft or damage to property, etc –and an intention to cause it is nearly always a state of mind which ordinary people would regard as blameworthy; but moral blameworthiness is not the legal test.".

[6] Indeed, the position taken by the Magistrate had, I am informed by Mr. Lutui, never been taken before in Tonga despite the fact that the offence of grievous bodily harm also contains the same provision and has existed in the Criminal Offences legislation for many years. The change postulated by the Magistrate would represent a radical change in approach for Tonga in common offences such as causing serious or grievous harm. Such a change would in my view as Mr. Lutui argued be quite inconsistent with the English approach to mens rea and have to be one that was plainly intended under the Tongan version of the legislation.

[7] Mr. Lutui pointed out that the correct approach was for the Magistrate to have satisfied himself first whether there had been a simple clerical error or error in translation, and only if it went beyond that could the Court treat the Tongan version of that provision as giving the true meaning of the law. He had not it seems done so or applied his mind to this issue and, accordingly, he had misdirected himself.

[8] There is no reference at all in Magistrate's Mafi's decision to dictionary meanings, or expert evidence. He said in a translated version;

> "Ticket to Bodily harm– that the defendant is released upon this court based on section 21 of the Interpretation Act. When the Tongan Act is compared with the English Act, there are differences. It states if one is heard due to breach of the law then it has a difference from the English Act in that which the defendant is being charged upon. Therefore the defendant will be judged whether he is innocent or not based upon the Tongan language.".

However in this case there has been wilful which must be proved by the Prosecution the main elements of wicked act been made. There are important terms which are wilful, ill-will – this is wickedness but yet proved. That the bodily harm was because of wilful but it is clear there that the prosecution asked the defendant to shoot him when he held the gun mouth towards his chest. The defendant was shooting at bottles. Therefore the ticket to bodily harm is released from the defendant."

[9] I interpret the Magistrate in this translation, which may be rather limited, from what he had recorded in Tongan to assert that the word "fakalotokovi" to require proof of ill-will, rather than mere intention or deliberation, and could have no other meaning. The fact that the complainant requested the accused to take the action in his view absolved the Respondent of responsibility, and the prosecution

was dismissed. Mr. Lutui, who speaks fluent English and Tongan, says that is not so. "Fakalotokovi", he contented, was intended to mean deliberate or intentional although it could also have the meaning ill-will, as well.

[10] I consider that I should refer the matter back to the Magistrate to reconsider this issue in accordance with the appropriate statutory provisions. In relation to the issue of whether the Tongan version is materially different, the prosecution should proceed to have Tongan dictionary meanings available, and because the issue is so important for the orderly development of Tongan law, expert Tongan evidence on the point. I understand Mr. Lutui to say that "fakalotokovi" was the only word that could be used in Tonga to encapsulate intention, and that it did.

[11] In any event, it would seem, although I express no view upon the issue, that even if the interpretation in Tongan is not materially different and moral culpability is not required then the defence of consent may be available to the otherwise unlawful act of firing the rifle and causing serious harm.

[12] Again, the commentary in Smith and Hogan at pages 420-422 is helpful. For some, but not all assaults, consent can be a defence to an intentional application of force, for example murder. Professor Smith discusses limitations on consent to the infliction of physical harm. The law is not clearly settled, as the commentary suggests. See Brown [1993] 2 All ER 75, at 79, 86, 106 119 HL, and the criticism of Smith at pg 421, at least in so far as the judgment suggests consent is negated because harm occurred regardless of whether it was foreseen. For robust horseplay by Royal Air Force officers involving setting fire to others garments, leading to serious burns see Aitken [1992] 1 WLR 1006, and the comment by Professor Smith, at page 422;

> "Two such incidents apparently caused no harm but then P sustained severe burns. It was held that a ruling that it was not open to the court martial to find that the activities were lawful was wrong. If P consented to them or if D believed reasonably or not that P consented to them, it was open to the trial court to find there was no offence.".

[13] This plainly is a case which raises some uncertain and quite fine legal issues and is unusual. I am informed by Mr. Lutui that the firearm was an air rifle in good working condition, and the accused and the complainant had been drinking and were in a sense involved also in horse play plainly also of robust kind, so the issue may arise as to whether or not if consent applies to this charge, the causation of harm per se is sufficient to negative consent, or whether the prosecution must

prove that the accused must have foreseen the possibility of harm, as Professor Smith opined should be the correct approach. In which case, the nature of the weapon and its propensity to cause harm and the accused's awareness of this possibility in the circumstances as he found himself may be factors which assume importance.

[14] The issues raised in this case in my view are of significant importance to the orderly development of Tonga's criminal law. In my view, a senior prosecutor should be instructed to conduct this prosecution to ensure that the Magistrate is given every assistance at the trial.

10 [15] I quash the ruling made by the Principal Magistrate for the reasons I have given and refer the matter back to him, in his enhanced jurisdiction, for a rehearing. The Respondent is granted bail on terms which have been set out at the conclusion of the hearing. His next appearance is before Principal Magistrate Mafi in his enhanced jurisdiction in the No 3 Court room of the Supreme Court on the 7th February 2017 at 10 am for a trial date to be set.

Helu v Helu and Minister of Lands

Land Court, Nuku'alofa
President Paulsen
LA 18/2016

17 January 2017

Land — respondent built on unallocated "family" land — Minister grants a lease of land to other family member — grounds for cancelling registered lease — prior occupation no bar to granting a lease

The father has a town allotment and the older son operates accommodation business on the land; the younger brother has the lease of contiguous land. The older brother built on the younger brother's land without his knowledge. The father claims the younger brother's lease should be cancelled because it was not available for lease and the Minister should have inspected the land before granting a lease.

Held

1. The claim to cancel the lease failed; plaintiff to remove buildings in a reasonable time if a compromise could not be reached;
2. The general principle is that when a challenge is made to a registered grant of an allotment, and the grant of a registered lease of land by the Minister with the consent of Cabinet, the registration will be regarded as valid and final unless it is shown that the grant was made as a result of an error of law, or as a result of fraud, mistake or breach of the principles of natural justice;
3. The Minister must make such enquires as are reasonably necessary in view of the information before him to determine if the land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable;
4. There is no requirement that when making a grant the Minister must undertake an inspection of the land in every case;
5. Occupation of the land by someone other than the person applying for it does not necessarily render the land unavailable for grant.

Cases considered

Tafa v Viau & Ors [2006] Tonga LR 287
Manu v 'Aholelei [2015] Tonga LR 135
Naulu v Tupou and Others [2016] Tonga LR 163

Pelesikoti v ‘Anau anor [2016] Tonga LR 477
Finau v Minister of Lands [2012] Tonga LR 127
Vai v ‘Uliafu [1989] Tonga LR 56
Ongolea v Finau [2003] Tonga LR 151
Schaumkel anor v ‘Aholelei anor [2015] Tonga LR 22

Counsel for plaintiffs	:	Mr. V. F. Mo’ale
Counsel for first defendant	:	Mr. S. Fili
Counsel for second defendant	:	Mr. ‘A. Kefu SC

R U L I N G

The nature of the action

[1] The first plaintiff (Viliami Snr) and second plaintiff (Viliami Jnr) are father and son. Viliami Snr has a registered town allotment at Kolofo’ou where Viliami Jnr runs a business offering holiday accommodation. The first defendant (Sione) is Viliami Snr’s younger brother. He has a registered lease of land that is contiguous with Viliami Snr’s town allotment. Viliami Jnr built accommodation on the land that is now leased by Sione. The plaintiffs ask the Court to direct the Minister to cancel Sione’s lease. They argue that the Minister should have undertaken an inspection before granting the lease and given them the opportunity to take a lease “for the sake of their investment”. They also contend that the land was not available to be leased.

[2] The defendants argue that the land was available for lease, the lease was validly granted and the Minister was not obliged to undertake an inspection or hear from the plaintiffs prior to granting the lease.

[3] In closing submissions the plaintiffs advanced two other claims. Neither claim was pleaded. First, they argue that the Minister should be required to comply with the orders of the Land Court in LA 20 of 2007 (ruling on 30 March 2009) requiring the Minister to reinstate Viliami Snr’s town allotment to its original area prior to its subdivision in 1978. Secondly, they argue that should the lease not be cancelled then they are entitled to compensation of TOP$80,000 for their improvements.

[4] The defendants oppose the plaintiffs’ attempt to advance these new claims.

The witnesses

[5] Viliami Snr, Viliami Jnr and Sione are Tongan but have been resident in the United States for many years. Neither Viliami Snr nor Sione gave evidence and I am told that they are both unwell.

[6] Viliami Jnr gave evidence. He has lived overseas since childhood returning to Tonga from time to time. His evidence was surprisingly brief. It did not cover much of the relevant background, was lacking in detail and supporting documentation and, on some matters, it was implausible. I will highlight those matters later in this ruling.

[7] Tevita Helu is a younger brother of Viliami Snr and Sione. He gave evidence for Sione about the Helu family history and the circumstances under which Sione had been granted the lease and also of the use to which the family wishes to put the land.

[8] Semisi Moala, a Lands Registration Officer, gave evidence for the Minister of the dealings with the land and produced relevant documents from the Ministry's file. Unfortunately some documents have been lost and could not be produced.

The facts

[9] The parents of Viliami Snr and Sione were Viliami Helu (Old Viliami) and Nanisi Helu. They had ten children of which four were sons. Viliami Snr was the eldest son. Sione was the second son followed by Tevita and Heneli. Heneli has died.

[10] In 1953 Old Viliami was registered as the holder of a town allotment fronting Vaha'akolo Road at Kolofo'ou called 'Elipeni'. Elipeni had an area of 1 rood 24.4 perches.

[11] Directly to the rear and sharing a common boundary with Elipeni was unallocated Crown land with an area of 28.87 perches. This unallocated land had no direct access to Vaha'akolo Road.

[12] Old Viliami died in 1967 and Elipeni was claimed by Nanisi as his widow but not registered in her name until 28 August 1977. Tevita gave evidence, which I accept, that as he grew up the older children in the family moved away but he remained and looked after his parents and maintained Elipeni and the unallocated land. When Old Viliami died Nanisi told Tevita to apply for the unallocated land but the land was not large enough to be granted as a town allotment.

[13] In around 1977, Viliami Snr (who was Old Viliami's heir) agreed that part of Elipeni would be subdivided and amalgamated with the unallocated land so that Tevita could apply for it as his town allotment.

[14] On 15 June 1977, Viliami Snr wrote to the Minister of Lands consenting to the subdivision of Elipeni so "that it may be divided between me and my younger brother Tevita Solopani Helu". There is a handwritten note of a Ministry Officer on the letter. That note is dated 14 February 1978 and states that a letter was being written to Viliami Snr together with a map of the subdivision of Elipeni.

[15] The letter of 15 June 1977 was produced by the Minister for the first time at the hearing. Mr. Mo'ale was asked if he objected to the production of the letter and he did not. In his closing submissions Mr. Mo'ale said he was taken by surprise and asked the Court to ignore the letter. I do not accept that he was taken by surprise and Mr. Mo'ale cannot, at such a late stage, raise an objection to a letter that was produced with his agreement. I note also at this point that the evidence established that Viliami Snr was fully aware of and consented to the subdivision of Elipeni.

[16] In September 1977, Nanisi surrendered Elipeni in favour of Viliami Snr. Elipeni was registered in Viliami Snr's name although no deed of grant was issued to him at that time.

[17] The subdivision of Elipeni was undertaken during 1978. In a savingram of 12 June 1978, the Minister directed the subdivision of 8.1 perches of Elipeni to be added to the unallocated land. Notably, the savingram records that it was Viliami Snr who had applied for the subdivision on 7 June 1978. There was attached a plan of the subdivision. It shows that Elipeni was reduced in area to 1 rood 16.3 perches (from 1 rood 24.4 perches) with 8.1 perches being taken to provide access from the unallocated land to Vaha'akolo Road.

[18] Together the unallocated land and accessway had a total area of 37 perches. Tevita applied for this land as his town allotment. On 1 November 1978, the Minister granted the land to Tevita but it was never registered.

[19] It is not clear how it came about but Sione applied for the land that had been granted to Tevita as his town allotment. On 22 January 1991, Sione was issued with a deed of grant (deed of grant 309/61) for the 37 perches (935.8 sq metres). Highlighting the family connection to the land, Sione called his allotment Elipeni II. Tevita gave evidence that he took no objection to this.

[20] It was not until 28 October 2005 that Viliami Snr was issued with his deed of grant for Elipeni (deed of grant 250/66). There is an acknowledgment on the deed of grant of the changes made to the map, which would appear to be a reference to the subdivision.

[21] Shortly before that, in September 2005, Viliami Jnr obtained a permit to build rental accommodation on Elipeni. Neither the application for the permit nor the supporting documents and related correspondence were produced. Viliami Jnr's evidence was that he built about eight buildings between 2005 and 2009. Four of the buildings were built in whole or part on Sione's land. Viliami Jnr estimated that the cost of these four buildings was around TOP$100,000.

[22] I found Viliami Jnr's evidence as to when the buildings were built unsatisfactorily vague. No documents were produced to substantiate his estimate of the costs, which I find were unproven. However I accept Viliami Jnr's evidence that the buildings on Sione's land were the last to be built as this accords with Tevita's evidence that those buildings were built in around 2009.

[23] In 2007, the plaintiffs filed a claim against Sione and the Minister in the Land Court under LA 20 of 2007. No evidence was given about the events that gave rise to the litigation. The plaintiffs applied to restore Elipeni to its original area, which would necessarily involve the cancellation of Sione's grant. Viliami Jnr said that the intention was to get rid of the accessway.

[24] On the face of it the claim faced formidable hurdles. Viliami Snr had consented to the subdivision of Elipeni and the claim was, potentially at least, time barred. However, Sione was living in the United States and no defence was filed.

[25] On 30 March 2009, the Land Court made orders following a formal proof hearing directing the Minister to cancel Sione's registration and to rectify Viliami Snr's deed of grant "by amending the area [of Elipeni].…to show 0a 1r 24.4p instead of 0a 1r 16.2 p thereby reinstating the same to the original area of the town allotment before the subdivision subsequent to 1978".

[26] On 30 April 2009, the Minister directed that Sione's deed of grant be cancelled and that a survey be carried to return Elipeni to its original area of 1r 24.4p. Sione's registration was cancelled on 15 November 2010 and on the same day the Minister reissued a deed of grant in respect of Elipeni (deed of grant 375/95).

[27] Elipeni was restored to its original area but not to its original boundaries. Semisi Moala steadfastly maintained in his evidence that the Land Court ruling did not require the Minister to restore Elipeni to its original boundaries. The rear boundary was moved back from boundary pegs 2024 and 45638 to boundary pegs 100847 and 100855 (document 1 of the Minister's bundle) thereby increasing the area of Elipeni by 8.1 perches. The accessway was retained to avoid the land at the rear from becoming landlocked. Viliami Jnr collected and signed for the new deed of grant on behalf of Viliami Snr on 29 March 2011.

[28] Despite his evidence to the contrary, I find that Viliami Jnr built his accommodation units knowing they were on Sione's land. Before commencing the action in the Land Court Viliami Jnr clearly knew Sione owned his allotment. He must also have been aware of, or willfully blind to, the location of the boundaries shared by Viliami Snr's land and Sione's land.

[29] Having been successful in the Land Court, Viliami Jnr took the view that no one else would apply for Sione's allotment and therefore built on the land. He acknowledged that following the Land Court case he knew the land was available for lease "but I didn't think anyone would come and take the land". Also under cross examination the following exchange occurred:

> Kefu: and you built those three houses knowing that that land did not belong to your father?
>
> Witness: I thought nobody would ever have access to it and there wouldn't be a problem.
>
> Kefu: Yes and you knew that land didn't belong to your father?
>
> Witness: All I knew it was family land.

[30] Viliami Jnr was mistaken, as in early 2011 Sione applied for a lease of what remained of his town allotment. Cabinet approval was obtained and on 1 June 2012 Deed of Lease no. 8202 was issued to him. The lease was for 728.7 sq metres of land and included the accessway.

[31] In his closing submissions, Mr. Mo'ale submitted that Sione knew that Viliami Jnr was building on his land and never challenged the construction. In answer to questions from me, Mr. Mo'ale accepted that there was no evidence that Sione knew Viliami Jnr was building on his land (at least not prior to the grant of the lease). In circumstances where Sione was living in the United States I am not prepared to infer that he had such knowledge either. On the state of the evidence I

find that Sione did not know prior to the grant of the lease that Viliami Jnr had built on his land.

[32] Since 2012 there has been conflict between Viliami Jnr and Tevita and other members of the Helu family. The Helu family wants Viliami Jnr to remove his buildings so they can build on the land to provide a place to stay for relatives visiting Tonga from overseas. Viliami Jnr wants his buildings to remain so he can continue to use the land for commercial purposes.

[33] The plaintiffs first complained to the Minister about Sione's lease in October 2012 but they took no other steps to challenge it at that time.

[34] In August 2015, the Minister had a survey done to confirm the boundaries of the parties' land in the hope that it would resolve the conflict. It did not, and on 4 September 2015 a law practitioner, Mrs. Vaihu, wrote to the Minister on behalf of Viliami Snr disputing the boundaries and asserting that Sione's land was not available for lease.

[35] It appears matters came to a head in late 2015 when Tevita Helu and others removed a gate and some trees on Sione's land. This resulted in the issue of proceedings by the plaintiffs for trespass (since abandoned) and this proceeding.

The legal submissions

[36] Mr. Mo'ale argued that the grant of the lease was invalid and should be set aside because the Minister did not inspect the land and because Viliami Jnr had built on it. Viliami Jnr's occupation was, he argues, an impediment to the grant of a lease which would have been apparent upon inspection of the land. He relied on Tafa v Viau & Ors [2006] Tonga LR 287 and Finau v Minister of Land and Anor (Unreported, Court of Appeal, AC 9 of 2012, 12 October 2012).

[37] Mr. Mo'ale also raised the Land Court's ruling in LA 20 of 2007 and argued that "regardless whether it is pleaded or not" the Court should give effect to it. How exactly that should be done was not explained.

[38] In the alternative, Mr. Mo'ale argued that should the Court decide, it would not order the cancellation of the lease then it should award the plaintiffs compensation in a sum of TOP$80,000 for the improvements. Mr. Mo'ale did not articulate the legal basis for this claim or provide any relevant authority to support it.

[39] In his submissions, Mr. Fili emphasised that Viliami Snr had in 1978 agreed to surrender part of his allotment, that Sione had been registered as the holder of the land in dispute since 1991, that the plaintiffs had not made any competing application for the land and had built on it unlawfully. In those circumstances, he submitted, there was no obligation upon the Minister to inspect the land or consult with the plaintiffs before granting the lease.

[40] Similarly, in comprehensive submissions for the Minister Mr. Kefu argued that the grant of the lease to Sione was valid as the land was unallocated and available for lease.

[41] Mr. Kefu submitted that the Minister was not obliged to inspect the land before granting the lease because the Ministry did not know and had no reason to suspect that the land was occupied by the plaintiffs nor that the plaintiffs would use and build on the land without lawful authority.

[42] Mr. Kefu also strongly opposed the plaintiffs' attempt to advance their case on grounds that were not pleaded. He argued that there has been no attempt to amend the pleadings and that the defendants would be prejudiced as they prepared their defenses on the basis of the pleadings. Mr. Kefu also submitted that in any event the Minister had complied with the Land Court's ruling. He argued that in giving effect to the Land Court's ruling the Minister maintained the accessway as a matter of necessity (to avoid the rear land becoming landlocked) and also to honour the desire of Viliami Snr that the land be kept in the family and be given to his younger brother.

The law

[43] The general principle is that when a challenge is made to a registered grant of an allotment the registration will be regarded as valid and final unless it is shown that the grant was made as a result of an error of law, or as a result of fraud, mistake or breach of the principles of natural justice. In my view the same principles will apply in the case of the grant of a registered lease of land by the Minister with the consent of Cabinet (Manu v 'Aholelei [2015] Tonga LR 135). No submissions were presented to me to the contrary.

[44] The Minister must make such enquires as are reasonably necessary in view of the information before him to determine if the land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable (Tafa v Viau (supra) at [12] and [13], Naulu v Tupou and Others 2016 Tonga LR 163 [13]).

[45] In some cases the circumstances will require the Minister, inevitably through his officers, to undertake an inspection of land. In other cases it may not (Pelesikoti v 'Anau anor [2016] Tonga LR 477).

[46] In Naulu the Court of Appeal set aside a grant of a tax allotment on the grounds that there was significant information available to the Ministry that the appellant, who had not himself applied for the land, had been farming the land. The Court noted at [21]:

> That surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. That might not be a short-term project … In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in light of what it found, should the Minister have decided whether the land was available.

[47] In Pelesikoti I set aside a grant where the Minister had not inspected the land and the Ministry had actual knowledge that the land had been surrendered by the former holder intending that it be applied for by the plaintiff and that the plaintiff had developed the land intending that his sons would apply for it upon reaching the age of 16 years.

[48] There are two important points made by the Court of Appeal in Naulu that should be highlighted in this case. First, there is no requirement that when making a grant the Minister must undertake an inspection of the land in every case. Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert. Secondly, occupation of the land by someone other than the person applying for it does not necessarily render the land unavailable for grant.

Discussion

[49] The plaintiffs' submissions proceed on two misconceptions of law. First, that the Minister must inspect land before making a grant in every case, and, secondly, that the fact that land is occupied makes it unavailable for grant as a matter of law. The law is more nuanced than the plaintiffs' case would acknowledge.

Did the Minister make reasonable enquires?

[50] As the Court of Appeal held in Naulu, the Minister is obliged to undertake such reasonable inquires as the circumstances require to determine if there might

be some impediment to a grant. There is no blanket rule that the Minister must always undertake an inspection of land before making a grant.

[51] The plaintiffs did not advance their case on the basis that the Ministry had knowledge that the plaintiffs had built on Sione's land. They have also failed to satisfy me that there was anything in the circumstances of this case to have alerted the Ministry to the fact that the plaintiffs had built on or were occupying the land.

[52] When I asked Mr. Mo'ale to identify any circumstances which required the Minister to carry out an inspection he could not do so.

[53] The facts of this case were unusual. Sione had been the registered holder of the land for 19 years until his registration was cancelled following the Land Court ruling. The Ministry might well, in those circumstances, have thought it possible that the land was occupied by Sione or his invitees, but would have no reason to think it was occupied by anyone else.

[54] As far as the plaintiffs were concerned, they had challenged Sione's grant, but only to the extent that they sought to restore Elipeni to its original area prior to the 1978 subdivision. They had made no claim to the balance of Sione's land or any claim which suggested that they were occupying the balance of the land.

[55] Mr. Mo'ale submitted that Sione was obliged to bring to the Minister's attention the fact that Viliami Jnr had built on the land when applying for the lease. This submission appears to be based on an erroneous understanding that the form of application for lease prescribed by the Land Act requires the grantee (rather than the grantor) to provide a declaration that the there was no known impediment to the lease. In any event, as I have found there was no evidence that Sione knew the Viliami Jnr had built on the land before the lease was granted.

[56] Following the Land Court's ruling, and the steps taken by the Minister to give effect to it, the Minister was entitled to assume that the plaintiffs' claims were finally resolved in the Land Court.

[57] The plaintiffs made no challenge to the steps taken by the Minister to give effect to the Land Court's ruling until after the lease was granted to Sione. Furthermore, Sione was the only person to apply for the land. The plaintiffs did not apply for the land despite Viliami Jnr knowing that it was available for lease.

[58] Viliami Jnr had built on the land without permission and unlawfully. The Minister certainly cannot have been expected to assume that the plaintiffs would act in that way.

[59] There were no competing applications for a lease of the land for the Minister to consider or any other claims to the land of which he should reasonably have been aware. In those circumstances there was no obligation upon him to conduct an inspection of the land before granting Sione his lease.

Was the land available?

[60] Following the Land Court's ruling and the cancellation of Sione's grant, his land (other than the 8.1 perches that was amalgamated with Elipeni) reverted to the Crown. It was unallocated land and was 'available' in the sense that it had not been registered to any person.

[61] Mr. Mo'ale referred me to section 124(1) of the Land Act requiring all applications for lease to be in the prescribed form and to Form 1 in Schedule IX of the Act which contains a requirement that an application for lease contains a declaration that there is "no impediment to prejudice this lease". He moved from there to make the bold submission that in this case "[Sione's land] was in fact occupied; thus it was [an] impediment to a grant". I do not accept that submission.

[62] In Finau v Minister of Lands [2012] Tonga LR 127 the Court of Appeal noted that Tafa, which was relied upon by the plaintiffs:

> "…is not authority for the cumulative propositions that the statutory requirement in s 50 that land be available is, as a matter of law, a precondition to grant and that lawful occupation by someone other than the potential grantee, renders the land unavailable. The case only establishes an element of the first proposition, namely that the Minister must consider whether the land is available before making the grant. A failure to do so vitiates the grant.".

[63] In the Land Court in Naulu v Tupou and ors it was held that lawful occupation by someone other than the potential grantee does not render land unavailable. Whilst that decision was reversed on appeal that was on a different basis and the Court of Appeal confirmed at [21]:

> Occupation of land does not necessarily mean [land] is unavailable. That will depend upon the nature and history of the occupation.

[64] There is Land Court authority that occupation of land as a squatter will not be an impediment to a grant (Vai v 'Uliafu [1989] Tonga LR 56 and Ongolea v Finau [2003] Tonga LR 151). In Vai, at page 65, Webster J said:

> Whilst it may be one thing to consider as 'available' land which a person is occupying as a squatter without any form of leave, it would not be right to include in 'available' land plots occupied by people with leave of the estate holder or his agent. To do so would … lead to manifest injustice.

[65] The law protects the interests of persons who in good faith and with permission of the holder or estate holder occupy and develop land. It will guard against the manifest injustice that might result should such persons be dispossessed of the land without due inquiry. That is an explanation for the rulings in Naulu, Pelesikoti and Manu. This is not such a case.

[66] Viliami Jnr was not given permission to occupy the land or to build on it. He knowingly and unlawfully entered on to the land and built on it for commercial advantage assuming that no one else would apply for it. He was a trespasser and accordingly had no interest which made the land unavailable for grant by way of lease to Sione.

[67] Having chosen to take a commercial risk there is no injustice in the fact that Viliami Jnr is required to bear the cost of his decision and remove his buildings from Sione's land. To hold otherwise would be to reward lawlessness. To the contrary, there would be manifest injustice should Sione's entitlement to the land be defeated in the circumstances of this case.

The Land Court case

[68] The plaintiffs submit that the Court can give effect to its earlier decision in LA 20 of 2007. I do not agree. The proper course is for the plaintiffs to take enforcement proceedings in respect of the Land Court's 2009 ruling. With the passage of time they now require leave of the Court to do so (O.29 Rule 1). They have not applied for leave.

[69] Even if the matter could be raised in this proceeding it has not been pleaded. Whilst the Court has a wide discretion to allow an amendment to the pleadings, and generally should do so provided that the amendment is material and will not result in prejudice or injury to the other party which cannot be compensated in costs, the plaintiffs have not applied to amend the pleadings.

[70] In addition, the Land Court's ruling is ambiguous. It is not at all clear whether the Minister was required to restore Elipeni to its original boundaries or (as he has done) to its original area. In circumstances where the issue was first raised at a very late stage and Sione is both unwell and resident in the United States, the defendants have not had adequate opportunity to present all relevant evidence that may have a bearing on the issue.

[71] At a practical level, even if Elipeni was restored to its original boundaries that will not resolve the dispute between the parties. Viliami Jnr's buildings will still be unlawfully on Sione's land and Sione may require them to be removed. An adjustment of boundaries would likely cause further litigation to re-establish access from Sione's land to Vaha'akolo Road. I cannot see that the plaintiffs will gain anything by this, but to the extent they wish to enforce the Land Court's ruling they are free to take such steps as are open to them in other proceedings.

Compensation

[72] The plaintiffs' claim for compensation was not pleaded and it was a complete surprise when the matter was raised in closing submissions.

[73] No application was made by the plaintiffs to amend the pleadings to include this claim and the defendants had no opportunity to call evidence in defence of it. For those reasons it cannot now be raised.

[74] In any event, the claim had no prospect of success. Mr. Mo'ale did not articulate the legal basis for the plaintiffs' entitlement to compensation and in the cases to which Mr. Mo'ale referred me the Court did not make awards of compensation.

[75] Mr. Mo'ale asserted that the Court had the power to award compensation in a case such as this but appeared unaware of the decision in Schaumkel anor v 'Aholelei anor [2015] Tonga L.R 22 where Land Court held that in the absence of some representation as to future conduct or circumstances that might lead to the invocation of equity the making of improvements to land does not of itself give rise to a right to compensation. Furthermore, Mr. Mo'ale did not explain how the sum of TOP$80,000 was made up nor was the loss of that sum proven.

Result

[76] The plaintiffs' claim is dismissed.

[77] If the parties are unable to come to an agreement that allows Viliami Jnr's buildings to remain on Sione's land then he must be given reasonable time and opportunity to remove them.

[78] The defendants are entitled to costs to be fixed by the Registrar if not agreed within 21 days.

Kalaisi v Tu'i'onetoa and Ors

Land Court, Nuku'alofa
Scott J
LA 22/2015

1 September 2017

Land Law — proper owner where a church has broken up — contributions, original doctrine of church — equity — grounds for appeal about disallowing amendment to pleadings

The Tokaikolo Christian Church International (TCCI) began operating at a small church in 2009. In 2013 there was a schism and the plaintiffs were excluded from the church. The plaintiffs claim that TCCI own the church and associated dwellings and the defendants should be ejected. There was confusion in the Land Ministry by which Cabinet approved leases to both TCCI and one of the defendants and only the TCCI lease was registered. The court considered the history and doctrines of the church and its foundation and found that this was the only church building where the breakaways can worship compared with the many other churches of TCCI. The application of rules of equity was considered.

Held

1. The buildings were paid for and built with the intention they would belong to TCCI. Most of the money and effort to establish the church was made by local residents and those who broke away from TCCI.

4. The church building and assets belong to the local chapter and not the international church, and a lease should be granted accordingly.

5. In an application for leave to appeal to the Court of Appeal on a ruling disallowing leave to amend pleadings, the court held it is not sufficient that the application for leave establish an error of fact or law in the decision that is challenged. The error must be one which threatens real detriment or raises an important point of law or is a matter of public importance.

Cases considered

Tafa v Viau [2006] Tonga LR 125, 136
Kalaniuvalu v Minister of Lands (1937) II Tonga LR 40
Setaleki Manu v Watkins – II Tonga LR 136
Free Church of Scotland v General Assembly of the Free Church [2005] CSOH 46.

O. G. Sanft v Tonga Tourist etc [1981 – 1988] Tonga LR 26
Baumgartner v Baumgartner [1987] 164 CLR 137

Counsel for the Plaintiff:	W. C. Edwards SC
Counsel for the Defendants:	L. M. Niu SC with O. Pouono
Counsel for the Third Party:	S. Sisifa SC

NB see also the appeal in [2017] Tonga LR 137

J U D G M E N T

INTRODUCTION

[1] Towards the western end of the Vuna road, at Halaano, Kolomotu'a there stands an attractive small church. It is presently occupied and used by the Fourth Defendant (Mo'ui Fo'ou) of which the First Defendant (Pohiva), the Second Defendant (Kava) and the Third Defendant (Sione Maile) are prominent members.

[2] The Plaintiff (Tokaikolo) (sub nom Tokaikolo Christian Church International) is a society incorporated in May 2007 under the Charitable Trusts Act 1994.

[3] On 29 December 2009 the President of the Plaintiff, Rev. Dr Liufau Saulala (Dr Saulala) assisted by its Secretary General (Sione Maile) formally opened and consecrated the church.

[4] In July 2013 Sione Maile told Kava that he had received a divine call to leave Tokaikolo. On 8 July 2013 he wrote to Dr Saulala to tender his resignation. He told Dr Saulala:

> "It is obvious to me that you no longer need my service. I am happy that I have been liberated from [Tokaikolo]".

[5] On 18 August 2013 Kava preached his last sermon at the church, of which he was the Minister in charge. He told the congregation that he was leaving Tokaikolo and joining Sione Maile. Following an intervention by Pohiva those members of the congregation who wished to remain with Tokaikolo were excluded from the church. Since this time the church has been reserved for the use of the members of the new fellowship led by Sione Maile, namely Mo'ui Fo'ou.

RELIEFS SOUGHT

[6] The principal reliefs sought by Tokaikolo are a declaration that the land upon which the church stands, the church itself and its furnishings together with two residential properties associated with the church (apparently inhabited by the present Minister of Mo'ui Fo'ou, Kava, and the Deacon) are the property of Tokaikolo; and an order that vacant possession of the same be given to it by the Defendants.

[7] The Defendants deny that the properties belong to Tokaikolo and assert that they either own or are entitled to their possession and use.

[8] For the avoidance of doubt it is recorded that all counsel agreed that all the property in dispute, both real and personal was, in the circumstances of this case, within the jurisdiction of this court. (See Fonua & Anr v Westpac Bank of Tonga [2015] Tonga LR 410).

PLEADINGS

[9] The following pleadings were filed:

Amended Statement of Claim 15-12-16;

Amended Statement of Defence 5-1-17;

Third Party Notice 1-2-17;

Reply to the Amended Statement of Defence 6-2-17;

Statement of Defence to Third Party Notice 27-2-17

WRITTEN SUBMISSIONS

[10] Mr. Edwards filed an opening submission on 19-4-17. Mr. Edwards, Mr. Niu and Mr. Sisifa also filed helpful written closing submissions in July 2017.

BRIEFS OF EVIDENCE

[11] In conformity with a recent practice which has been adopted, counsel filed written briefs of evidence of their witnesses. While this certainly frees the tribunal of the need to note down the entire evidence in chief of a witness the practice as presently followed appears to have some significant problems. In the first place, it is ungoverned by Rule or Practice Direction. Secondly, it appears to be in conflict with the Evidence Act which prohibits leading evidence in chief and with Order 26 Rule 1 which requires evidence ordinarily to be given orally. Thirdly, and most seriously, the filing of unedited briefs is providing an opportunity for evidence

which is prima facie inadmissible to be led before the Court. It was also noted that timetabling for the filing of briefs was not adhered to and that briefs were filed not only in chief but also in reply to briefs filed by the other side.

[12] In my opinion it is unsatisfactory for prolix, unedited briefs to be filed without the Court having a practical opportunity to exclude material which should never have been included. In the present case questionable advantage was also taken by both the Plaintiff and the Defendants of a supposed general exception to the rule against hearsay in the Land Jurisdiction to include material of a personal and highly defamatory nature which, as I found, did nothing to advance their cases or enhance the reputations of the contending religious bodies.

[13] In my respectful opinion, if the practice of filing written briefs of evidence is to continue then it should be subject either to Rule or Practice Direction. The Court, at a pre-trial hearing, should be given the opportunity to review the contents of the statements proposed to be filed.

[14] It is also my view that following the decision of the Court of Appeal in Fonua (above) the supposed exemption to Part IV of the Evidence Act in the Land Jurisdiction (see Tafa v Viau [2006] To. L.R 125, 136 and also Kalaniuvalu v Minister of Lands (1937) II Tonga LR 40) may need to be revisited.

DOCUMENTS

[15] Seven bundles of documents were admitted by consent, although not all documents were referred to by witnesses. A short film was shown. Additionally, two books were produced:

> A Thirty Year History of Tokaikolo Christian Church by Sione Sangster Saulala (Sangster); and
>
> Island Churches: Challenge and Changes (extracts) by Makisi Finau (Finau). (D–9 to 34)

It was agreed that the Court could make reference to any part of these books, whether or not they had been referred to by a witness.

ESTABLISHMENT OF TOKAIKOLO BY SENITULI KOLOI

[16] In about 1965 the Scripture Union, an interdenominational evangelical Christian movement which "working with churches, aims to make God's Good News known to children, young people and families and to encourage people of all

ages to meet God daily through the Bible and prayer" started working in Tonga. Between 1965 and 1970 the movement spread to many schools both in Nuku'alofa and beyond.

[17] In 1970 the Rev. Senituli Koloi was appointed Chairman of the Union. Rev. Koloi was, by all accounts, an exceptional person. Born in 1926 into a family of 19 children he attended theological college from 1958 to 1961 where he distinguished himself by his piety, his diligence and his teaching and leadership abilities. He obtained a diploma in theology from the PTC in Suva in 1968. In 1970 he was ordained.

[18] Following his ordination Senituli Koloi developed a personal and somewhat unorthodox ministry. In Finau's words:

> "Senituli believed that all problems whether physical, mental, spiritual or social had their solution in one basic principle which is Christ .... Senituli firmly believed, for example that, if you were sick, Christ would cure you if you believed and were prepared to give your life totally to him. He taught the same for any social or family problem".

[19] Through the Scripture Union Senituli Koloi acquired a substantial personal following:

> "Those under his teachings were not discouraged by distance but found their way ... just to listen to Senituli's message. The church was always full with people sitting outside. Senituli's message sounded new to most ears. It was very simple, straightforward, tangible and related to the present life and problems of his audience. The heart of his message was Christ". (Finau).

[20] In 1976 Senituli Koloi took leave of absence from his duties as a circuit minister and devoted his full energies to the work of the Scripture Union. In 1976, 1977 and 1978 he spent time in New Zealand. In 1978, at the request of the New Zealand branch of the Scripture Union he established a new Bible College in Auckland. Senituli Koloi was the first principal of the college which he named "Tokaikolo Bible College".

[21] According to Finau "Tokaikolo" literally means "to honour in our fortress". It is generally translated as "the Lord is in our midst". As Sangster points out, it is similar to Emmanuel which means "God is with us".

[22] According to Finau, the emphasis of Senituli Koloi's preaching began to evolve in about 1978:

> "[his] gospel shifted from Christocentric emphasis to an attack on the weaknesses of the (Free Wesleyan Church). In this he had three points of attack: church traditions, traditional customs and heritage".

Among practices condemned by Senituli Koloi were lavish feasting, annual donations (misinale) and the assumption by ministers and others of a higher status than ordinary people:

> "Senituli did not believe in the visible organised church which he saw as an organisation consisting of laws and authorities who made decisions for the rest of the members".

[23] In August 1978 he returned to Tonga from New Zealand:

> "He started preaching in some places in Tongatapu and strongly criticised the Church for its failure to bring the people to a true knowledge of the Gospel. He began addressing his sermons to the serious social and economic problems of the Kingdom. He was preaching at Pangai next to the King's palace. Senituli faced the palace and preached against the King and the way he ruled the country. He preached that the respect that the people gave to him should be going to God". (Finau)

[24] In September 1978 Senituli Koloi resigned from the Free Wesleyan Church:

> "Senituli believed that the Church was sinful and dead. Therefore, he called the people to move out if they wanted to live". (Finau)

[25] In September 1979 those who had followed Senituli Koloi held a camp at 'Atele. Shortly after, the breakaway movement was named "The Tokaikolo Fellowship in Christ" or "Feohi'anga Tokaikolo 'ia Kalaisi". According to Finau somewhere between 3,000 and 4,000 people eventually left the Free Wesleyan Church and joined the new movement.

[26] Very sadly, and quite suddenly, Senituli Koloi died on 14 February 1980, just a week after the Tokaikolo Fellowship had opened Lavengamalie College (a substantial establishment with 500 students and 22 staff) at Tofoa.

[27] According to Sangster, the announcement of Senituli Koloi's death:

> "Startled the whole of Tonga, especially those who had broken away. Few people expected the Minister to die so soon. Lavengamalie College had just been opened and the new fellowship had only been running for two years. There was much confusion because the man who led the exodus from the churches, who reassured them of God's presence, the healer, the counselor, father figure and leader had died. To the members it was as if they had lost the manna that surrounded them and there was no hope, for their leader was dead. People gossiped, saying it was a punishment from God for leaving the church. Many believed that Senituli's death would be the end of the newly established fellowship and that everyone would now return to their churches. Those who had broken away became afraid that this would be the case".

DR SAULALA ASSUMES LEADERSHIP OF TOKAIKOLO

[28] Senituli Koloi's funeral took place on 15 February 1980. The principal eulogy and sermon were delivered by Dr Saulala who also told the congregation that the late Senituli Koloi had disclosed to him in 1978 that God had revealed to him that Dr Saulala was to be his successor. In this way Dr Saulala assumed the leadership of the Tokaikolo movement which he retains until today. In the words of Sangster:

> "The change of leadership was unique in that it did not follow the norm. There was no election and no candidates were nominated. The members of the Fellowship had no part in the process. The God that told Senituli to establish the Tokaikolo Fellowship also told him who would succeed him after he died".

TOKAIKOLO DEVELOPS & BECOMES A CHURCH

[29] Finau writes:

> "From September 1979 to 1981 the Tokaikolo Fellowship in Christ did not build any church building. According to the Secretary ... during this period they still held on to ha'ofanga (fellowship or group gatherings) and did not believe in building church buildings. They had no rules or constitution, they used mostly the open air and beach services. They used only their houses for their group meetings. They were happy to be known as a fellowship to avoid the idea of organisation".

[30] In paragraph 82 of his brief of evidence Dr Saulala stated:

> "For the first five years of the Fellowship I purposely did not permit any construction, gifting, donations, feasting etc. and the reason was to allow the members ample time really to be saturated with Jesus Christ and His teachings in the Bible. In the meantime I exhausted other means (of raising money) like having bales of second-hand clothing sent from overseas to be sold for church income".

Dr Saulala went on to explain that Lavengamalie College was the biggest expense for the Fellowship. Apart from some overseas financial contributions the College also held bazaars and had other methods of fundraising.

[31] In his very interesting book Sangster described how the Tokaikolo Fellowship from its humble and simple beginnings developed into a fully-fledged Church. The first ordained minister was Dr Saulala, followed by Sione Maile. Further ordinations of ministers and deacons followed. Annual conventions were held, new organisations within the fellowship were established: youth groups, Sunday schools and a women's group. A Radio Programme was launched in 1989, an evangelism office was opened in 1990 and a newspaper, 'Ofa Ki Tonga, began publication in 1991. In 1993 the Mother of the Year programme was launched, the first mother who was selected being the then Queen Halaevalu Mata'aho.

[32] In 1994 the Fellowship held its annual convention in Sydney, Australia. Two especially important decisions were reached. The first was that the Fellowship would become a church with the name of the organisation changing from "Feohi'anga Tokaikolo" to "Siasi Tokaikolo 'Ia Kalaisi". The second was that the leader of the new church, Dr Saulala, was given the title of President.

[33] During the next few years several branches of Tokaikolo Church were established overseas, including in New Zealand, Australia, California and Hawaii. Although the exact relationship between these branches and Headquarters at Lavengamalie was not investigated at the trial, it seems clear that these branches were semi-autonomous. Filimone Saulala told the Court that the New Zealand Church was a locally registered separate legal entity but it seems that in respect of purely church matters the President in Tonga retained control.

[34] In 2003 the annual convention approved Tokaikolo's first constitution. In due course this constitution, apparently slightly amended, became the constitution that was registered with the Registrar of Charitable Trusts in May 2007. A copy is at page 137 of the Plaintiff's Supplementary Bundle of Documents (Part 2). As noted in 'Ofa Ki Tonga (1 January 2004):

> "One important matter in this new constitution is that the positions of President and the General Secretary are elected concurrently. These will end on resignation or death".
>
> "[Previously] all the deliberations and decisions of the Church were done by Reverend Liufau Saulala and the leaders of the Fellowship without any involvement from the congregation in general".

PROBLEMS EMERGE

[35] The history of the development of religions is unfortunately also in large measure a history of controversy. Almost no worldwide religion however major or minor has been without rift, split or reformation. Some of these differences have their origin in difficult theological questions, some in culture, some in administration, some in the exercise of power and some simply in money. The evidence shows that Tokaikolo, not much more nor less than any other religious organisation was not free of these differences and difficulties.

[36] When Sione Maile the General Secretary of Tokaikolo resigned in 2013 and founded Mo'ui Fo'ou, a substantial number of members of Tokaikolo joined the new fellowship. According to Dr Saulala "we lost about 34% of our members". According to Mafi Angahi Taufa who had been a Tokaikolo Minister for 23 years before leaving to join Mo'ui Fo'ou, the split in 2013 "was the fourth time people broke away from the Tokaikolo Church .... I believe [2013] is the highest number to leave Tokaikolo Church and approximately 50% of them [left]". Whatever the precise figure, it is clear that this was a substantial split and it is relevant to the outcome of this case to elucidate the causes of the disharmony. Before doing so it is important to note that a very substantial number of members of the church, at least half, did not choose to join Sione Maile. In examining the complaints of those who left it must be borne in mind that those who remained did not think that the matters of complaint were well founded or at least, as serious as the leavers maintained.

DR SAULALA'S LEADERSHIP STYLE

[37] The first breakaway followed very soon after Dr Saulala proclaimed himself to be Senituli Koloi's appointed successor. Senituli's widow Luseane, her family and several others did not accept Dr Saulala's assumption of the leadership and left.

[38] As has been seen, for the first five years at least the new fellowship operated without rules, regulations or an established organisation. In these

circumstances Dr Saulala, together with a few close advisers, took all major decisions on behalf of the members.

[39] Among important decisions taken by Dr Saulala was the appointment and posting of ministers to the various districts. Dr Saulala told the Court:

> "I agree that I appointed group leaders and the pastors to the branches. I also appointed all the directors and can replace them, it is God's will. I began making allocations and appointments in 1982 when the ordination of Ministers began. I was aware in the late 1970's that there was some dissatisfaction with the appointments. I do not agree that the pastors were "yes men" who agreed with me to avoid unpopular postings. I remember Pastor Tupou. I appointed him to look after the store. I removed him from that position because he negligently handled a $100,000 container of meat. I did not send him to the Niuas as a punishment. My own brother is there since 2 years. All the pastors have hardship. Do I have domineering power? I don't know about that. I do not feel guilty. Someone has to lead".

[40] It was the contention of defence witnesses that Dr Saulala ran Tokaikolo in an undemocratic manner. As an example of this, Mafi Taufa told the Court that when the position of President was opened for election in 1986 only Dr Saulala was a candidate for the office. He was then appointed for life. In paragraph 68 of his brief Pohiva stated:

> "Liufau has not changed. No one dares to interfere with him. Even if he appoints small committees or calls meetings he is the overriding authority and sole decision maker. Whoever opposes and questions him will be referred to as rebellious or unbelievers".

In paragraph 76 he stated:

> "Rev. Liufau has a habit of strategically dropping contentious issues from the agenda of meetings to which many of us who would not agree to attend and only calls for ballot if we do not attend. He would only inform a meeting to discuss his needs when we are likely not to attend".

[41] One area of particular concern was the constitution. Several witnesses, including Pohiva and Mataiasi To'ofohe suggested that the constitution was drafted by Dr Saulala without any consultation or input from the membership and without

approval by the General Conference. It was claimed that it gave Dr Saulala far too much power. Article V(10)(n) may be noted:

> "The President has authority to manage, direct and oversee all employees and all the affairs of the Church, according to law, and to account to the Conference".

[42] Although, as already noted, all witnesses had filed written briefs of evidence these detailed complaints of authoritarianism levelled at Dr Saulala were not put to him or to his witnesses at any length and the Court does not find itself in a position to make a determination in their regard. However it is not necessary to do so. What is abundantly plain is that there have, since the beginning of the Tokaikolo movement been some who did not agree with the manner in which Dr Saulala led the church and who believed his leadership to be unacceptably autocratic. Having heard the evidence on this score I do however find myself unable to accept Dr Saulala's statement in paragraph 4 of his brief:

> "No challenge to my leadership [came from Tonga or from any of the overseas groups]. Not ever, till this new development in 2013 when some left because they felt called to start Mo'ui Fo'ou Fellowship in Christ".

[43] The question which Dr Saulala's statement raises is "why did some feel called" to leave Tokaikolo? Part of the answer, as I find, is because some of the members disliked the way Dr Saulala led the church. For some members, however, other reasons appear to have been more important. For this group it was not the manner in which Dr Saulala led the church but rather the direction in which he led it.

EVOLUTION OF CHURCH PRACTICES

[44] As has been seen, Senituli Koloi was very much in the anchoretic tradition. Although not a recluse, he preached withdrawal from the pleasures of the flesh, led a deeply prayerful life and practised and advocated quite intense fasting lasting on occasions two weeks or more. He scorned feasting, displays of wealth, excessive obeisance and all forms of ostentation. He believed in the priesthood of all believers and the equality of all men in the eyes of God. His sermon at Pangai has already been referred to.

[45] Several of the Defence witnesses told the Court that they particularly objected to the way in which Tokaikolo under Dr Saulala's leadership seemed to have turned its back on this aspect of Senituli Koloi's message. Dr Saulala denied that this was the case. Unlike the Free Wesleyan Church, members of Tokaikolo

were free to celebrate as they wished and as they thought appropriate. As to the honoring of persons of high status such as nobles or members of the Royal Family Dr Saulala stated, at paragraph 73 of his brief:

> "Everyone is equal in the eyes of the Lord, regardless of whether that person is the Leader, President, Minister, Deacon etc. and we remain firm on that belief up until now".

[46] The difficulty for Dr. Saulala, as I find, however, is this: actions speak louder than words.

[47] It is convenient first to refer to Sangster Saulala's book. On pages 155, 157, 164, 167, 174,232, 233, 239 and 240 there are photographs of gatherings of the church at which distinguished guests are being welcomed in quite lavish style to the accompaniment in some cases of the presentation of gifts and feasting. On page 138 "a big banquet took place for everyone's enjoyment" at page 152:

> "Each state and smaller sub-district presented themselves with an entertainment item together with their gift offerings of Tongan artefacts and monetary donation ... the Los Angeles monetary gift was $40,000, not including their Tongan artefacts and other gifts ..... they offered Tongan mats and tapa together with $10,000 .... Texas ... offered Tongan artefacts together with a monetary donation of $10,000 ..... Salt Lake City .... gave $10,000 .... Seattle and Portland .... gave $10,000 .... Sacramento and Reno .... gave $10,000".

At page 154 he writes:

> "The celebration started at 2pm and went into the hours of the night. The food was abundant, but so were the monetary gifts, artifacts, not to mention grace and joy ..... All the monetary gifts collected on the day totalled $160,000".

[48] Of particular concern to some members was the way in which the Tokaikolo Church, as it developed under Dr Saulala's leadership, seemed increasingly to recognise, defer to and honour persons of high social status and especially members of the Royal Family.

[49] Although it had been decided by Tokaikolo in early 1994 that Dr Saulala would be its first President, and indeed President for Life, his inauguration did not take place until the following December. At page 95 of his book Sangster writes:

"This special day of the installation of the President of the Church was graced by the presence of His Majesty, King Taufa'ahau Tupou IV, Her Majesty Queen Halaevalu Mata'aho was also present together with Princess Pilolevu Tuita, her husband Honourable Tuita, Prince Lavaka and his wife, Princess Nanasipau'u Tuku'aho and other royal guests".

[50] At page 97 Sangster writes:

"The Tokaikolo Christian Church celebrated her 20th anniversary in 1998 with the joy of having played a vital role in helping people to accept Christ as their personal saviour, through various evangelistic activities. This included the conversion of Honourable Fanetupouvava'u Tuita, soon after the opening of the Church in Auckland, 1997. Hon Fanetupouvava'u is the granddaughter of King Tupou IV and Queen Halaevalu Mata'aho. She is the second eldest daughter of Princess Salote Pilolevu Tuita and Noble Tuita. Noble Vaha'i of Fo'ui also converted to the Tokaikolo Church two years earlier. He is the eldest son of Princess Fusipala and the late Hon. Vaha'i .... Honourable Tu'ilokomana Tuita, the eldest daughter of late Noble Tuita also converted to the Tokaikolo Church and became a member in 1998.

[51] At pages 117-121 Sangster describes the opening in 1997 of the first Tokaikolo Church building in New Zealand. This obviously important event was, as described by Sangster, attended by H.M. the King and several other senior members of the Royal Family. Following the opening, luncheon was served and entertainment provided: "It was decorated neatly and beautifully, in a manner fit for the King".

[52] Several witnesses pointed out that the growing practice of involving members of the Royal Family in the events of the Church did not come without considerable expense. Both Tu'uta Lavaka, who had been a Tokaikolo Member and later Minister from 1978 to his departure in 2013 and Mataiasi To'ofohe who was also a prominent member from 1978 to 2003 criticized the Mother of the Year programme. As has been seen, the first mother chosen was the then Queen and among other notable holders of the title were HRH Princess Nanasipau'u Tuku'aho in 1994 and HRH Princess Salote Pilolevu in 1995.

[53] According to Lavaka, To'ofohe and Pohiva the award for the title "Mother of the Year" included a cash prize of $10,000 which, according to Pohiva, was increased to about $100,000 in 2016 and $200,000 in 2017. Lavaka and

To'ofohe told the Court that when H.M. King Taufa'ahau Tupou IV visited Lavengamalie in November 1994 he was presented with a cash gift of $100,000 by Dr Saulala. This particular allegation was denied by Dr Saulala but To'ofohe told the Court that he was one of those present at time when the gift was made:

> "Saulala is lying if he says nothing was given to the King. The King was present at Lavengamalie. I was shocked when Saulala stood up and said this is a birthday gift for you of $100,000. Everyone who was present heard this. I believe it was given to the King. It was also broadcast on the radio. If a person says that it was not given then that is a lie".

10 The evidence that considerable sums of money were given to the Mothers of the Year was not challenged.

[54] At pages 159 and 164 of his book Sangster has included photographs of royal visits to the Church. On page 232 is a photograph of Dr Saulala's wife Falamoni being presented with gifts as Mother of the Year in 2005.

[55] It is important to be clear that it is not alleged that anything dishonest took place. This Court has no view on the propriety of honouring members of the nobility or Royal Family nor of the practice of giving them cash gifts. What however, is inescapably plain is that such practices were in marked contrast to the preaching of Senituli Koloi both outside the Royal Palace at Pangai and elsewhere.
20 In a sermon delivered at 'Eua Senituli Koloi said:

> "The Church ministers and leaders are more concerned now with things of the flesh. Paying too much attention to eat. The word says that the Kingdom of God is not about eating or drinking but rather it is about living a righteous life".

While it cannot be doubted that most of the membership saw nothing or nothing sufficiently wrong with these new ways of the Tokaikolo church it is also clear from the evidence that a significant number of members became increasingly unhappy at what they perceived to be significant departures by the Fellowship from its simple foundations.

30 **CHURCH FUNDING**

[56] The Tokaikolo movement had very humble beginnings and it is not in issue that few of those who joined the Tokaikolo Fellowship in the early years had private means or even regular salaried employment. In paragraph 24 of his supplementary brief Dr Saulala states: "Senituli knew that the people were poor".

In his evidence to the Court Dr Saulala said that in one of the early years the total income of Tokaikolo was only $3000. Apart from the very valuable help given to Lavengamalie for some years by the Association of Christian Schools International very little, if any, financial assistance came to the new church from overseas. In this the Tokaikolo Church is quite different from the major churches in Tonga which are all associated with well endowed overseas counterparts.

[57] Not surprisingly, when money is scarce and the average member of the church is making ends meet on a very limited income, what were regarded by some as unnecessarily lavish celebrations and beyond generous gifts of cash attracted criticism. After the Tokaikolo dispensed with the misinale which was one of the mainstays of the FWC, it was left only with tithing which raised rather little, and voluntary donations and other fund-raising activities such as bazaars and sporting occasions.

[58] In an effort to improve the Church's finances a retail arcade, Maseia Plaza, was opened in Nuku'alofa in 1988. At page 224 of his book Sangster writes:

> "The Tokaikolo Church as a whole must do everything possible, in its power, to get money and funds to effectively execute its projects and cater for its mounting financial responsibilities. Hosts of small business enterprises were tried out in the Maseia Plaza since 1989. This business arm of the church has ventured out into different fields to help the income of the Church. A retail store, a butchery, a photo studio, bookshop, travel agency, restaurant, you name it – but it did not do well. The Church then bought a promising fishing vessel M.V. Toutai Mei Langi for TOP$700,000 but the natural El Nino worldwide phenomenon prevented its effective operation right from the start".

[59] The business enterprises of Tokaikolo did not flourish and the financial situation of the Church deteriorated. By October 2007 just under TOP$1.5 million was owed to the Bank (Document D-70) secured by a registered mortgage over the properties at Lavengamalie. Sangster concludes chapter 18 of his 2008 book:

> "As of late the church has drafted the assistance of a New Zealand businessman Dr David Hobbs, an international financier who has dedicated himself to help with the finances of the church and schools".

[60] In October 2006 Dr Saulala spoke to a meeting of the Tokaikolo Church in Auckland. It is a lengthy speech a copy of which is at D295-301. Some extracts from the speech will convey its flavour:

Paragraph 4 "The church has a business programme which has been in operation for a while now .... the church has four businesses".

Paragraph 5 "We have in place some investments ... this deposit which the church has made was $250,000 US dollars ... withdrawals so far has only been $40,000 US dollars which was the value of 3 or 4 months withdrawals altogether".

Paragraph 6 "Our investment is wholesale investment, it's not retail. To be eligible to enter we must have $100 million US dollars to join. We were able to join because someone assisted us. $30 million was donated by a chinese woman ... she has visited Tonga twice with us ... together with $70 million donated by various companies owned by Dr Hobbs. These enabled us to join".

Paragraph 10 "What the church is doing to reach the threshold is its growing its 250 grand investment to reach 1 million! When we reach 1 million we will be able to "out" it. When we reach 1 million we'd be able to connect online direct to the bank and watch our investments grow every day! I have seen the accounts of those with 1 million deposits and how they ... almost 35% daily interest .. as shown on the statements!".

Paragraph 11 "and there is this Chinese guy who owns a cattle farm in Australia, who's a Christian guy! .... and this person told me, perhaps after a week of knowing the financial situation of the church ... offered to give us $500 grand to be deposited in our investment to help grow our investment to $1 million! ... The interest from the 1 million investment Brethren is in the average of one hundred thousand a month, because this is wholesale investment".

Paragraph 13 "There is another business that the church is operating right now which is called JIL International Insurance. JIL means Jesus is Lord and all arrangements are in order as we speak because of ... Praise the Lord, because of this person Dr Hobbs".

Paragraph 14 This Dr Hobbs I believe you've heard of him, he was the founder of the renowned insurance company Colonial Mutual .... Hobbs also created another company called Norwich Union which is also a flourishing company now .... and this is the 3rd Company he is putting up JIL .... JIL is unique because it runs its business differently from any other business in the world .... when you die ... your family would get 500 grand

in addition to your principal insurance of 100 grand. That's just an example and that's part of how JIL operates!".

Paragraph 15 "… Since [JIL] is booming this guy wants to join in. Hobbs has a lot of employees and he told me when I went there that five law firms were going to invest in JIL ... this person's name in short is Con. He was about to come and build one gym in Lavengamalie in January but Hobbs stopped him so he could set up another business in Greece and he went".

Paragraph 18 "Not only that Brethren, this guy Phil who owns cattle stations in Kimberley ... he insures his whole cattle farm with JIL Insurance".

Paragraph 26 "This guy Phil who owns the cattle ranch, he'll give us $500,000. He offered to sell the church his cattle range, one of his cattle farms in Australia. At our meeting in Sydney he planned for Dr Hobbs and I to fly over to Western Australia ... he offered to sell us a cattle station in Western Australia, a sheep farm in Victoria and some pig farms. He told me he wanted to sell all that to the church. He's a Christian and they're warming up to anything that's to do with the church".

Paragraph 28 ".... there are six of us on the JIL Board. From the church there are three of us, myself, Sione Maile and Dr Hobbs ..... I'm happy because Dr Hobbs has now joined us since he accepted the Lord as his Saviour ..... Our big land purchase project is we are going to buy 30 acres in Auckland. This is the Church's aim and we'll have the JIL and Maseia Bank there ... that'll be an exclusively Tokaikolo village!"

Paragraph 29 "I believe this is our major function, Brethren".

[61] Tokaikolo's business activities caused considerable concern among several members. Prominent among these was the First Defendant. Pohiva is a Chartered Accountant and was for many years the Tonga Government's Auditor General. He joined the Tokaikolo movement in 1978 and signed the lease application on behalf of Tokaikolo for the college at Lavengamalie.

[62] Another member who had early concerns about the way in which the Church's finances were being managed was Mataiasi To'ofohe a former Manager and Internal Auditor for the Tonga Development Bank. At paragraph 6 of his brief he stated:

> "Ever since [Dr. Saulala] became leader there had been numerous conflicts and troubled concerns about his actions, as it was evident that he made calls by himself and decisions regarding the Church most of the time .... He ruled and did whatever he pleases with everything that belonged to the church including the church's money. What made it more alarming was the fact that he did not want any financial statement/report for the church and a constitution in case the way he ran the church was discovered".

[63] Article X of the Tokaikolo constitution of 2004 deals with Church Finance. Paragraph 1(ng) permits the "President and Finance Committee" to spend up to $100,000 at any one time without prior approval from the Conference or Conference Board. Paragraph 1(k) requires Church Finances to be audited annually and for financial statements to be prepared for the annual conference.

[64] It was the contention of the Defendants that no financial reports of the Church whether audited or unaudited had ever been presented to an annual conference. Dr. Saulala did not deny that this was the case but stated that it was his belief that these reports had been prepared and had been lodged with the Church office where they were available for inspection. So far as he knew, nobody had ever asked to inspect them. He told the Court that the Church's Treasurer would be producing the reports in his evidence. As it turned out, however, Mr. Edwards advised the Court that he would not be calling the treasurer since "The Church's finances were no longer in issue".

[65] It appears that Mr. Edward's decision may have been influenced by Mr. Niu's deletion of paragraphs 26 – 34 of the Statement of Defence. In my view, however, the management of the Church's finances were clearly still in issue as pleaded in paragraphs 35(c) and (f), 36(a) and 36(h) of the Amended Statement of Defence.

[66] With the possible exception of the year ended 31 December 2010 (Document D-92) I am satisfied that no annual audited Financial Statements were presented to the Annual Conference, as required by the constitution, in the years prior to 2013.

[67] The failure to present the membership with complete, audited annual financial statements including a satisfactory and detailed explanation of how the church's debts had been incurred was the cause of much disquiet, particularly when it emerged that the Church had become involved in various business schemes

of which they knew almost nothing. Even before Hobbs joined the church various other enterprises had been embarked upon, not including those based at the Maseia Plaza. Among these were Mannatech Vitamin Pills and Kangen Water.

[68] According to 'Epenisa Poloniati paragraph 5:

> "Towards the end of the year 2000's the Tokaikolo Church became unsettled because the people started to question why the church did not have reliable financial reports of its financial activities for too long. ..... the dispute become more intense when it was revealed that there was self-interest of the President in the financial dealings of the Church when he promoted Mannatech pills in the annual camp of 2003/2004 and came to America and promoted the same and said their business with his personal secretary Melenaite Fifita and told us to pay US$1000 to her as entrance fee to become a member and to receive the pills that cure all diseases including cancer and diabetes".

[69] According to 'Asiula Foliaki, paragraph 3, one of the main concerns was that:

> "Dr Saulala as President of the Church was preaching for the Church to purchase Holy Water (how he described it) or the Kangen Water. It is said to heal all sickness including cancer, diabetes, heart diseases etc. He advertised that everyone in the church should drink from this water, especially the church Ministers. Upon payment, the company will deliver a small machine/device that will cleanse the water from the tap to holy water and heal all sicknesses. Liufau told the Church to meet with Melenaite Fifita, his secretary, fill out the forms and pay before delivering of the machine".
>
> "The price of one machine was US$3,980..... I purchased a machine and drank the cleansed water and felt no difference to my health ....This was no difference from another time prior to this when Liufau had advertised the Mannatech Pills in 2003 and 2004. We were told to go to Melenaite Fifita, his secretary, to fill out a form before payments were made .... The machine could not be returned for refund because it was already used, however the loss had exceeded $3900. But upon close inspection of the plastic used for the machine its costs did not reach US$500".

[70] According to Dr Saulala (paragraph 29 of his supplementary brief):

> "I was not directly involved in the business ventures".

He did not comment on his alleged involvement with Kangen Water but as to Mannatech:

> "These business opportunities were engaged in by some members of the Church. They asked me to support them, which I did by advising its health benefits to our community. It was not my business".

At paragraph 88 of his first brief Dr Saulala denied "conducting or being involved with" Mannatech.

[71] In its February 2004 issue (Document 148 – D-3 pages 743 and 744) the Church newspaper 'Ofa Ki tonga reported that Dr Saulala and a party of six, including his secretary, had departed for New Zealand and were to travel on to the USA to attend the Mannatech Company Conference:

> "The Mannatech Company is the provider of the nutrients supplementary pills which have healed many members of the Church and people of Tonga. Many have proved the effectiveness of the pills to heal cancer, diabetes, high blood pressure and all sorts of diseases.
>
> The President, Rev. Liufau Vailea Saulala has been appointed Regional Director of the Mannatech Company".

Dr Saulala did not tell the Court the truth when he denied being involved with Mannatech.

[72] Witness 'Asiula Foliaki produced copies of an order form, a periodic payments form and a warranty for the Kangen water machine. (Documents D405, 406 & 407). The machine is described as an "Electrolysis water generator". Electrolysis is the decomposition of water into oxygen and hydrogen due to an electric current being passed through the water. It is not immediately obvious what this machine actually does but the matter was not investigated by counsel. The order and periodic payments forms both include email addresses: "mnaite@msn.com". I accept Asiula Foliaki's evidence that Dr Saulala's personal secretary was involved in the sale and distribution of these machines.

[73] In paragraph 88 of his brief Dr Saulala denied "conducting or being involved" in JIL International Insurance. This denial is inconsistent with the claim in paragraph 28 of his Auckland 2006 speech (see paragraph [60] above) that he was a member of the JIL Board.

[74] In paragraph 32 of his further brief Dr Saulala states:

> "No insurance company was ever established here in Tonga".

On page D561 may be found a Business Licence certificate issued by the Ministry of Commerce, Tourism and Labour. It is dated 29 May 2014 and is issued in favour of JIL International Insurance.

[75] On the next page D562 is a Certificate of Registration of the business name JIL International Insurance. The owner of JIL is stated to be Maseia Holdings Co Ltd. According to a company search dated 6 May 2014, 50% of the shares in Maseia Holdings are owned by the Tokaikolo Church, the other 50% by Dr Saulala.

[76] Probably none of Dr Saulala's alleged business dealings attracted more criticism than his association with David Hobbs. As has been seen, Dr Saulala described Hobbs as having established two very well known Assurance Companies, Norwich Union and Colonial Mutual. This claim is repeated at Document D317, a photocopy of a page on the Church's website (where Hobbs is said to be "helping to set up" JIL Insurance). Hobbs' claims are fictional: according to Wikipedia (Document D312) Norwich Union was founded in 1797 while Colonial was established in New South Wales in 1811.

[77] In October 2012 the Supreme Court of New South Wales (Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs [2012] NSWSC 1276) found Hobbs to have contravened numerous provisions of the Corporations Act 2001 (Cth) by carrying on a financial services business without a licence and by engaging in misleading and deceptive conduct. The Court pointed out that the self-styled "Dr" Hobbs had no formal degree qualifications. Although he described himself as a Certified International Financier the Court described this as an honorific title. He also claimed to be a member of the International Society of Financiers, however his membership of this organisation (which was not restricted to persons with particular academic qualifications) had lapsed.

[78] Paragraph 9 of the Judgment states:

> "ASIC contends that Mr. Hobbs promoted and offered the Hobbs financial product to unsophisticated retail investors in Australia on the basis that it was an offshore investment into the wholesale market that would enable those investors to obtain investment benefits (at a high rate

of return) otherwise available only to wholesale or sophisticated investors ...."

[79] In paragraphs 35 – 38 of his supplementary brief Dr Saulala described his relationship with Hobbs:

> "I am not David Hobbs' business partner. Hobbs came and presented the Church with various business opportunities for investments".
>
> "At the same time it was an opportunity for me to witness to Hobbs and his family about Jesus Christ and his salvation".
>
> "I wrote a character reference for David Hobbs for the Australian Court, to convey how he wanted to help the Church and that Hobbs did us no wrong".
>
> "To my understanding, Hobbs was not guilty of the criminal court case mentioned above but was guilty of the civil case".

[80] In paragraphs 39 and 40 and 48 – 59 of his supplementary brief Dr Saulala dealt with the allegation that he had invested US$250,000 of the Church's money in one of Hobbs' Ponzi schemes. He admits that the investment was made on Hobbs' advice but denies that any money was given to Hobbs. He concedes that to date the only return on the investment is the $40,000 mentioned in his Auckland speech. Dr Saulala relies on the authority given to him by the 2004 constitution of the Church to make investments up to $1 million. To refute the allegation that the investment was in a Ponzi scheme Dr Saulala relied on a letter P-69 from an Australian firm of accountants confirming that according to its records, the Church had not invested in the Integrity Plus Unit Trust (one of the Hobbs funds mentioned by the Supreme Court of New South Wales).

[81] Mr. Edwards forcefully submitted that there was no evidence that Dr Saulala either knowingly or unknowingly had invested in a ponzi scheme. I agree, but do not find that this does much to improve his position. This is because the simple fact is that there is no evidence at all to show where this US$250,000 (a much larger sum in Tongan Pa'anga) has gone. Apparently, Hobbs had advised Dr Saulala that the money was invested with Merrill Lynch, a wealth management division of the Bank of America. But no document to establish this as being the case was produced. The only document that suggests that anything was invested with Merrill Lynch is an undated letter from Melenaite Fifita to Hobbs "wondering what is happening to our Merrill Lynch project" and enquiring whether "it would be possible to draw out US$100,000 now in order to help our serious financial

problem that we have been facing for the past months". No reply was shown to the Court.

[82] At page D589 there is a photograph of Dr Saulala and Hobbs standing in front of a large banner proclaiming:

> "Thank you Dr David Hobbs - a huge malo 'aupito and appreciation from the Tokaikolo Christian Church – to God be the glory".

[83] Dr Saulala may have been telling the literal truth when he stated "I am not David Hobbs' business partner" however I am satisfied that the account of his relationship with Mr. Hobbs given by him to the Court fell far short of revealing the true picture. Furthermore, there is nothing to rebut the suggestion that his dealings with Hobbs resulted in an enormous financial loss to the Church and to its members.

A QUESTION OF DOCTRINE – HOUSEHOLD SALVATION

[84] Before returning to the little church at Kolomotu'a one final area of contention must be referred to. It is the only doctrinal dispute between the parties.

[85] As already mentioned, central to Senituli Koloi's beliefs was the doctrine of justification by faith alone. In the words of Article 4 of the 1530 Augsburg confession:

> "We receive forgiveness of sin and become righteous before God when we believe and accept that Christ suffered for us and that for his sake our sin is forgiven and righteousness and eternal life are given to us".

[86] At the heart of this teaching is the requirement for personal belief and acceptance for which no amount of good works can be a substitute.

> Thus, Finau quotes Senituli Koloi as saying:
>
> "God is my decision maker. God guides me and controls my life, while the Holy Spirit is my sanctifier".
>
> In his 'Eua sermon he said:
>
> "This is the day that we have come and call for you to come to Jesus. It is not a call to join a church. It is a call to accept Jesus in your heart".

[87] On 16 September 2012 Dr Saulala delivered a sermon which was broadcast by Radio Tonga. A transcript is at pages 439 - 442 of the Defendants' second bundle of documents. On page 3 of the sermon Dr Saulala stated:

> "The salvation of the Christian God is done in households, *it is not done individually*". (emphasis added). He concluded by saying:
>
> "Again I say unto you. Salvation is household-based. Household salvation. Amen".

[88] According to Defence witnesses this sermon and several others in the same vein caused considerable consternation. As an example, Mosese Tamolaka 10 'Ahomana at paragraph 4 of his brief of evidence stated:

> "... we finally realised that [Dr Saulala] shifted from the principles that Senituli Koloi established. For instance, Senituli Koloi strongly emphasised the individual acceptance of Jesus Christ as personal salvation. On the other hand Liufau Saulala preached 'household salvation' meaning that once the Father or the Mother accepted Christ as Saviour then everyone else in that household are saved. This is indeed a new doctrine to me and I do not believe it".

[89] In the opinion of Tu'uta Lavaka who was one of the founding members of the Tokaikolo movement in 1978, Dr Saulala:

20 > "is completely lost and tends to be a heretic unorthodox thinker, non-conformist or free thinker when he preached about household salvation which is different from the true Christian beliefs preached by Senituli Koloi and which caused us to leave the Wesleyan Church in 1978".

[90] In cross-examination Dr Saulala conceded that he had not preached the doctrine of household salvation until 2013. He also accepted that it had not been preached by Senituli Koloi. In his view however:

> "There are two ways to salvation – household and individual but both end up the same way".

[91] In paragraph 89 of his brief Dr Saulala gave numerous examples of the 30 salvation of households both in the New and Old Testaments of the Bible. In his further brief he again stated his belief that salvation could "be achieved in two ways". But in his sermon quoted above he had clearly stated that "Salvation is done in households it is not done individually".

[92] This Court sees no need to resolve this doctrinal issue since it is clear first, that it was not a trivial or fanciful matter and secondly, that it was the quite widely held view that Dr Saulala had significantly departed from, if not repudiated, one of Senituli Koloi's core beliefs.

A CHURCH BUILDING AT KOLOMOTU'A–FUNDING AND CONSTRUCTION

[93] A small booklet was prepared for the occasion of the opening and dedication of the new Church building at Kolomotu'a. Its authors were Pohiva and Hepeti Takeifanga. A copy of the booklet D2-365 and D3-680 was produced to the Court. It provides a history of the development of the Church at Kolomotu'a which all parties were able to accept.

[94] Prior to 2002 the members of Tokaikolo from the Kolomotu'a area had worshipped at Haveluloto. It was then decided that Kolomotu'a should have a church building of its own. The precise process by which the land was acquired is set out on pages 1 – 4 of Mr. Sisifa's closing submissions filed on behalf of the Third Party.

[95] In July & September 2002 and January 2003 Neomai Holani, a widow, applied to the Minister of Lands for his consent to the surrender of 7 portions of her tax allotment totalling in all 1 acre, 1 rood and 10 perches "for the work of the Tokaikolo Church". The application was approved by Cabinet and a section 54 notice was published. After the effluxion of the 12 month period an application (a copy of the application cannot be found) for a lease of the surrendered land was lodged by "The Tokaikolo Christian Fellowship".

[96] According to Dr Saulala in about 2002/2003 he was approached on behalf of "Kolomotu'a members who wanted to start building their own church and to have a separate parish. I was informed that they wanted to do some fundraising in the USA to acquire land that was available at Kolomotu'a. They needed my approval which I was happy to give".

[97] According to the booklet "there were fundraisings conducted with the intention to the Kolomotu'a members of the church at San Francisco. Pohiva Tu'i'onetoa then travelled with a letter of request signed by the President. The request was accepted by the Chair Minister of America Rev. Holomesi Mahe. Over $50,000 was received .... it was used to purchase 7 town allotments for the Church".

[98] Rev. Holomesi Mahe's widow Salote Fanueli was present at the fund-raising concert, held on a Friday night in about June – October 2002. According to Fanueli: "this fund raising was clearly understood to be a donation for the constructing of the Tokaikolo Christian Church building for the Tokaikolo in Christ of Kolomotu'a. We were excited and very much willing to donate as we knew it was the work of the Church. It was announced to all church members and they were encouraged to donate money".

[99] Another person who was present at the concert was Nina Kaufusi. Her evidence was that "the money we donated was to assist the Tokaikolo 'Ia Kalaisi Christian Church of Kolomotu'a. We did not give money to Pohiva Tu'i'onetoa but to the work of the church we belonged to. If it was a fundraising concert to assist the construction of chapel for the people of Kolomotu'a then I would not have gone there as I am not from Kolomotu'a". She did not remember how much she and her husband had contributed.

[100] According to 'Epenisa Poloniati (married to Pohiva's sister for 25 years) by 2002 it was already clear that there was an opposition group within Tokaikolo, headed by Pohiva. Although Dr Saulala gave his approval for fundraising for the new Church at Kolomotu'a he did not really support the project. 'Epenisa was also at the fundraising concert. As he remembered it, about 30 people attended but of the US$25,000 raised virtually all, apart from a few loose donations was given by "the core people connected to Kolomotu'a and all of us broke away from Tokaikolo ... because we hate the despotism of [Dr Saulala] in the Tokaikolo Church".

[101] 'Epenisa told the Court:

> "Not only we donated over US$10,000 ... but we donated all doors for the Church building, redwood timber for the pews, altar partition, pulpit, plywood for front part of the altar, cement mixer machine, 4 toilet sets, 4 hand wash sink, powerful machines, Skil saw, chainsaw drills, hammers, paint brush with many rollers, water level measurement big and small, tool for tile layout, grouts and many more different types of carpentry tools etc .... over 200 buckets of paints (20 litres) and again the small bucket (1 litre) was also over 200".
>
> "We paid for both the containers that was shipped to Tonga with the above-mentioned goods".
>
> "We gave a donation on the day of the opening ceremony and that money was taken from our pocket. Our donation was not for the Tokaikolo but to

help Kolomotu'a congregation and their supports for their loan repayment".

[102] Having raised approximately TOP$50,000 in the USA Pohiva returned to Tonga; Holani was paid for agreeing to surrender the allotments and the filling in of the land commenced. The foundation ceremony was held on 6 December 2003.

[103] It was then necessary to raise further funds for the actual construction of the church and associated residences. The late pastor at Havelu (of which the Kolomotu'a congregation were still a part) led a fund raising team to New Zealand and Australia. The only member of the expedition to give evidence described meeting up with Dr Saulala in New Zealand. Dr Saulala and the other New Zealand Tokaikolo Church pastors met at the main church centre Nasaleti: "The President concluded the meeting with a request that the pastor of the Haveluloto and Kolomotu'a Congregation is here accompanied by some of his members with the objective to raise funds to assist the construction of the Tokaikolo Christian Church Chapel for the Kolomotu'a members. He also asked that they help assist us fundraise". About $60,000 was raised in New Zealand.

[104] According to Pita Vai, the Chair Minister of the Church in New Zealand from 2004 to 2014: "The reason they contributed to the fundraising was because the construction of the Church building at Kolomotu'a was for [Tokaikolo] not for Pohiva Tu'i'onetoa". Siotame agreed: "We did not hold the fundraiser for any purpose personal or specific to Rev. Taufatofua or Mr. Mailau himself. Rather we raised and donated the funds because it was for the only purpose of building a new church for our members of the Church, the Tokaikolo Christian Church at Kolomotu'a".

[105] Filimone Saulala, a pastor in New Zealand shed a rather different light on the fundraising effort. He revealed that he also "invited our neighbouring Tongan Churches such as the Methodist Church, the Free Wesleyan Church of Tonga and the Siasi 'o Tonga who also attended the fundraiser event. Our Tongan communities also attended".

[106] After New Zealand, Rev. Luva Taufatofua went on to Australia. It was conveyed to the Chair Minister of the Tokaikolo Church in Australia "that the purpose of their trip is to fundraise in connection with the construction of the Tokaikolo Church at Kolomotu'a. They told me they have spoken and reached an understanding with the President. They told me he accepted their request to travel overseas for the purpose of fundraising to build the chapel of the Tokaikolo Christian Church at Kolomotu'a".

[107] Although there is no dispute that substantial funds were raised through the trips to New Zealand and Australia the Defendants do not accept that the fund-raising effort was an official Tokaikolo Church fund-raising drive. According to Pohiva: "All the fund-raising activities conducted overseas only targeted the Kolomotu'a residents who reside overseas".

[108] Hepeti Takeifanga's evidence was that the fundraising concert in America "was conducted by the Kolomotu'a members to construct a church building for their church services. We had the concert and collected money from different people and were not limited to only those members of the Tokaikolo of Kolomotu'a. In fact those who were of Kolomotu'a origins who resided nearby to where the concert was held joined in as well, the proceeds of the concert was given to Pohiva Tu'i'onetoa because he was the one who came and conducted the fund-raising. There was never a time that we heard the Plaintiff claiming this money as theirs that they have gifted to the Tokaikolo members of Kolomotu'a, or to deposit into the Plaintiff's bank account and then granted to us, never".

> "We also travelled to New Zealand to fundraise for our construction through the Plaintiff in New Zealand but that did not mean that it belonged to them or that the Plaintiff would have authority over them, we built it ourselves for the purpose that it belonged to the members of Kolomotu'a and all the money that was received for it".

[109] In January 2006 Pohiva applied for a building permit for the new chapel and hall for "Tokaikolo Church Kolomotu'a". Shortly after Sione Maile, representing Dr Saulala and the Tokaikolo Church also requested "permission to allow this small congregation to build".

[110] Construction of the new buildings began in 2007, using materials purchased in New Zealand with funds that had been raised there. Further materials were required to complete the project to be sourced locally. In about February 2008 Pohiva approached Westpac Bank for a loan of $130,000 to complete the project. The Bank agreed in principle but sought guarantees by the "Tokaikolo Church – Head Office" signed by Dr Saulala, the Chief Financial Controller Rev. Manatu Tu'iono and Sione Maile who was then Secretary General of Tokaikolo. In March 2008 Tokaikolo replied declining to offer guarantors:

> "We regret to inform you that currently we do not guarantee any loan from the district churches including Tonga and overseas. We already received similar requests from Churches in overseas but we declined the request".

Fortunately TDB came to the rescue. It agreed to advance $130,000 (later increased to $202,600.00) on the strength of guarantees by four members of the Kolomotu'a congregation including Pohiva and Hepeti Takeifanga, who between them, it appears, also repaid the bulk of the borrowed money.

[111] Kava (the Second Defendant) told the Court that in 2007/8 he was the Carpentry Minister for the Tokaikolo Church. The term "carpenter" has a widened meaning in Tonga and Kava explained that he was the minister whose primary responsibility was the buildings of the Church:

> "6) The Rev. Luva Taufatofua, the leading minister for Kolomotu'a approached me that permission was granted at a meeting by the Kolomotu'a District that I build the Kolomotu'a church building of which I was informed that I will take the matter to the President of the Church.
>
> 7) The answer given was 'look for the people to perform the task because Kava's time is demanding and that is work needed to be completed by Kolomotu'a alone'.
>
> 8) Therefore I swear that as Minister and Leading Carpenter for the Church at that time that all expenses made for building the Church building and residential quarter for Kolomotu'a was done by them alone, with no involvement from the main Church. Including purchasing of building materials, labour, land and all other expenses were done by members of the Kolomotu'a Church alone".

[112] Support for the proposition that it was the Kolomotu'a congregation who constructed the buildings without any assistance from the Church Headquarters also came from other witnesses including Hepeti Takeifanga who stated at paragraph 41 of his brief:

> "We were determined with [Deacon] Kali Pekipaki to commence our work, so Kali went to ask a handful of workers whom were his nephews that resided at Lavengamalie to help him begin our construction. We all paid for their labours every week and also provided daily meals during the work, we divided the meals into families and provided them with food every day and also their weekly pays".
>
> "During this time there was not a single attention from the Plaintiff to our work or any kind of assistance provided in accordance with the requirements of the ... Constitution in 2007".

THE CHURCH AT KOLOMOTU'A OPENED

[113] As already mentioned, the New Church building was opened on 29 December 2009 by Dr Saulala. According to the booklet the approximate total cost of the construction was a little over TOP$500,000. On the opening day about $150,000 was collected including donations from Australia, New Zealand, USA and $5000 from Lavengamalie. Dr Saulala promised that a further $30,000 would be paid by Headquarters. His evidence was that the money was paid and he referred to document P33. Unfortunately, the author of the document, Lisiate Sauluni, was not called to produce it or what were said to be the relevant cheque stubs. Both Pohiva and Hepeti deny that Dr Saulala kept his promise. In my view there is real doubt that he did.

[114] Hepeti's evidence is that he travelled to Australia in 2011 and there raised the required amount from seasonal work and friends to pay off the remaining debt. It is not in dispute that by 2013 all the loans taken to build and furnish the new church and associated buildings had been repaid.

THE LEASE

[115]It has been seen in paragraph [95] above that Holani made several different applications to surrender parts of her allotment. The rather complicated sequence of following events is set out in Mr. Sisifa's closing submissions. As already noted, the first application for a lease, signed by Pohiva, was in the name of the Tokaikolo Fellowship of Kolomotu'a. This application was approved by Cabinet in November 2005 and resulted in a lease finally being granted on 18 September 2009.

[116] Unfortunately, when the lease was granted to the Tokaikolo Fellowship in Christ of Kolomotu'a, the Ministry overlooked the fact that in 2006 a second application for a lease of the land, plus a small extra piece, had been received from Sione Maile, then the General Secretary of the Tokaikolo Church. This application, necessarily entailing the cancellation of the first application, was also approved by Cabinet. The result of this oversight is that no lease, in the form and to the lessee last approved by Cabinet has ever been issued while the lease actually registered (and mortgaged) is not in the name of the lessee last approved by Cabinet.

THE TOKAIKOLO CONSTITUTION

[117] Some provisions of the Tokaikolo Constitution as registered in 2007 must be referred to.

[118] Art. IV-6 provides that the highest authority in the Church is the Conference of Chairman Ministers and this Conference is to be held annually. A General Conference is also to be held annually.

Paragraph 10-h) has already been noted: it gives the President authority to manage direct and oversee all employees and all the affairs of the Church, according to law and to account to the Conference.

Paragraph 10-l) allows the President to "manage and oversee the finances of the Church, employing the Treasurer and Finance Committee for that purpose and to account to the Conference".

Art VII-4 establishes a Conference Board chaired by the President which is charged with attending to the business of the Church between Conferences.

[119] Article X deals with Church finance. Tithing is to be the principal method of raising funds (1-a). X-1-l establishes a Finance Committee chaired by the President.

Paragraph 1-k) specifies that:

"Church finances must be audited annually. and Financial Statements must be prepared for the Conference every year".

Paragraph 1-ng) states:

"The President and Finance Committee may not spend more than $100,000.00 [one hundred thousand pa'anga] at any one time. Anything over the stated amount must receive approval from the Conference or Conference Board.

Paragraph 1-p) is as follows:

"All deeds of security, trustee deeds and mortgages on loans, loans for any local church or branch in the church shall not be authorised unless permitted by the Council of Chairman Ministers, or any committee chosen to manage these areas. and upon approval, the loan documents should be signed by any of the following two people:

President of the Church

Secretary to Conference

Treasurer

Superintendent Minister of Tongatapu".

Article X (2)(a) provides that:

"Every disciple shall pay a voluntary donation, once every Quarter. The amount of monies will be stipulated by the Conference".

[120] Article XI deals with Property and Land. Art. 1 a) states that:

"Everything acquired, built, purchased or leased in the name of the Church shall become a property of the Church".

Paragraph 1-h) states:

"A new building to be built or a building renovation must be submitted to the Construction Committee of the Conference. Attached to the submission is the financial estimate of costs to the project and budget proposal".

Paragraph 2-a) provides that:

"Every land that is leased, gifted or acquired in the name of the Church shall become a land of the Church".

Paragraph 2-e) provides that:

"All work to acquire, lease or exchange land or anything to do with land or tax allotment or town allotment of a local church, to construct a residence for the Church or for any other purpose must be submitted through the Church Office to the Lands Office and the legal advisor of the Church".

Paragraph 2-h) requires that:

"Lease requests submitted to the Conference, renovation, expansion or restoration of any buildings, construction of new buildings, must be submitted with a Financial Report and budget estimate and source of funds".

INCORPORATION OF THE CHURCH

[121] The Tokaikolo Church was incorporated, on 21 May 2007 as a "Society as a Board" of the Charitable Trusts Act 1993 (Cap 38.10). Some key provisions of the Act must be referred to.

[122] Section 9 – Effect of Incorporation

"Every Board ... shall be capable of holding real or personal property of whatsoever nature and whether situated in Tonga or elsewhere, and of suing and being sued and of doing and suffering such acts and things as bodies corporate may lawfully do and suffer".

Section 10 – Vesting of property

"(2) Where any estate or interest in or any mortgage or charge on, any land under the Land Act is vested in a Board by virtue of this section, the Board shall without delay advise the Minister of Lands under its common seal of such estate, interest, mortgage or charge and the Minister of Lands shall without delay register the Board as the proprietor of that estate, interest, mortgage or charge".

Section 30 – Audited annual financial statements

"(1) Every Board shall deliver annually to the Registrar in such form and within such time as he requires an audited financial statement containing the following particulars:

The income and expenditure of the Board during the Board's last financial year; and

The assets and liabilities of the Board at the close of the paid year; and

All mortgages, charges and securities of any description affecting any of the property of the Board at the close of the said year.

(2) -

(3) If any default is made by a Board in the observance of the provisions of this section, every officer of the Board shall be liable to a fine not exceeding $500 or not exceeding $20 for every day thereafter during which the default continues or both".

CONSIDERATION OF THE ISSUES

[123] The fundamental submissions advanced by the Plaintiff may now be restated in the light of the foregoing. The first is that the Church buildings at Kolomotu'a were built and paid for with the intention that they would become the property of the Tokaikolo Church; secondly, that they so became and thirdly, that having broken away from the Tokaikolo Church the Defendants then converted these properties to their own use.

The Defendants, on the other hand first deny that the buildings ever became the property of the Tokaikolo Church and secondly, say that the primary aim of the constructions was to provide a place of worship in the Tokaikolo tradition in Kolomotu'a. Thirdly, they say that even if the Court were to hold that the buildings became the property of the Tokaikolo Church, the Church forfeited the right to continue owning those properties by departing from fundamental beliefs and practices of the Tokaikolo movement as founded by Senituli Koloi.

[124] The Plaintiff's strongest argument is the raising of funds overseas with the approval and support of the President. The first problem however is that, as pointed out by Mr. Niu, the total sums contributed from overseas are nowhere near the sums raised and contributed by the Defendants, their families and their supporters. Secondly, there is nothing to suggest that the funds collected overseas ever became part of the funds of the Tokaikolo Church. Rather, the evidence suggests that while most of the fundraising took place at church properties those properties did not belong to the Tokaikolo Church of Tonga but to their overseas cousins which are distinct legal entities. Furthermore, there is evidence that the social functions were specifically directed at expatriate Tongans with Kolomotu'a connections, whether or not they were members of the Tokaikolo Church. Once raised, the funds were either brought back directly to Tonga and then spent in Kolomotu'a or brought back later after being held in a temporary bank account. The funds which were raised overseas were never paid to the Tokaikolo Church at Lavengamalie.

[125] The only direct contributions which it is clear were made or promised by Tokaikolo Headquarters were $5000 received on the opening day and $30,000 which was promised but which I doubt was ever paid.

[126] Of course, without the labour put in to convert the swampy allotments into a chapel and associated buildings no amount of money would have brought them into existence. While there was some help from Kolomotu'a members who did not later join the breakaway, it is impossible to dispute that the overwhelming effort was put in by residents of Kolomotu'a, their friends and families and that Headquarters contributed nothing at all. Furthermore, those who contributed most, both in cash and in kind, made up the great majority of those who broke away.

[127] Some provisions of Tokaikolo's constitution have been set out above, dealing with the acquisition of land, construction of buildings, payment for those projects, their mortgaging and so on. There is no evidence to rebut the claim of Defence witnesses that none of these constitutional provisions was ever complied with.

[128] As can be seen from the mortgage documents in respect of the Kolomotu'a loan, the loan was guaranteed, not by Dr Saulala and another as required by Article X-1-(p) of the constitution but by four members of the Kolomotu'a congregation, including the First Defendant.

[129] Some provisions of the Charitable Trusts Act have also been set out above. According to a letter from the Registrar of Charities dated 15 June 2017 (admitted by consent), Tokaikolo has not submitted a single financial statement since its incorporation in 2007, contrary to the mandatory and penal requirements of Section 30 of the Act. It has not, in other words ever included the Kolomotu'a buildings as part of its declared assets. There was no evidence, either, that the vesting or mortgaging of any property including the Kolomotu'a property had been advised to the Ministry of Lands as required by Section 10. In view of the carefully precise history of the land in question provided by the Ministry containing no reference to any such vesting or registration in favour of the "Tokaikolo Christian Church International" it is reasonable to assume that section 10 of the Act has not been complied with either.

[130] It must be borne in mind that following its incorporation in 2007 the correct and formal name of the church was "Tokaikolo Christian Church International". Prima facie, property belonging to an entity bearing another name does not form part of the property of the incorporated society. There is no reference to the registered name of the Church in any of the documents produced by the Third Party.

[131] Mr. Edwards quite rightly stressed the importance of the fact that Dr Saulala opened the new Chapel. But I do not think that the firm conclusion which he suggests, should be drawn from this event. Dr Saualala presided over the opening of the new church in New Zealand (at which the then King was the Chief guest) but this does not mean that the Tongan Tokaikolo Church was the owner of that building since, as is accepted, it was part of the Tokaikolo Church in New Zealand, a separate legal body altogether.

[132] It is important to bear in mind that the fundraising and construction of the Kolomotu'a buildings took place between 2002 and 2009 but that the breakaway

by Sione Maile and his followers did not occur until 2013. It is plain therefore that all the money contributed was, if not merely for the use of Kolomotu'a, for the use of the Tokaikolo congregation in Kolomotu'a. In the absence of any formal steps to include the new buildings among the assets of the Tokaikolo Church as required not only by its own constitution but also by law I find it hard to see how legal ownership of the properties can be claimed by the Plaintiff.

[133] In my view the words: "The Tokaikolo Church of Kolomotu'a" which were written on the new chapel may be understood to emphasise either the Tokaikolo connection or that with Kolomotu'a. Mr. Edwards placed some emphasis on a certificate P-52 prepared by the Ministry in January 2015 which included the Kolomotu'a lease in a list of leases owned by the Tokaikolo Church. In view however of the fact that the current lease was issued in error by the Ministry and that Semisi Moala agreed that he made no distinction between the Tokaikolo Fellowship and the Tokaikolo Church, I do not think this document advances the Plaintiff's claim to any significant degree. Neither, with respect, does Dr Saulala's observation that "What is given to God, belongs to God".

[134] The consequence of finding that Tokaikolo had unencumbered legal ownership of the Kolomotu'a buildings would be similar to declaring them merely to be a branch of Tokaikolo Church International, one which could (like the branch of a supermarket chain) be mortgaged, closed down or sold, without the users of the buildings, the inhabitants of Kolomotu'a who are adherents to, but not in communion with, the Tokaikolo tradition having any say at all.

[135] In my opinion the church and associated buildings at Kolomotu'a never became the property of the Plaintiff and therefore no question of conversion arises.

DEPARTURE FROM ORIGINAL TENETS AND PRINCIPLES

[136] Much of the pleadings, submissions and evidence were directed to the Defendants' alternate defence. This arises from the principle (in the words of Setaleki Manu v Watkins – II Tonga LR 136 – explaining the effect of Bannatyne v Overtoun [1904] AC 515):

> "Where property is given for the purpose of a particular voluntary association having as its band of union one or more distinctive fundamental religious tenets or principles, the majority of such association cannot, in the absence of express provision, by amalgamating with another body which does not hold such tenets or principles as essential

> oust from the property belonging to such voluntary association the minority who still adhere to those tenets and principles".

[137] The principle that the Court may have to enquire whether there has been a fundamental departure from tenets of the original association was more recently accepted and explained in Free Church of Scotland v General Assembly of the Free Church of Scotland [2005] CSOH 46.

[138] As has been seen, the only strictly theological issue raised by the Defendants was the question of "household salvation". The other alleged departures from the vision of Senituli Koloi were practical or procedural. Furthermore, it is clear that not all who left the Tokaikolo Church assigned the same priority to the issues raised. Unfortunately, Sione Maile was not well enough to give evidence but it seems clear that doctrinal questions were for him of primary importance. On the other hand, Pohiva identified the alleged financial mismanagement shortcomings of Dr Saulala as the principal problem. It will also be recognised that it is seldom that the aims and practices of organisations, whether eleemosynary or not, remain static over a period of time. All churches tend to evolve. Having said that, however, I am satisfied that a significant group of members of the Tokaikolo Church had, for some time, and increasingly, taken the view that Tokaikolo, under Dr Saulala's stewardship, had significantly and unacceptably departed from several fundamental principles upon which the Tokaikolo Fellowship was established.

[139] Dr Saulala suggested that there was no real conflict between individual and household salvation. In his view, both came to the same thing in the end. He very learnedly referred to several Biblical examples in which whole households had been saved, including most famously Noah and his family. But what Dr Saulala overlooked was that households are made up of individuals each of whom, in the teaching of Senituli Koloi, has to take the individual decision to accept Christ into their lives. Dr Saulala preached that salvation was not done individually, but in households, through the head of that household. This teaching which brings to mind the Mormon belief in proxy baptism is a clear departure from one of the core beliefs of Senituli Koloi.

[140] Mr. Edwards argued that the early Fellowship from 1978 to 1980 "had no agreed or documented statement of beliefs or doctrines" and that therefore there was nothing from which the Tokaikolo Church could be said to have departed. He also argued that, in establishing itself as an association with its own constitution Mo'ui Fo'ou "are doing exactly the same thing they are criticising Dr Saulala [for doing]". With respect, I do not accept either of these submissions. It was not the

adoption of a constitution which was the focus of criticism, rather that it was claimed that it was adopted without proper consultation, and then breached. Although there may not have been an "agreed statement of beliefs and doctrines" Senituli Koloi's emphasis on personal salvation and disdain for worldly pleasures are plain enough.

[141] It may bear repeating that this Court takes no view on whether the way in which the Tokaikolo Church developed should be approved or not. The question is whether a significant body of its members arrived at the conclusion that it had lost its way. I am satisfied that they did and that their conclusion was not without foundation.

A PLACE FOR EQUITY?

[142] The Court was told that the congregation at Kolomotu'a now includes former members of the Tokaikolo Church who broke away in 2013 or later. Many come from other parts of Tongatapu and beyond. It is the only church building in which members of Mo'ui Fo'ou can assemble together for worship. On the other hand, those who remained have the use and benefit of all the other churches and assets of the Tokaikolo Church, to which departing members made significant contributions. It was not disputed that during the entire time they were building their new chapel, the Kolomotu'a congregation continued to pay their, not insubstantial, dues to Headquarters. In these circumstances, taken together with my finding that the Kolomotu'a congregation contributed much the greater part of the cost and labour for the new buildings I thought there might be a place for equity in the resolution of the issues raised.

[143] In paragraph 3(a) of the Amended Statement of Defence it was pleaded that "common law and equity" applied. A place for equity in land law in Tonga, once a lease has been created, was preserved in O. G. Sanft v Tonga Tourist etc [1981 – 1988] Tonga LR 26. I had in mind the words of Gaudron J in Baumgartner v Baumgartner [1987] 164 CLR 137 who said:

> "Ordinarily, where two (or more) persons establish a fund constituted by their several contributions, it is recognised that they are entitled to that fund in proportion to their contributions. Where the legal ownership of that fund vests otherwise than in accordance with the parties' respective contributions that recognition is effected by equity's implication of a resulting trust based on a presumption that the legal title is to be held on trust for those who provided the fund in proportion to their contributions.

> The presumption may be rebutted in relation to a joint fund . by evidence of a contrary intention ..."

[144] I drew this line of thinking to the attention of counsel but neither referred to it in their submissions. Whether or not this was because it seems clear that the Plaintiff, as opposed to some of its remaining members, had only made quite a small contribution to building the new church at Kolomotu'a, I do not know. Those members, both locally and overseas who may have contributed to the Kolomotu'a effort but who did not break away to join Mo'ui Fo'ou are not parties to this action.

RESULT

10 [145] In my view, a lease of the properties at Kolomotu'a should be granted to the Fourth Defendant. The Plaintiff's claim is dismissed. I will hear counsel as to costs.

I record my thanks to Mr. Assessor Tu'ifua for his assistance. This judgment is, of course, my own.

Lord Lasike v Kingdom of Tonga

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 35/2015

2 February 2017

Criminal law — effect of conviction being quashed on appeal — in this case, a conviction that is quashed on appeal is to be regarded as if it is no conviction at all — appeal decision operates retrospectively to the date of the decision — conviction not a nullity for all purposes — acts lawfully done at the time are protected

Words and phrases — quash, has a range of meanings depending on context

Costs — reserved, no order, where parties each succeeded in various issues

The Plaintiff was convicted of unlawful possession of ammunition and as a result, by operation of clause 23 of the Constitution and s 37 of the Land Act he was deprived of his hereditary title and estates and his role as Speaker and member of the Legislative Assembly. On Appeal his conviction was quashed and his estate and title restored but his role as Speaker of MLA could not be restored. The plaintiff claimed for declarations that his ouster was unlawful, that he remained a Member and that remuneration and emoluments due to him as Speaker and MLA for the remainder of his term.

Held

1. It is necessary that Court orders be treated as valid and may be acted upon unless and until they are set aside;
2. It was lawful to remove the Plaintiff as Speaker and Member after conviction. Clause 23 (prior to its amendment) was a self-operating provision and the plaintiff ceased to hold office from the moment of his conviction;
3. Plaintiff was entitled to remuneration he would have received if he had been a member and Speaker for the remainder of his term;

Cases considered

Hancock v Prison Commissioners [1960] 1 QB 117
Commissioner for Railways (NSW) v Cavanaugh [1935] HCA 45

Statutes considered

Constitution clause 23, 74, 75
Land Act section 37
Court of Appeal Act section 17(2)

Counsel for plaintiff:	:	Mr. C. W. Edwards SC
Counsel for defendant	:	Mr. S. Sisifa SC

R U L I N G

The nature of claim

[1] On 9 July 2012 the plaintiff was convicted in the Supreme Court of the offence of possession of ammunition without a license under section 4(2)(b) of the Arms and Ammunition Act. He appealed from his conviction but nevertheless was deprived of his hereditary title and estates of Lasike, his seat in the Legislative Assembly and his position as Speaker. On 12 October 2012, the Court of Appeal quashed the plaintiff's conviction. He was restored to his hereditary title and estates but not to his seat in the Legislative Assembly or as Speaker. The plaintiff seeks declaratory relief that his removal from the Legislative Assembly and as Speaker was unlawful and contrary to the Constitution, that he remained a member of the Legislative Assembly from 9 July 2012 until the end of its term on 24 November 2014 and that he is entitled to remuneration and emoluments that were not paid to him following 9 July 2012.

[2] The defendant argues that upon his conviction the plaintiff ceased to be a member of the Legislative Assembly as a matter of law and that his appointment as Speaker was lawfully revoked by His Majesty the King.

It also argues that the decision of the Court of Appeal operates prospectively so that the quashing of the plaintiff's conviction did not invalidate earlier acts taken in reliance upon it. The plaintiff is, the defendant argues, a victim of the law and entitled to no relief.

The facts

[3] There is no dispute about the facts and no need for me to set them out in greater detail than follows.

[4] The plaintiff has held the title and estates of Lasike since 2002. In 2005 he was elected to the Legislative Assembly as the Nobles Representative for 'Eua. He was re-elected in 2008 and again in 2010. On 17 December 2010 he was made Speaker of the Legislative Assembly.

[5] On 9 July 2012, the plaintiff was convicted in the Supreme Court on a charge of possession of ammunition without a license under section 4(2)(b) of the Arms and Ammunition Act. This is an indictable offence. It is punishable by imprisonment for a term of up to five years. The plaintiff was fined $500. The plaintiff immediately appealed against both conviction and sentence to the Court of Appeal.

[6] It is common ground that the offence was one to which both clause 23 of the Constitution and section 37 of the Land Act (prior to their 2013 amendments) applied. Clause 23 provided that no person convicted of a criminal offence punishable by imprisonment for more than two years was qualified to hold office under the Government or to be elected to the Legislative Assembly. Section 37 provided that the holder of any hereditary estate who was convicted of any indictable offence ceased to hold their title and estate.

[7] On around 11 July 2012, the Attorney General, Mr. Adsett, reported the result of the case and consequences of the plaintiff's conviction to the Prime Minister, Lord Tu'ivakano, and the Deputy Prime Minister, Mr. Samiu Vaipulu. It was decided that the Government would take no steps until the appeal was heard. Subsequently the Attorney General had a change of mind. He reported this to the Prime Minister and Deputy Prime Minister. He was now adamant that a by-election should be held to replace the plaintiff as a Nobles Representative and that the plaintiff should be removed as Speaker. The Prime Minister and Mr. Vaipulu insisted that nothing be done because it would create considerable problems for the Government if the plaintiff's appeal was allowed. The Attorney General advised them that whether they liked it or not he would advise His Majesty to revoke the plaintiff's appointment as Speaker and the Legislative Assembly to call a by-election, which is what he did.

[8] On 17 July 2012, the plaintiff received a letter from the Palace Office signed by the Lord Chamberlain giving him notice on behalf of His Majesty that his appointment as Speaker was revoked.

[9] On 18 July 2012, the Attorney General sent a letter of advice to the Acting Chief Secretary and Acting Secretary to Cabinet (copied to the Ministers of Finance and Lands, the Lord Chamberlain and the Clerk of the Legislative

Assembly). He advised that the plaintiff had ceased to hold his Noble title and his seat in the Legislative Assembly from the date of his conviction and that he should not be paid for any period after 9 July 2012. He further advised that the plaintiff's appointment as Speaker had been revoked by His Majesty on 17 July 2012 and he should receive no payments in respect of his holding that position from that date. He also noted that the Deputy Speaker assumed the role of Speaker until the appointment of a new Speaker, who was to be appointed by His Majesty within 7 days of the vacancy arising. He said there would need to be a by-election to replace the plaintiff as a Noble's Representative.

[10] Lord Fakafanua was appointed to replace the plaintiff as Speaker on 20 July 2012.

[11] A by-election was held on 2 August 2012 and Lord Nuku was elected to replace the plaintiff as the Nobles' Representative for 'Eua.

[12] All payments of remuneration, allowances and other entitlements to the plaintiff ceased from 9 July 2012. It is not disputed that the amount that the plaintiff would have received for the balance of the Legislative Assembly's term had he not been removed from his positions amounts to TOP$223,385.

[13] The Court of Appeal allowed the plaintiff's appeal on 12 October 2012.

The Court ordered:

> Accordingly we .....allow the appeal. The conviction and sentence are set aside and we direct that a judgment and verdict of acquittal be entered in relation to the charge.

[14] Following his successful appeal the plaintiff sought reappointment and also compensation but was told that he had lost his positions by operation of the law and nothing could be done by the Government to remedy the situation. There were discussions about settlement but no agreement was reached. On 15 October 2012, the plaintiff wrote to the Speaker and the Legislative Assembly requesting that consideration be given to reinstating him as Speaker or paying compensation but he did not receive a reply.

[15] On 7 February 2013, His Majesty in Council restored the plaintiff to his hereditary title and estate of Lasike. The decision stated:

> For the avoidance of any doubt [His Majesty in Council] Finds and Declares that the plaintiff was on 9th July 2012, and has been at all times since then, and remains, the holder of the hereditary title and estate of Lasike.

[16] The plaintiff does not accept that he was, as the defendant contends, a victim of the law. He says he was a victim of a hasty decision to remove him notwithstanding that his appeal had not been heard. He says, and I accept, that he was greatly distressed by what had occurred and publicly humiliated and that he had to move from his home in Taufa'ahau Road Kolofo'ou to Lakepa to get away.

The arguments of Counsel

[17] I first summarise the defendant's arguments justifying the steps taken to remove the plaintiff from his positions in the Legislative Assembly and then the plaintiff's arguments that his removal was unlawful.

[18] The defendant argues that upon the plaintiff's conviction section 37 of the Land Act automatically applied so that he ceased to hold the title and estate of Lasike. At the time section 37 relevantly read:

> Any holder of any hereditary estate convicted of an indictable offence....shall as from the date of such conviction ..cease to hold such title and the estate.

[19] The conviction also triggered clause 23 of the Constitution so that the plaintiff was ineligible to hold office as an elected representative in the Legislative Assembly. At the time clause 23 relevantly read:

> No person having been convicted of a criminal offence punishable by imprisonment for more than two years, shall hold any office under the Government whether for emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly ....

[20] For completeness I should add that both section 37 and clause 23 have since been amended substantially but those amendments do not assist to resolve this case.

[21] Mr. Sisifa submitted that once the plaintiff ceased to be a member of the Legislative Assembly his appointment as Speaker was revocable by His Majesty under clause 61(2)(c) of the Constitution and was revoked.

Pursuant to clause 61(4) His Majesty was required to appoint a new Speaker within 7 days. Sections 61(2)(c) and (4) read:

> (2) The Speaker shall remain in office until-
>
> (c) he dies, resigns or his appointment is revoked after he ceases to be an elected representative of the nobles for any reason other than the dissolution of the Legislative Assembly.
>
> (4) The King shall appoint a Speaker within 7 days of the occurrence of a vacancy.

[22] The defendant argues that as clause 23 applied automatically there was no need for the Legislative Assembly to initiate impeachment proceeding against the plaintiff to remove him from his seat. Such proceedings would, it was argued, be futile as there was nothing for the Legislative Assembly to adjudicate upon.

[23] Mr. Sisifa submitted that the steps taken to remove the plaintiff did not become unlawful when the Court of Appeal quashed his conviction. This was because the decision of the Court of Appeal operated prospectively only. He argued that the Courts have never held that a decision quashing a conviction applied retrospectively from the date of the original conviction. He was not able to provide any authority for that submission. He supported the argument by noting that a person found to have been wrongfully convicted and imprisoned has no right in law to compensation.

[24] For the plaintiff Mr. Edwards advanced two principal arguments. First, he submitted that the decision of the Court of Appeal operated retrospectively so that the plaintiff's conviction must be regarded as having never been entered. As a result the steps taken to remove the plaintiff in the Legislative Assembly were unlawful. In direct contradiction to Mr. Sisifa's submission, Mr. Edwards argued that the proposition that a decision quashing a conviction acts prospectively is unheard of in Tonga. He too provided no authority. He did however quote extensively from the decision of the High Court of New Zealand in Marino v Department of Corrections [2016] NZHC 3074 which, consistent with the declaratory theory of law, states that judgments overturning previous decisions of the Court have retrospective effect.

[25] The second ground advanced for the plaintiff is that under clauses 74 and 75 of the Constitution, a Nobles Representative only ceases to hold his seat upon death, resignation or impeachment, none of which applied in this case. Mr. Edwards argued that His Majesty had no power to revoke the plaintiff's

appointment as Speaker under clause 61(2)(c) unless the Legislative Assembly has first recommended that course to him following impeachment proceedings.

Discussion

[26] There is no right of appeal from conviction at common law. The right to appeal is derived from statute and so the starting point in my analysis of this case is section 17(2) of the Court of Appeal Act. It is concerned with the determination of appeals in criminal cases and provides:

> "...the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial.".

[27] The word 'quash' generally means to make void or to annul (Butterworths New Zealand Law Dictionary, Sixth Edition) but it may have a range of meanings depending on the context in which it is used and the subject matter to which the word is applied (Dreja v The State of Western Australia [2012] WASCA 151 at [12]). It may mean make null and void for all purposes or in some contexts make null and void for the future only (Hancock v Prison Commissioners [1960] 1 QB 117).

[28] In the context that the word applies in this case, a conviction that is quashed on appeal is to be regarded as if it is no conviction at all (R v Barron (1914) 10 Cr App R 81; Dreja (supra); Lynch v Hargrave [1971] VR 99; R v Lapuse [1964] VR 43 and Commissioner for Railways (NSW) v Cavanaugh [1935] HCA 45;).

[29] In Cavanaugh, at pg 225, the judgment of the majority (Rich, Dixon, Evatt and McTiernan JJ) states that a conviction overturned on appeal is "utterly defeated and annulled" (quoting Lord Sancher's case (1613) 9 Co. Rep 117). The remaining member of the Court, Starke J, said at pp 227-228 that the consequence of the reversal of a conviction is that it is annulled, obliterated and held for nothing.

[30] I do not accept Mr. Sisifa's submission that the decision of the Court of Appeal operated prospectively. To the contrary, I consider it operated retrospectively and must be taken to have annulled the conviction entered in the Supreme Court from the date that it was made.

[31] That does not mean that the plaintiff's conviction was a nullity for all purposes (Roads and Maritime Services v Porret [2014] NSWCA 30 at [29]). This is because acts done in reliance upon a judicial order are protected in law. As it

was put in Cavanaugh at page 224, "Acts done on the exigency of a judicial order afterwards reversed are protected: they are "acts done in the execution of justice which are compulsive".

[32] Cavanaugh is a case with very close parallels to the present. It concerned an officer in the employment of the Commissioner of Railways for New South Wales who was convicted of a felony. By section 80 of the Government Railways Act 1912 (NSW) an officer convicted of a felony was deemed to have vacated his office. The conviction was subsequently set aside but from the date of his conviction until its reversal the plaintiff received no salary and was suspended. He brought an action to recover his unpaid salary. The High Court of Australia upheld his claim.

[33] As in the present case, the defendant in Cavanaugh argued that the plaintiff had lost his office by operation of law and the setting aside of his conviction did not entitle him to be reinstated and he had no right to payment for any period between his conviction and when the conviction was set aside. The High Court rejected those arguments finding that whilst acts done in reliance upon the judgment were protected from challenge, the effect of setting aside the conviction was that the plaintiff was entitled to be restored to all things which he had lost by reason of his erroneous conviction. The majority judgment said at pg 225:

> "Acts done according to the exigency of a judicial order afterwards reversed are compulsive" (Dr. Drury's Case), and proceedings which, although based upon a judgment, are brought to completion before its reversed are not avoided. For "collateral acts executory are barred, but not collateral acts executed" (Dr. Drury's Case). But "upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living, he (or if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him" (Archibald's Criminal Pleading, Evidence and Practice, 2ist ed. 1893), pp. 226, 227).
>
> As the respondent in contemplation of law was never out of office, he is entitled to the salary attached to it..".

[34] Cavanaugh is a principled decision which produces just results and has been consistently approved and applied not only in Australia but also in other jurisdictions (see for example P & O Nedlloyd B. V. and Arab Metal Co [2006] EWCA Civ 1717 at [29]).

[35] Applying the principles in Cavanaugh to the present case, the acts taken by the defendant to remove and replace the plaintiff as an elected representative and Speaker were not unlawful simply because the plaintiff's conviction was subsequently quashed. This makes perfect sense. It is necessary that Court orders be treated as valid and may be acted upon unless and until they are set aside (DDP v TY [2009] VSCA 226 at [23]). It is for this reason that breach of an order for injunction may be regarded as a contempt even though the injunction is subsequently set aside. It also explains, to take Mr. Sisifa's example, why a person subject to imprisonment following conviction has no right (unless provided by statute) to compensation for their wrongful detention. It is not therefore the case, as I understood Mr. Sisifa to be submitting, that if the Court of Appeal's ruling was applied retrospectively it would be necessary to 'untangle' the revocation of the plaintiff as Speaker, his removal as a Nobles Representative and the election of a new Nobles Representative for 'Eua.

36] But it is also not the case that the plaintiff must be regarded for all purposes as a victim of the law and entitled to no redress for what he lost as a consequence of his wrongful conviction. As far as is possible he is to be "restored to all things which by reason of the judgment he has lost" (Cavanaugh per Starke J at 228). How could the law be otherwise? Upon his successful appeal the plaintiff could not be restored to his positions in the Legislative Assembly but he was entitled to the salary and emoluments attaching to those positions of which he was deprived. The quantum of the salary and emoluments is not disputed.

[37] I can deal briefly with the plaintiff's alternative argument that the plaintiff could not be removed from his seat in the Legislative Assembly, and consequently not as Speaker either, because he did not resign nor was he impeached. The short answer is that (Veikune v The Kingdom of Tonga [2007] Tonga LR 284 clause 23 (prior to its amendment) was a self operating provision and the plaintiff ceased to hold office from the moment of his conviction). I see nothing in section 61(2)(c) of the Act to make His Majesty's power to revoke the appointment of the Speaker subject to the will of the Legislative Assembly.

The relief sought

[38] The plaintiff seeks declaratory relief. The declarations sought are as set out in paragraph 9.1(a) to (d) of Mr. Edwards' closing submissions. They differ significantly from what is sought in the amended statement of claim. Mr. Sisifa understandably and correctly objected to the changes whilst accepting that the Court has a wide discretion as to the terms of any declaration it might make.

[39] The declarations sought are to the effect that:

a the plaintiff was unlawfully and in breach of the Constitution removed as Speaker and as a member of the Legislative Assembly;

b that the plaintiff did not resign from nor was he dismissed after impeachment from his position as a member of the Legislative Assembly;

c that the plaintiff remained a member of the Legislative Assembly from 9 July 2012 until the end of its term on 24 November 2014; and

d that the plaintiff is entitled to receive payment of his remuneration from 9 July 2012 until 24 November 2014, along with interest.

[40] For the reasons I have given I am not prepared to make declarations in terms of paragraphs 39(a) and (c) above.

[41] Paragraph 39(b) has never been in dispute and I cannot see any utility in making a declaration in those terms.

[42] As far as paragraph 39(d) is concerned, for the reasons given I make a declaration as follows:

> The plaintiff is entitled to payment from the defendant of the remuneration that he would have earned as a member of the Legislative Assembly and as Speaker for the period 9 July 2012 to 24 November 2014 in the sum of TOP$223,385.

[43] I make no declaration as to the payment of interest on the TOP$223,385. A declaration is not coercive and does not create a judgment debt in terms of 0.30 Rule 2(1) Supreme Court Rules and no justification was advanced for the claim to interest.

[44] Costs are reserved. If the parties are unable to agree on costs they should file written submissions within 21 days.

Bank of South Pacific Tonga Ltd v Fonua

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 53/2016

14 February 2017

Practice and Procedure — summary judgment — what defence must be shown on pleadings — counterclaim effect

Commercial — obligations of bank — not bound by Australian banking code — no fiduciary duty owed to customers

The Bank seeks summary judgment for default in loan repayments. The defendant's affidavit to support the defence and counterclaim was late and deficient. The defendants admitted the debt but claimed without meaningful evidence that the amount was not payable.
The defendants counterclaimed that the bank failed to properly advise the borrowers.

Held

1. The Bank was granted summary judgment for $371,639.
2. The bank did not owe the debtors any special duty of care arising from their loan arrangement. The bank is not bound by an Australian code of banking practice. A bank does not owe a fiduciary duty to its customers.
3. A defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail.
4. Merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent or inherently improbable in itself it may be".

Cases considered

Westpac Bank of Tonga v Toloke [2015] Tonga LR 367
Toloke v Australia & New Zealand Banking Group Ltd [2016] Tonga LR 416
Moehau v Westpac Bank of Tonga [2013] Tonga LR

Counsel for plaintiff: : Mrs. D. Stephenson

Counsel for defendants : Mr. L. Niu SC

R U L I N G

The application

[1] The plaintiff is a bank. It seeks summary judgment against the defendants for the balance of advances made to them. The defendants oppose summary judgment arguing that they have counterclaims against the bank that ought to be heard.

The rules and the principles

[2] Applications for summary judgment are made on notice. It is a requirement of O.15 Rule 3 Supreme Court Rules that the plaintiff is to file an application and supporting affidavit.

[3] Under O.15 Rule 5(1) a defendant may oppose an application for summary judgment by affidavit or by leave of the Court in some other manner. O.15 Rule 5(2) provides that: A defendant's affidavit must state clearly what the defence is, and what facts are relied upon to support it.

[4] Relevant also in the present case, O.15 Rule 7 provides that where the Court enters summary judgment on a plaintiff's claim it may stay execution of that judgment pending determination of any counterclaim advanced by the defendant.

[5] The guiding principles of summary judgment have been set out in decisions of this Court and the Court of Appeal (Westpac Bank of Tonga v Toloke [2015] Tonga LR 367, Australia & New Zealand Banking Group Ltd v Toloke (Unreported, Land Court, LA 13 of 2015, 4 February 2016, Paulsen LCJ) approved in Toloke v Australia & New Zealand Banking Group Ltd [2016] Tonga LR 416).

[6] It will suffice for present purposes to repeat what the Court of Appeal said in Moehau v Westpac Bank of Tonga [2013] Tonga LR 71 at [17] as follows:

> Notwithstanding the plethora of authorities on the point placed before the Court by counsel for the appellants, there can really be no dispute about what a plaintiff applying for summary judgment must demonstrate. Under Order 15 rule 2 and comparable rules in other jurisdictions a defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail. The Supreme Court must be satisfied, in other words, that the asserted defence has no

prospect of succeeding at trial. In a case in which there is a factual contest it may not be proper to enter summary judgment and deprive the defendant of the exercise of the right to a trial. But merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statements by the same deponent or inherently improbable in itself it may be": *Eng Mee Yong v Letchumanan [1980] AC 331* at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.

The course of this application

[7] The plaintiff's application was filed on 16 November 2016. At a timetabling conference of 29 November 2016 I ordered that the plaintiff was to file an amended statement claim by 13 December 2016, the defendants had until 10 January 2017 to file any opposition and affidavits and that the application would be heard on 27 January 2017.

[8] The plaintiff's amended claim was filed on 12 December 2016. It was not until 25 January 2017 (two days before the hearing) that the defendants filed an amended statement of defence and counterclaim along with a curt affidavit.

[9] The defendants' amended statement of defence admits all elements of the plaintiff's claim except that the amount claimed is owing. It does however plead various counterclaims seeking damages.

[10] The defendants' affidavit does not provide any evidential foundation for the counterclaims. It does not confirm the contents of the amended statement of defence and counterclaim. The defendants baldly state that they believe their 'defences and counterclaims are strong and proper'.

[11] Although the defendants' amended statement of defence and counterclaim and their affidavit were filed very late Mrs. Stephenson elected to proceed with the hearing on 27 January 2017 and spoke to the matters that had been raised.

[12] Mr. Niu spoke to the defendants' counterclaims but was unable to provide any case authorities to support what were, to my mind, propositions of law that are contrary to established principles and, in some respects, heterodox. Mr. Niu advised me that he had supporting decisions but he had difficulty printing them. I

gave him until 2 February 2017 to provide those decisions and submissions as to their relevance.

[13] On 2 February 2017, Mr. Niu filed two decisions of the Supreme Court of Victoria along with further submissions. The submissions went considerably further than I had allowed. They included new arguments along with additional allegations of fact unsupported by any evidence. Mrs. Stephenson filed submissions in reply on 8 February 2017.

The facts

[14] The plaintiff is a bank and carries on business in Tonga. It was formally known as Westpac Bank of Tonga.

[15] The defendants are a married couple. They have obtained loans from the plaintiff for private and business purposes.

[16] On 19 August 2005, the plaintiff made a loan to the defendants, on the terms set out in the amended statement of claim, in the amount of $260,650. This amount included a prior advance which had been used to refinance the defendants' home from ANZ to the plaintiff. The plaintiff subsequently agreed to requests from the defendants to provide additional advances. The advances were obtained for business purposes. By July 2006 the amount advanced had increased to $326,234.

[17] The defendants defaulted on their payments. By 31 October 2011 they had ceased making payments altogether. The plaintiff made a number of demands for payment of the amount outstanding during May 2013 but was not paid.

[18] In April 2016, the plaintiff exercised its power of sale over the defendants' leasehold land at Fangaloto which had been provided as security for the plaintiff's advances. The sale proceeds were credited to the defendants' debt and a further amount of $7,900 credited to them in September 2016. The balance owing was then $371,629.21, which the defendants have failed to pay.

[19] All of the above is admitted by the defendants. However the defendants deny that they are liable to make payment of the $371,639.21.

Resolution of the application

[20] I am satisfied by the evidence and the admissions of the defendants that the plaintiff has met the onus upon it to satisfy the Court that it is entitled to summary judgment. As Mrs. Stephenson correctly pointed out, there is no

meaningful evidence from the defendants to challenge the plaintiff's case. The allegations of fact in the statement of defence are not evidence. The allegations of fact in Mr. Niu's submissions are not evidence. That is enough to dispose of this matter. However, in deference to the defendants I am going to address the matters that have been raised as counterclaims and explain why none, in my view, are arguable.

The counterclaims

[21] The defendants allege that the plaintiff owed them duties of care to ensure that they had the means to repay the loans, to appraise the security offered to ensure that it was adequate and to refer them for independent advice. In his written submissions Mr. Niu supported the imposition of such duties on three grounds. I will deal with each in turn.

[22] First, Mr. Niu argued that the duties are justified on the 'neighbour' test in Donoghue v Stevenson [1932] AC 562, 580 and Dorset Yacht Co Ltd v Home Office [1970] AC 1004, 1027. They are important decisions and have been applied to determine whether a duty of care exists in a great variety of cases. However, the existence (and ambit) or otherwise of a relevant duty of care is usually well established and not a live issue. Such is the case here. It is settled law that in the absence of special circumstances the relationship between a bank and its customer is one of debtor and creditor. The relationship does not give rise to a duty of care on the part of the bank to advise the customer of the prudence of a loan or the wisdom of the customer's intention to borrow or to be satisfied as to the adequacy of any security offered. In a typical relationship of debtor and creditor each party is entitled to look out for its own interests and is entitled to expect that the other party will do the same. (Dandin Group (Tonga) Limited & Teulilo v ANZ [2016 Tonga LR 144, Westpac Bank of Tonga v Toloke [2015] Tonga LR 367, Southland Building Society v Alison [2012] NZHC 2614 and Baldwin v Daubney (2005) 78 O.R (3d) 693)).

[23] In Lloyds Bank plc v Cobb (UK Court of Appeal, 18 April 1991) cited in Tyrees Banking Law in New Zealand at 4.8 page 132 Scott LJ said:

> In my judgment, the ordinary relationship of bankers and customers does not place on the bank any contractual or tortious duty to advise the customers on the wisdom of commercial projects for the purpose of which the bank has been asked to lend money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, or some arrangement between the customer and the bank under which the advice is given.

[24] There is nothing to suggest that there was a special relationship between the plaintiff and the defendants or that the plaintiff provided advice to the defendants as to the prudence of their borrowing from which the existence of a duty of care might be inferred.

[25] Secondly, Mr. Niu argued that the plaintiff was bound by the Code of Banking Practice of the Australian Bankers Association. The Code provides at clause 25.1 that before offering or extending credit, the bank will exercise the care and skill of a diligent and prudent banker in selecting and applying credit assessment methods and forming an opinion as to the customer's ability to repay advances. Mr. Niu submitted that the Code reflects desirable and proper banking practice which applied to the plaintiff because Westpac Banking Corporation of Australia was bound by the Code and the plaintiff was a subsidiary of that bank.

[26] The Code has no application in Tonga. It is apparently a voluntary code adopted by some Australian banks. The plaintiff is not an Australian bank and did not adopt the Code. Furthermore, the plaintiff never held itself out as bound by the Code nor did the defendants plead that they relied upon, or even knew of the existence of, the Code when they obtained their advances. For this reason the two cases that Mr. Niu provided with his written submissions were not helpful.

[27] Thirdly, Mr. Niu argued that if this Court was to find that the Code does not apply in Tonga it should hold that it has been adopted here because of the legislative history of Tonga, particularly the Contract Act (Cap 25). Under the Contract Act agreements for goods to be supplied, services to be rendered or money lent where the consideration exceeded $500 could not be enforced unless registered. The Act provided that a Magistrate might refuse to register such an agreement if it appeared to him that the agreement was 'beyond the power of either party to perform' (sections 5 and 10 of the Act).

[28] The Contract Act was repealed in 1989 from which time it ceased to be part of the corpus of Tongan law. It is not a proper basis to infer the existence of a duty of care in tort. If it were otherwise such a duty must necessarily extend not only to banks but to any supplier of goods and services. Should a plumber, electrician, retailer or lawyer be precluded from recovering a debt for goods and services supplied because he failed to assess his customer's creditworthiness? That would have a most chilling effect on commerce in the Kingdom.

[29] Importantly, there is no evidence whatsoever that the practices in the Code have been accepted here in Tonga or that any of the duties for which the defendants contend have been recognised in Tonga as a matter of banking practice.

[30] Even had I been of the view that it was arguable that the plaintiff owed the defendants a duty of care I would have found that it had not been breached. The plaintiff assessed the defendants' creditworthiness and the defendants are people well capable of looking after their own interests. Furthermore, any failings in the plaintiff's assessment of the defendants did not cause them any loss. The defendants' defaults were apparently caused by circumstances quite beyond the reasonable foresight of the parties, including the riots and what Mr. Niu described as the "high incidence of thefts embezzlements, burglaries and robberies in Tonga".

[31] In so far as the defendants say that they should have been referred for independent advice before taking out the loans, the law does not oblige that of the plaintiff in a case such as this. In any event the plaintiff's letters of offer contain an acknowledgement that the defendants were offered the opportunity to seek advice. There is also a warning that the defendants should not sign for the loans unless they had read and understood the terms.

[32] The next matter raised by the defendants relates to a quite separate loan advance made by the plaintiff to the second defendant in 2006 or 2007 for $600,000 to purchase a lease and buildings. It is pleaded that in making the advance the plaintiff had a conflict of interest as it was the mortgagee of the property that the second defendant was acquiring, its customer was in default and the plaintiff had an interest to "sell the mortgaged property for as much as it could get". It is alleged that $200,000 of the loan was advanced to a third party so that the buildings were not renovated and rented out as expected. It is also alleged that the loan should not have been made without the first defendant's consent after being given independent legal advice.

[33] A duty not to act in a position of conflict is recognised by equity where the relationship between the parties is a fiduciary one. As a general rule a bank is not a fiduciary for its customer. As the Court of Appeal noted in Dandin Group (Tonga) Limited & Teulilo v ANZ:

> In general a Bank does not owe a fiduciary duty to its customers. The existence of a special fiduciary duty must be based on unusual facts which must be proved.

[34] The core banking activities of receiving deposits and making loans are not fiduciary in character because in the absence of special circumstances there is no legitimate expectation that the bank will not utilise its position in a manner which is averse to the customer (Arklow Investments Ltd v Maclean [2000] 1 WLR 594

(PC)). In this case the plaintiff did not undertake (expressly or by implication) to act on behalf of the defendants in circumstances which gave rise to an obligation of loyalty.

[35] In any event, any claim the second defendant might have had arising from the circumstances under which this advance was made was fully settled by a deed of settlement she entered into with the plaintiff on 10 May 2010 (exhibit L to the first affidavit of Daniel Henson). In his written submissions, Mr. Niu challenged the settlement agreement on the basis that the plaintiff had not given consideration for it and that it was a fraudulent agreement. There was clearly consideration for the settlement agreement in that the plaintiff accepted a reduced sum in satisfaction of the second defendant's indebtedness. There is absolutely no evidence of fraud and, consistent with Counsel's obligations, that submission should never have been made.

[36] As far as the first defendant is concerned it would be wholly unrealistic for him to assert he was not fully aware that the loan was made to the second defendant and, in any event, the plaintiff had no obligation to obtain his consent. The existence of such a duty (for which I know of no authority) would not only impose an unreasonable burden upon the plaintiff but would also be an unjustifiable restriction on the activities of the second defendant.

[37] There are two further arguments advanced by the defendants. First, they plead that the plaintiff breached a duty of care in not providing in the loan agreements whether interest was simple interest or compound interest. Secondly, they argue that the plaintiff failed to obtain the best possible price for the Fangaloto property. Both of these matters have both been determined in other proceedings between these same parties (Fonua v Westpac Bank of Tonga [2016] Tonga LR 374 (Unreported, Court of Appeal, AC 5 of 2016, 14 December 2016). The defendants cannot raise them again.

Result

[38] The plaintiff is entitled to summary judgment.

[39] Judgment is entered in favour of the plaintiff and against both defendants in the sum of $371,639.21.

[40] Interest is awarded on the sum of $371,639.21 from the date of judgment until payment at the rate of 10% per annum.

[41] The plaintiff is entitled to costs to be fixed by the Registrar if not agreed.

[42] The defendants' counterclaims are without merit and I do not see any basis to order a stay of the plaintiff's judgment.

[43] Mrs. Stephenson has indicated that the plaintiff will apply to strike out the defendants' counterclaims. Whether the plaintiff pursues that particular course or not, a statement of defence to the counterclaims should be filed within 28 days.

Latai Adoption Application

Supreme Court, Nuku'alofa
Paulsen LCJ
FA 146/2016

20 February 2017

Adoption — child's interests paramount — total severing of legal ties with child not in her best interest

This case concerns a 7 year old girl. The girl and parents and siblings lived with an Uncle and Aunt who want to adopt her and the parents and girl agree. The girl is loved and well cared for by her parents. Aunt and Uncle are aged 58 and 62, they provide financial support and have ties (including a daughter) with Australia. The applicants say they have no intention of taking the child out of Tonga; the parents think this would be an advantage for their daughter.

Held

5. The paramount consideration is whether the granting of letters of adoption is in the best interest of the child.

6. Adoption here is not in child's best interests – she gets nothing from it and her legal relations with her parents are severed. The age of the applicants raises the possibility that they may be too old to look after the girl, or may die leaving her adrift.

Counsel for the Guardian ad litem : Mr. Finau

RULING ON APPLICATION FOR LETTERS OF ADOPTION

[1] This ruling concerns an application by 'Asaeli Funaki Latai and Maria Mary Latai to adopt Uaniva-'I-Vahafolau Latai, a female child who on 31 March 2017 will turn seven years of age.

[2] Uaniva is the illegitimate child of Funaki Latai and Lesieli Falase. The father and the mother are in a long-term relationship. They met in 2000 and have been living together since 2003. They have three children. There is the possibility that they will marry in the future. Uaniva is the eldest child. She has two brothers, aged 5 and 3 years. I am told that Uaniva is close to her siblings.

[3] Funaki and Lesieli raised their children in a house at Fua'amotu which is owned by the male applicant. Funaki is the male applicant's nephew.

[4] The male applicant is Tongan and the female applicant is Maori. They are both Australian residents. They are aged 58 and 62 years respectively and have been married for 33 years. They have one daughter of their marriage who is an adult and lives in Australia.

[5] In 2016 the applicants decided to return to Tonga to retire. They have moved into the male applicant's house at Fua'amotu. They live there with Funaki and Lesieli and their three children, including Uaniva. They tell me that they have no plans to return to Australia.

[6] The applicants are financially well off and of good character. However, they both suffer from diabetes and hypertension which is controlled by medication.

[7] The applicants say that they have financially supported Funaki and Lesieli and will continue to do so it would appear that Funaki and Lesieli may be financially dependent upon the applicants and the Guardian ad litem report stressed the financial support provided to date and that Lesieli works on the applicants' farm. The applicants are very close to Uaniva and they say that she regards them, and not Funaki and Lesieli, as her parents. They say that they do everything for her and love her. They want to adopt her.

[8] Lesieli consents to the adoption. There is nothing on the file that Funaki also consents but for present purposes I am proceeding on the basis that he does consent.

[9] I questioned the applicants closely about the reasons they want to adopt Uaniva. There were a number of answers given. They say that they want to continue to support her financially and ensure that she has a good life. They said that there is no intention to take her out of Tonga but want to ensure that when she is older she has every opportunity available to her. Another reason given was that they want Uaniva to inherit their property upon their deaths. Another reason was that they have only one child and that they want their daughter in Australia to have a sister. Finally, they said that an adoption order would provide them with some security that Uaniva's parents would not leave and take Uaniva with them. The male applicant emotionally expressed his love for Uaniva and asked where it would leave them if she was taken from them. He said they had decided to come back to Tonga and want to look after Uaniva as much as they can. It does appear

that Uaniva has become a singular focus of the applicants' affections and their lives.

[10] I also asked Lesieli why she supported the application. She said that the applicants could offer Uaniva a better life. She understood that Uaniva would go to Australia and she would have the ability to take her brothers overseas also. She said that the applicants had told her that Uaniva would go overseas. She also said that Uaniva would miss her brothers but that she did not think Uaniva would miss her very much because she would be busy with her new life.

Considering the application

[11] Adoption involves the total substitution of new parents for existing parents of a child. Applications are to be considered from the point of view of the child not the applicants.

[12] The fundamental purpose of adoption is to provide a child who cannot or will not be provided for by his or her own parents with a permanent and secure family life. The Court must be careful not to commoditise children or to extinguish existing legal relations unless it is necessary to provide proper care for a child or where there are other alternatives, including customary or legal guardianship (as examples).

[13] The paramount consideration for this Court is whether the granting of letters of adoption in favour of the applicants is in the best interest of Uaniva. Although I have absolutely no doubt that the applicants are genuine in their application. I am equally in no doubt that the granting of letters of adoption is not in Uaniva's best interests.

[14] Fundamentally, there is no reason to grant this application. The application gains Uaniva nothing while severing the legal relations she has with her own parents and her siblings. The reasons the applicants advance in support of the application primarily focus on their wishes and emotional needs which must necessarily be secondary to the interests of Uaniva.

[15] Uaniva already has a family. It is by all accounts a stable family. She is clearly loved by her parents and her siblings. She is fortunate in that she benefits also from the love and financial support of the applicants and there is no reason why that should not continue. In so far as the applicants wish to provide financially for Uaniva, during their lifetimes and following their deaths, they are able to do that without being granted letters of adoption.

[16] The applicants reject any suggestion that they intend to take or send Uaniva to Australia. However, given their long association with Australia and their continuing links with that country through their daughter, there is a prospect that Uaniva might go to Australia for her education. This was in the contemplation of Lesieli and a major reason for her support of the application. I cannot see that any educational or other advantages would outweigh the potential for harm resulting from Uaniva's removal from her family and home.

[17] The age and state of health of the applicants is another consideration. It is clearly possible that their existing conditions, whilst presently stable, may deteriorate making it difficult for them to care for Uaniva. There is also an increased risk that either or both might pass away leaving Uaniva without parents. At the present time her natural parents are both young and will most likely be able to support her to adulthood.

Result

[18] The application for letters of adoption is dismissed.

Fifita v Tonga Communication Corporation

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 34/2016

10 March 2017

Employment — wrongful dismissal — right to be heard — need to take account of representations — reasonable notice of termination

The Plaintiff was employed by TCC for 25 years, lastly as a retail executive. The
10 Plaintiff was dismissed for negligence in failing to supervise employees in his charge – to ensure they attended training sessions. Warnings and final warnings had been given to the plaintiff who had no contract of employment.
The plaintiff told staff to attend the training sessions but several did not. The plaintiff was asked to explain this breach in writing and he did so promptly, explaining why each employee did not attend – due to holidays, illness, and approved assignment to counter duties.
A TCC enquiry committee considered the explanation but decided to dismiss the plaintiff, purportedly in compliance with staff policy.

Held

20 1. The defendant was not negligent and was wrongfully dismissed.

2. Damages of 2 months' salary was awarded (as claimed).

Cases considered

Masila v Tonga Water Board [2002] Tonga LR 156
Leiola Group Ltd v Moengangongo [2010] Tonga LR 85
Palu v Commodities Board and others [1990] Tonga LR 28, 32

Counsel for the plaintiff : Mr. 'O. Pouono
Counsel for the defendant : Mrs. D. Stephenson

R U L I N G

The nature of the claim

30 [1] The plaintiff (Mr. Fifita) alleges that he was wrongfully dismissed from his employment with the defendant as a Retail Executive on 18 June 2015 and seeks damages.

[2] The defendant responds that Mr. Fifita was justifiably dismissed as he neglected his duties and failed to ensure that staff under his supervision attended planned training during the week of 8-12 June 2015.

The facts

[3] Mr. Fifita was employed by the defendant for around 25 years. He held different positions over that period but at the time of his dismissal he was a Retail Executive. It was a responsible position and he supervised a number of staff.

[4] Mr. Fifita reported to the Acting Manager of Sales and Marketing, Ms. Lupe Taumoepeau. She in turn reported to the Chief Executive Officer, Mr. Rizvi Jurangpathy.

[5] Mr. Fifita did not have a written employment agreement. The defendant has staff policies and regulations (the staff policy) that apply to all employees. In addition, Mr. Fifita had a job description. His duties included all 'store or on-site operation activities' including 'staff scheduling/coverage'. He was therefore responsible for ensuring staff coverage for front counter duties at a number of locations.

[6] Mr. Fifita was not at all times an ideal employee. Disciplinary action was taken against him on a number of occasions and he was given warnings, including final warnings. The subject matters of those warnings are not directly relevant but the fact that warnings were given is of some importance.

[7] On Thursday, 4 June 2015 Ms. Kalolaine Pohiva, the defendant's Administration Manager, circulated an email to employees including Mr. Fifita that training was scheduled for the following week. This included customer service training for staff under Mr. Fifita's supervision on Tuesday, 9 June 2015 and Friday, 12 June 2015. I understand staff could attend either session. There was attached to the email a table of the training sessions and the staff who were to participate in the training on each day.

[8] The email was the first notice Mr. Fifita had that training was to be conducted during the following week and who was expected to attend. Upon receipt of the email Mr. Fifita contacted his staff about the training by telephone. Mr. Fifita also discussed with Ms. Taumoepeau which of his staff would not be attending the training because they had approved leave or were required for counter duties.

[9] The training was conducted the following week and a number of Mr. Fifita's staff did not attend. This was reported to Mr. Jurangpathy. On Friday, 12 June 2015 Mr. Fifita was called to a meeting in Mr. Jurangpathy's office. Ms. Taumoepeau and Ms. Pohiva were present and they confirm what Mr. Fifita says occurred. Mr. Jurangpathy was very angry with Mr. Fifita. He blamed him for the low turnout at the training. He shouted at him and refused to allow Mr. Fifita to offer an explanation. He then ordered him from the office but only after telling Ms. Pohiva to suspend Mr. Fifita for one week.

[10] It appears that Mr. Jurangpathy, Ms. Pohiva and Ms. Taumoepeau then decided that Mr. Fifita should have an opportunity to provide an explanation. He was therefore not suspended. On Monday, 15 June 2015 Mr. Fifita was handed an internal memo by Ms. Pohiva giving him 24 hours to provide an explanation as to why he should not be disciplined for the following matter:

> Upon reviewing the records of attendance against the staff, it is observed that there has been an inconsistent basis of assigning staff for training which can in turn be seen as unfair.

[11] The internal memo is odd in that on the face of it the expressed concern was not the low staff turnout for training but that staff were assigned for training on 'an inconsistent basis' which 'can…be seen as unfair'. I have no idea what that actually means and the evidence did not shed any light on the matter.

[12] In any event Mr. Fifita responded promptly. In a letter dated 15 June 2015 he said that he was aware of the importance of the training but he was also obliged to ensure the smooth operation of activities at the front counters. He said that it had been challenging to reshuffle the roster to ensure the maximum attendance of his staff at training. He gave an explanation for each staff member that failed to attend training. The reasons were variously that the staff member was on approved leave, the staff member was ill and that Ms. Taumoepeau had given approval to the staff member being assigned to counter duties rather than attend the training. Mr. Fifita expressed disappointment at the manner in which he had been treated.

[13] Mr. Fifita's letter was considered by an Inquiry Committee which consisted of Mr. Jurangpathy, Ms. Pohiva, Ms. Taumoepeau, Ms. Ane Mailangi (the Legal Manager) and the Audit Manager. A decision was made to dismiss Mr. Fifita.

[14] On 18 June 2015, Mr. Fifita was given an internal memo which stated that his explanation had been considered and the Inquiry Committee believed he was

negligent in failing to 'implement proper planning on your Counter Staff Roster which has resulted in staff failing to attend the Customer service training'. The memo referred to his prior warnings and that:

> "In light of the above and pursuant to s.1.18 Termination of Employment of the Staff Policy and Regulation Manual (Revised May 2010) you are hereby disciplined as follows:
>
> Your service of employment with the Company is hereby terminated with effect from 18th June 2015. Please return all properties of the company including uniform.".

[15] Despite being on the Inquiry Committee neither Ms. Pohiva nor Ms. Taumoepeau considered that any failing on Mr. Fifita's part in the matter of the staff training justified dismissal. They said that the decision to dismiss him was made taking into account his employment history. Ms. Taumoepeau said this played the 'key role' in the decision.

[16] Mr. Fifita did not accept the decision to dismiss him and he wrote to Mr. Jurangpathy on 19 June 2015 stating that the decision was 'baseless' and that he held Mr. Jurangpathy and the Board of the defendant accountable for it. In a letter of 23 June 2015 Ms. Ane Mailangi responded that Mr. Fifita's objection was noted and had been forwarded to the Board to make a 'final decision'. However, on 14 July 2015 Ms. Mailangi again wrote to Mr. Fifita stating that the Board was not involved in the decision to terminate his employment and 'the Board unanimously objects to you holding them accountable for such a decision'.

The staff policy

[17] The defendant relies upon clause 1.18.1 of the staff policy which relevantly reads:

> Should an employee at any time…..(b) refuse or neglect his/her duties…..the Company shall be entitled to dismiss the employee and to terminate his/her employment in which event the employee shall only be entitled to be paid salary calculated up to the time of such dismissal and termination.

[18] There are other clauses in the staff policy that I should briefly mention.

[19] Clause 1.16 is headed 'Discipline' and clause 1.16.3 provides that the Company may impose a number of sanctions, including dismissal, for

"misconduct, insubordination, breach of secrecy, unsatisfactory work or carelessness in the performance of duties". It also allows for the defendant to suspend an employee in respect of a serious offence requiring investigation.

[20] Clause 2.15 provides that an employee wishing to resign from the services of the defendant shall give either two weeks or one month's notice depending upon their salary scale.

[21] Clause 1.17 deals with 'Grievances and Disputes' and provides a process by which an employee who has a work-related complaint may have that heard. Ultimately the employee may submit an appeal to the Board whose decision 'will be final'.

[22] Section 5 deals with redundancy and provides in clause 5.1.2 for payment of compensation of the equivalent of three month's salary 'in consideration of enabling [the employee] to find new employment' along with other benefits.

[23] What is noticeably absent from the staff policy is any clause which states that the defendant might terminate an employee's employment upon reasonable or some other period of notice.

Was the dismissal justified

[24] In her submissions Mrs. Stephenson referred me to Masila v Tonga Water Board [2002] Tonga LR 156 as authority that an employer's decision to dismiss an employee need only be based on "a reasonably founded belief, honestly held". The Court also held that the employer was not required to be satisfied of an employee's guilt to the high criminal standard but only that it was more likely than not that the employee was guilty of the misconduct charged.

[25] Mrs. Stephenson also referred to the statement of claim that pleads that Mr. Fifita's dismissal was wrongful on four grounds. She correctly argued only two are in fact grounds to challenge the dismissal. The first ground is that Mr. Fifita was not given an opportunity to be heard before the decision was made to dismiss him. The second ground is that there was no reason to dismiss Mr. Fifita, by which I understand it is meant that there is no substance to the allegation that Mr. Fifita was negligent in the performance of his duties. It is convenient to deal with the second ground first.

[26] There was some confusion as to the number and identities of the staff who were under Mr. Fifita's supervision. That notwithstanding the evidence established the following:

(a) The staff that were under Mr. Fifita's supervision who were scheduled to attend the customer service training on Tuesday, 9 June 2015 and did not attend were Mele Timani, Setaita Oko, Mohe Lomu and Aloisia Kaetau.

(b) Of those staff Mele Timani did not attend training because she was required at the counter at Fua'amotu Airport and it was decided that she would not attend the training. This was approved by Ms. Taumoepeau. Setaita Oko and Mohe Lomu did not attend training as they were on leave which was approved by Ms. Taumoepeau. Aloisia Kaetau did not attend training as he was ill but he did attend training on the Friday.

(c) The staff under Mr. Fifita's supervision who were scheduled to attend the customer service training on Friday, 12 June 2015 and did not attend were Pita To'a, Fololeni Tolu, Fatima Moa and Kalolaine Latu'ila.

(d) Of those staff Pita To'a and Fatima Moa were on leave which was approved by Ms. Taumoepeau. Fololeni Tolu had been assigned to work at the 910 Directory Assistance desk as agreed with Ms. Taumoepeau and did not require training in customer service. Kalolaine Latu'ila did not attend training as she was ill.

[27] I asked Ms. Pohiva to explain what she considered Mr. Fifita had done wrong that caused him to be dismissed. Ms. Pohiva initially said that in her opinion the low turnout of staff at training should not have been an issue and that Mr. Fifita undertook his duties correctly. She also said that the 'fact of the matter' was that they took his employment history into account in deciding to dismiss him. Later she said that perhaps Mr. Fifita should have arranged for staff who could not attend the first training session on Tuesday to attend training on the Friday but did not identify any actual instances where that could have occurred.

[28] In her evidence Ms. Taumoepeau said that before the decision was made to dismiss Mr. Fifita other factors could have been considered. I asked her what those factors were and she said the fact that staff did not attend training because they were on leave or were sick.

[29] Mr. Fifita cannot be held responsible for the low turnout of staff at the training and I consider that he was correct when he wrote to Mr. Jurangpathy that the allegation that he was negligent was entirely baseless. Mr. Fifita was advised of the training only a few days before it was to be held. Some of his staff already had pre-approved leave and Mr. Fifita also had to balance the desirability of staff training against the operational requirement to man the front counters. He promptly followed up with his staff and with Ms. Taumoepeau. He confirmed with Ms. Taumoepeau which staff could not attend training because they were to be on leave (approved by Ms. Taumoepeau), because they were required for other duties and/or, as in the case of Mele Timani, did not require training. Mr. Fifita acted diligently and at all times with the approval of his supervisor. He cannot of course be held responsible either for staff not attending training due to illness. It follows in my judgment that Mr. Fifita's dismissal was not justified.

[30] It is not necessary for me to consider the second ground advanced that Mr. Fifita was not given an opportunity to be heard but I will say a few words about it. I understood Mrs. Stephenson to accept that Mr. Fifita was entitled to a fair opportunity to respond to the allegations against him before a decision was made to dismiss him. She argued that he had been heard because regardless of the unfortunate events at the 12 June 2015 meeting, Ms. Pohiva wrote to Mr. Fifita on 15 June 2015 raising the concern about the low staff turnout at the training and giving him a chance to respond, which he did by his letter of 15 June 2015.

[31] I have real reservations as to whether Mr. Fifita was in fact ever heard in response to the allegation. Although sitting on the Inquiry Committee Ms. Taumoepeau could not say whether she had ever seen Mr. Fifita's letter of 15 June 2015. She also said that before dismissing Mr. Fifita the Inquiry Committee could have considered the fact that staff were on leave or ill which were two of the matters Mr. Fifita had raised in his letter of 15 June 2015. There was also evidence that Ms. Pohiva and Ms. Taumoepeau told Mr. Fifita that they had argued against his dismissal.

[32] All of that evidence when viewed in the context of Mr. Jurangpathy's behaviour at the 12 June 2015 meeting suggests to me that the decision to dismiss him was not based on 'a reasonably founded belief, honestly held' that he was negligent in the performance of his duties at all.

Damages

[33] In his statement of claim Mr. Fifita seeks damages for loss of earning for three years. Before me Mr. Pouono advised that he seeks just two months' salary

and entitlements. Both parties proceeded on the basis that it was an implied term of Mr. Fifita's employment that absent grounds justifying summary dismissal he was entitled to a reasonable period of notice of termination or payment in lieu. Mr. Pouono argued reasonable notice was two months. Mrs. Stephenson argued for one month.

[34] Importantly, Mr. Pouono referred to Leiola Group Ltd v Moengangongo [2010] Tonga LR 85 but did not present any argument that in light of the comprehensive nature of the staff policy no term as to reasonable notice could be implied and accordingly I cannot consider the case on that basis.

[35. In considering what is a reasonable period of notice the Court will look at a range of factors including, but not limited to, the importance of the employee's position, the length of service and his seniority (Palu v Commodities Board and others [1990] Tonga LR 28, 32).

[36] Mrs. Stephenson argued that it is relevant that under the staff policy Mr. Fifita could resign on one month's notice. I accept that is a factor that I can take into account but it does not necessarily follow that because an employee can terminate on one month's notice an employer must necessarily be able to do the same. I also note that in the case of redundancy the defendant agreed to pay compensation of three month's salary as well as other benefits. It might argue that an employee in Mr. Fifita's position, who is deprived of employment through the unlawful actions of his employer, should be no worse off.

[37] Mr. Fifita had worked for the defendant for 25 years; he was in a responsible and senior position and supervised a number of staff. On the facts of this case I am satisfied that Mr. Fifita is entitled to the two month's salary in lieu of notice that he has sought.

[38] As to other entitlements, there was no evidence as to what they are. Mr. Pouono referred to Mr. Fifita's retirement fund but I understand the defendant has no control over whether that is paid to Mr. Fifita or not.

Result

[39] The dismissal of Mr. Fifita was wrongful. I award him two months' salary in lieu of notice, which based on the information before me is $3,627.17 (gross).

[40] In the absence of any evidence I can make no further awards in his favour.

[41] Mr. Fifita is entitled to his costs which are to be fixed by the Registrar if not agreed.

Payne v Fakahau and Ors

Land Court, Nuku'alofa
President Paulsen
LA 23/2014

10 March 2017

Land law — occupation of land with permission of estate holder — registered lessee claims for land to be vacated — estate holder had no right to give permission to occupy — leaseholder lives overseas — 10 year statute bar on enforcement of right to evict under Land Act

The Leaseholder lived overseas and the lease devolved to his son the plaintiff who is duly registered as lessor. The plaintiff had previously noted that several groups of people were occupying the land and did nothing. The plaintiff lives in New Zealand. The plaintiff sought to evict the occupiers and wrote several lawyers' letters which were ignored. The noble estate holder is claimed to have taken some steps to cancel the lease and had apportioned this land to numerous people (more than the dozen separate defendants), and had given permission for people to reside on the land.

Various of the defendants had tried to register a lease of the land they had built houses upon but failed because there was an existing registered lease.

Held

1. The noble had no power to give land away because there was a registered lease;
2. The landowner's right of action first accrues when a defendant physically interferes with his right to occupy his land. Typically this might occur if a defendant builds or lives on the land;
3. Section 170 does not refer to adverse possession and the Judge cannot see how the doctrine has a place in the law of Tonga;
4. Burden of proof lies with those claiming that the 10 years under s 170 of the Land Act has expired;
5. The Plaintiff's claim to dispossess third defendant was time barred, but the other defendants were ordered to vacate;
6. No compensation is payable.

Cases considered

Tahavalu v Vakameilalo [2014] Tonga LR. 106
Fielakepa v Minister of Lands [1962-1973] Tonga LR 22,
Tu'ifua v Tui and ors [1974-1980] Tonga LR 99
Tonga v Sikaleti [2014] Tonga LR 6)
Motuliki v Namoa & ors [1981-1988] Tonga LR 141
Lokotui v Fifita & ors [1992] Tonga LR 18 (CAA)
Mokofisi v Minister of Lands and anor [2014] Tonga LR 267
Humphrey v Fairweather [1993] 3 NZLR 91

Statutes considered

Land Act, section 170
Evidence Act, section 105

Counsel for plaintiff : Mrs. P. Tupou
Counsel for defendants : Mr. 'O. Pouono

R U L I N G

The nature of the action

[1] The plaintiff's father was the registered holder of a tax allotment at Puke. The estate holder purported to allocate parts of the tax allotment to the first to eleventh defendants. The plaintiff has succeeded to his father's land. He wants to evict the first to eleventh defendants and anyone else who is presently on his land.

[2] The defendants do not dispute that the plaintiff is the registered holder of the land but argue that they are occupying the land and that this action is time barred under section 170 of the Land Act. If they are to be evicted, they seek compensation from the plaintiff.

[3] Steps have been taken to bring this action to the attention of other persons who may be living on the land so as to give them an opportunity to be heard. The twelfth defendant was joined and directed to bring this action to the attention of such persons and notice of the action was published in Taimi 'o Tonga. I made a site visit and it appears that there are people other than the first to eleventh defendants living on the land. None of them has sought to be heard in the action.

The plaintiff's title

[4] The plaintiff's parents were Siaosi Mahe (Siaosi), also known as George Payne, and Taina Fono Payne. They married in 1961. The plaintiff is their eldest male child.

[5] In 1977, Siaosi was registered as the holder of a tax allotment known as Ma'u Mamahi consisting of 8 acres 1 rood 0 perches. It is the land contained in deed of grant 243A/29. The tax allotment is at Puke within the estate of Fohe.

[6] Between 1978 and 2009 that title 'Fohe' was held by Samiuela Kavapalu. He died in 2009 and the title remained vacant until late 2016.

[7] The twelfth defendant, Ms. Lupe Fohe, is the daughter of the former estate holder. She assisted her father in the performance of his duties. Ms. Fohe produced a copy of a letter dated 31 August 1998 from her father to the then Minister of Lands. It said that Siaosi's registration had been cancelled in April 1977 and that Lord Fohe wanted to subdivide the land. The evidence of Mr. Warwick Vaea from the Ministry of Lands (the Ministry) was that the letter was not found on the Ministry's file. Siaosi's registration was not cancelled and, as I have noted, the defendants do not challenge the plaintiff's registration. Nothing more need be said about this.

[8] The plaintiff's family migrated to New Zealand in 1986. Siaosi then moved to the United States. The plaintiff lives in New Zealand but he has visited Tonga from time to time.

[9] In 2000 the plaintiff drove by Siaosi's land and saw several small houses on the land. They did not look permanent and he did not know who was living in them. He made no enquires and did not discuss this with his parents.

[10] In 2008 Siaosi died in the United States. The plaintiff's mother claimed the land as his widow. The plaintiff told her that people were living on the land. She considered it better if the plaintiff dealt with those people and she surrendered the land in his favour. The plaintiff was registered as the holder of the land on 8 October 2010.

[11] The plaintiff took steps to find out who was on the land. He engaged a local lawyer, Mr. Laki Niu, to act on his behalf. Mr. Niu wrote a letter in October 2011 asking those on the land to leave. At least some of the defendants received that letter but it was effectively ignored.

[12] In 2011 also, the plaintiff requested the Ministry to conduct a survey to identify the boundaries of his land and this was done.

[13] In 2014, the plaintiff engaged his current lawyer, Mrs. Petunia Tupou, and she sent letters to the defendants in June 2014 (a letter to the eleventh defendant

was sent on 16 July 2014) requiring them to vacate the land within a month. The defendants did not vacate the land.

[14] On one of his visits to Tonga in around July 2014 the plaintiff drove by his land and was waved down by the fifth defendant, Haveapava Vaea. The plaintiff stopped and the first defendant, 'Ofa Fakahau, and another person came forward. The plaintiff was introduced as the owner of the land. The plaintiff noticed a pile of rocks and was told that they belonged to Reverend Folauhola Taukafa who was then preparing to build his house on the land. 'Ofa Fakahau insisted that they go and see Ms. Fohe. She lives on adjoining land. It appears that despite her father's passing she was regarded as still having influence over the lands in the estate. At that meeting Ms. Fohe said that Siaosi's registration was to have been cancelled and that Lord Fohe had given permission for people to live on the land. She asked the plaintiff to return the next day on his own to discuss the matter further.

[15] Evidence was given that at this meeting the plaintiff agreed to give up his land in return for another tax allotment. The plaintiff denies any such agreement and I accept his evidence. The possibility of the plaintiff being given other land may have been discussed but it is entirely implausible that the plaintiff would have given up his land at an impromptu meeting, without taking any advice and without knowing that other suitable land could indeed be obtained for him. Nothing the plaintiff has done since that meeting would suggest that he had made any such agreement. I do not accept Ms. Fohe's evidence that she has arranged other land for the plaintiff and none has been offered to him. Mr. Pouono, quite correctly, did not advance an argument that the plaintiff had compromised his rights by agreement.

[16] The plaintiff returned for another meeting with Miss. Fohe the following day. She told him that he should be content with what remained of his land and that the people living on the land had been put there to assist Lord Fohe with his obligations. The plaintiff told Ms. Fohe that he was dissatisfied and asked her to stop any further occupation or building on his land.

[17] That meeting was followed up with a letter of 15 July 2014 from Mrs. Tupou to Ms. Fohe in which Ms. Fohe was asked to put a stop on any further building on the plaintiff's land. Ms. Fohe said that she did this but the evidence of the Reverend Taukafa, which I accept, was that he built his house only after being told to do so by Ms. Fohe.

[18] By the end of August 2014 none of the defendants had moved from the land and the plaintiff instructed Mrs. Tupou to file proceedings. This action was commenced on 1 September 2014.

The defendants

[19] The evidence of the defendants was surprisingly brief and lacking in relevant detail. They were generally not precise as to when Lord Fohe gave them land or as to the circumstances under which it occurred. They presented few or no documents to support their evidence.

[20] Some of the defendants have built houses on the land but they did not produce permits, plans, contracts, invoices or receipts to show when that work was done and the cost of the work. The one exception is the first defendant, 'Ofa Fakahau, who produced contract documents and plans for his house.

[21] None of the defendants produced documents that might establish the periods they have lived on the land such as bills for utilities or insurance.

[22] The defendants appear to have made no enquires about whether the land was registered and they took no steps to register the land themselves. The exception was the second defendant. In May 2007 he made an application to register the land he says Lord Fohe gave him. The application could not proceed due to the plaintiff's registration. At the same time applications for registration were made on behalf of the seventh and eighth defendants but they did not give evidence and what involvement (if any) they had in making the applications was unclear. Those applications did not proceed either.

[23] I will now summaries the relevant evidence for each of the defendants.

'Ofa Fakahau

[24] 'Ofa Fakahau ('Ofa) said that he was taken to see Lord Fohe in 2004 to ask for some land. He gave Lord Fohe TOP$500, yams and fish as a gift. He said Lord Fohe gave him about 60 perches of land.

[25] There was nothing on the land but bush and a house built by the third defendant, Latoa Mafua. He hired an excavator and cleared the land. He said he engaged the youth of the Pentecostal Church at Fangaloto to assist clear the land and pick up rubbish but did not say when this work was done. He also collected bricks and bought wire and fence posts from Tokomololo to fence the property.

'Ofa claims that every week from 2004 he and his family cut the grass and maintained the land.

[26] It was not until 2009 that he built his house. The house was completed a few days before Christmas and the family moved in. Before that they were living at Havelu. He produced some contract documents and plans relating to the construction of the house and its cost of TOP$102,350.

Taniela Makahununiu

[27] Taniela Makahununiu (Taniela) said that Lord Fohe gave him his land in Easter 2000. He cleared the land and built a four bedroom house including lock up garage, security systems, driveway and fences. He also planted trees. A well was drilled to supply the property with water. The electricity was connected. He travelled between New Zealand (where he was living) and Tonga to build the house. The evidence was that Taniela was assisted by his brother, Palasi Makahununui (Palasi) and tradesmen from New Zealand. Palasi said that the house was completed in 2000. Taniela said that construction began in 2000 but it was not until 2005 that he moved in with his family and that the house is still not complete. Another building containing shops was built in 2015. Taniela said that the total cost of the work was TOP$400,000. He produced nothing to support that figure. Photographs of the house and the shops were produced (document 49).

[28] Under cross examination Taniela acknowledged that his family now lives in New Zealand. He said that he travels between New Zealand and Tonga to manage his shop in Tonga which opened in around October 2015.

[29] Taniela acknowledged that in May 2007 he signed an application to register the land. That application was produced (documents 50-52) and there is a plan attached. The application was submitted to the Ministry but was not processed because the land was already registered to the plaintiff. Taniela was told by Naisa Fetokai, who stays at his house and works for the Ministry, that the land was registered to someone else. It appears that notwithstanding that knowledge Taniela went ahead and built the shops.

Latoa Mafua

[30] Latoa Mafua (Latoa) said that he was given land by Lord Fohe in 1995. He cleared the land and built a brick house with iron roof where he and his family lived. He connected electricity to the house. He said he spent $31,400 on the land over the last 20 years.

[31] Siaosi Molitika, the eleventh defendant and Latoa's brother in law, gave evidence that the house was built in 2005 or 2006. I believe he is mistaken. There is evidence from other witnesses that the house was built much earlier and Latoa recalled that the house was built in 1995 as at that time his wife had travelled to the United States and had given birth to their son.

[32] Latoa moved off the land in 2007. Siaosi Molitika has been allowed to live in the house since. Latoa said that he never misses a day to visit his house.

'Ofa Aso

[33] 'Ofa Aso did not give evidence. His brother Haumole Aso gave evidence that in 2003 'Ofa Aso had gone to Lord Fohe and requested a town allotment. He said his brother gave TOP$6,000 to Lord Fohe and was well received and given a town allotment.

[34] 'Ofa Aso has never lived on the land. He left Tonga in 2005 and has never returned. He has remained in the United States for medical treatment.

[35] A house was built in 2005 or 2006. It was paid for by 'Ofa Aso but Haumole and his family have lived in it. Haumole said the house cost about TOP$120,000.

Haveapava Pasimi Vaea

[36] Haveapava Pasimi Vaea (Havea) said that he went to see Lord Fohe at the end of 2004 for a piece of land and gave a TOP$5,000 gift in appreciation.

[37] He said that he was one of the first people to settle on the land and that he started to build a house in 2005 or 2006. The house was completed in 2007. He also connected the electricity. Havea said that the house cost $87,000 but that the total cost of developing the land was TOP$99,000.

Feleti Lavulavu

[38] Feleti Lavulavu (Feleti) said that in 2001 he went with his first wife and son and asked Lord Fohe for some land for his son. His son was three years old. He said he took TOP$500, yams and fish and that Lord Fohe personally pointed out his land to him.

[39] Feleti has a town allotment at Sopu. He built a house on the land at Sopu in 2001 or 2002 and lived there. He said that he started to build a house at Puke in 2002 but it was not completed. The house is a foundation and concrete block exterior walls. It has no roof, joinery or glazing and no internal divisions. The property is not fenced but Feleti said that there was once a one wire fence but it fell down. Feleti also said water and electricity was connected to the property but the electricity was later disconnected. He said that it cost at least TOP$30,000 to build the house.

[40] In 2007, after his first wife died, Feleti and his son migrated to New Zealand. Feleti said that when he returns to Tonga he mows the lawns at Puke and picks up rubbish and while he is in New Zealand his family does that for him and he sometimes pays them.

Sione Mataele Makahununui and Alaivahamama'o Makahununui

[41] These defendants are brothers and neither gave evidence. Sione Mataele Makahununui (Sione) lives in New Zealand. He left Tonga in 2001 and has not returned. Alaivahamama'o Makahununui (Alai) is travelling overseas. No explanation was given why they could not give evidence.

[42] Palasi gave evidence that he is the father of Sione and Alai and that in 1997 Lord Fohe gave land for him and his three sons. Sione was 14 and Alai was five years old. He said that later Taniela came to Tonga and asked Lord Fohe for land and he built Taniela's house. Palasi said that the Ministry had prepared a survey to subdivide the land but there was no other evidence of this. He also said that the land was fenced but gave conflicting evidence about when it was fenced saying, variously, after 2000, in 2007 and then in 2010. Nothing else is built on the land and there was no evidence that Sione or Alai have had any connection with the land.

[43] Applications were made on Sione's and Alai's behalf to register the land in around May 2007. The applications were signed by Naisa Fetokai. Palasi could not explain the delay between when he said the land was given (1997) and the applications were made (2007). He did not know either why the plan that accompanied the applications showed land allocated to his sister (but I note not to him). He said she must have been in Tonga and asked Lord Fohe for land but he never knew about it.

[44] Attached to Sione's application is his birth certificate (document 55) which states that his father is Finau Pau'u Makahununui. The birth certificate

attached to Alai's application is not Alai's birth certificate. It appears to be the birth certificate of an uncle. Alai was not 16 years old and could not have applied for the land in 2007.

Reverend Folauhola Taukafa

[45] Reverend Folauhola Taukafa went to Lord Fohe in 2005 and asked him for a town allotment for his son. He gave Lord Fohe TOP$3,000. He went back in 2006 and asked Lord Fohe for an allotment for another son and gave a gift of TOP$2,000.

[46] When Lord Fohe passed away in 2009 Reverend Taukafa began gathering his building materials to build a house. He has built a two-storey house (documents 46 and 47). It is not yet complete and the electricity is not connected. He said that when it is complete the house will have cost TOP$150,000 to build. Reverend Taukafa does not live in the house. He has lived at Sia'atoutai Theological College since 1997. His son lives in the house.

[47] He said that when he received the letter in 2014 from Mrs. Tupou the foundations for his house had been put down. He went to see Lupe Fohe about it and she told him not to worry and continue building his house. He relied upon her word and felt he had been let down.

Menolo Tafolo aka Kilisimasi Tafolo

[48] Menolo Tafolo (Menolo) said that in about 2004 he went to Lord Fohe and was given a town allotment. He gave Lord Fohe TOP$7,000.

[49] Menolo has built a house. He said that he took a bank loan for about TOP$38,000 but it cost about TOP$80,000. The build did not start until 2005 and was completed in 2006. He said he moves back and forth between this house and his parents in law's house where he keeps pigs.

Siaosi Molitika

[50] Siaosi Molitika said that Lord Fohe gave him land in 2007. He gave Lord Fohe TOP$4,500 as a gift. He said the land was approximately 30 perches but Lord Fohe did not show him the land. He was told that his land was next to 'Ofa Fakahau's land. He hasn't lived on the land and he has not built on it but he says he has maintained it. Since 2007 he has been living in Latoa Mafua's house.

The defendants' submissions

[51] The defendants rely on section 170 of the Land Act. Mr. Pouono submitted that all of the defendants are occupying the land allocated to them by Lord Fohe, by clearing bushes, building fences and/or houses and living on the land. The defendants' principal argument is that time began to run for the bringing of this action in 2000 when the plaintiff saw that there were people living on the land. As more than 10 years has elapsed the defendants argue that the plaintiff's action is time barred.

[52] Alternatively, Mr. Pouono submitted that by doing nothing the plaintiff allowed the defendants to settle on the land and he should pay compensation if they are to be evicted.

The plaintiff's submissions

[53] In reliance upon sections 6, 13 and 32 of the Land Act, Mrs. Tupou argued that Lord Fohe had no power to dispossess Siaosi of his land by giving portions of it to the defendants. Lord Fohe's actions were, she said, clearly unlawful and of no legal effect so that the Court did not have to consider section 170 of the Land Act.

[54] In the alternative, Mrs. Tupou argued that at best Lord Fohe granted the defendants a license to occupy the land which was revoked upon his death. On that basis the defendants were not in 'adverse possession' of the land until 2009 and the plaintiff commenced this action well within time.

[55] Mrs. Tupou argued that time could not run against the plaintiff from 2000 as he was not then the registered holder of the land and only the third defendant claimed to have been occupying the land at that time in any event. To avoid eviction, she argued, each defendant had to prove that he was in 'continual occupation' of the land for more than ten years immediately prior to the plaintiff commencing this action and that none of the defendants had done so.

[56] Finally, I understood that in reliance upon Tahavalu v Vakameilalo [2014] Tonga LR 106, Mrs. Tupou advanced another argument that time could not run against the plaintiff until he was the registered holder of the land.

The law

Lord Fohe had no power to dispossess Siaosi.

[57] In his closing submissions Mr. Pouono did not advance an argument that Lord Fohe had the power to give Siaosi's land to the defendants. He was right not to do so. Lord Fohe could not lawfully dispossess Siaosi other than in a manner provided by the Land Act (section 32 of the Land Act). No proceedings to eject Siaosi from his land were taken against him (ss. 68 and 69 of the Land Act). Lord Fohe did not confer any right or title to the land on the defendants. Those that entered on to the land did so as trespassers (albeit unintentionally so).

Section 170 of the Land Act

[58] Section 170 of the Land Act provides:

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

[59] I do not accept Mrs. Tupou's submission that I need not consider the defences under section 170 because Lord Fohe acted unlawfully in allocating land to the defendants and could never dispossess Siaosi. Section 170 is not concerned with the merits of an action. It may operate despite the merits and prevent a plaintiff from obtaining a remedy he would clearly otherwise be entitled to but for the effluxion of time. I must consider the application of section 170 to the facts of this case.

[60] Two other legal issues arise in relation to the application of section 170. First, when did the right of action upon which the plaintiff relies first accrue? Secondly, does the plaintiff carry the burden to prove that his claim is not statute barred or is it for the defendants to prove that the claim against them was brought out of time?

When did the plaintiff's right to action first accrue?

[61] If someone unlawfully enters upon land and interferes with the landowner's right to occupation or ousts the landowner altogether the landowner may eject the intruder by the use of reasonable force or may bring an action for recovery of the land.

[62] The right to bring an action is not dependent upon the landowner proving that he was completely dispossessed and does not "depend upon the niceties of

whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used" (Secretary of State for Environment Food and Rural Affairs v Meier and another [2009] UKSC 11, at [30] per Lady Hale).

[63] What is being protected is the right to physical occupation of land. In Meier (supra) at [35] Lady Hale described the form of action in these terms:

> "[35] It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another…...".

[64] Turning to the question of when the plaintiff's right of action first accrued, I do not accept Mrs. Tupou's argument that the defendants had a license to occupy the land conferred upon them by Lord Fohe so that time ran only from the date of his death. For the reasons I have given, Lord Fohe could not deal with Siaosi's land and confer a license on the defendants to occupy the land.

[65] It cannot be the case either that time began to run in 2000 when the plaintiff learned that people were living on the land. That would produce the absurd result that any person occupying the land unlawfully at any time prior to the plaintiff commencing this action (even for one day) could immediately avail himself of a defense under section 170.

[66] In my judgment, in a case such as this a landowner's right of action first accrues when a defendant physically interferes with his right to occupy his land. Typically this might occur if a defendant builds or lives on the land (Fielakepa v Minister of Lands [1962-1973] Tonga L.R. 22, Tu'ifua v Tui and ors [1974-1980] Tonga L.R 99, Tonga v Sikaleti [2014] Tonga LR 6). The date when time began to run will necessarily be different for each defendant but it is not when Lord Fohe gave permission for the defendants to live on the land. That did not interfere with Siaosi's right to physical occupation of his land.

[67] The plaintiff has no independent period of limitation that runs from the date of his registration as Mrs. Tupou contends. This is because, in terms of section 170, Siaosi is the person "through whom [the plaintiff] claims" (Motuliki v Namoa & ors [1981-1988] Tonga LR 141; Lokotui v Fifita & ors [1992] Tonga LR 18 (CAA) and Mokofisi v Minister of Lands and anor [2014] Tonga LR 267).

[68] The case of Tahavalu v Vakameilalo (supra) does not support an argument that time ran from the date of the plaintiff's registration. In that case the defendants were held to be in possession prior to the plaintiff's registration pursuant to a revocable license so that no right of action to remove them had accrued.

[69] I have been troubled by decisions which have held that an action to recover land may be defeated by a defendant's 'adverse possession' of the land for more than 10 years. The term 'adverse possession' is of ancient lineage in English real property law and refers to the circumstance where title to land may be extinguished in favour of a person who has been in possession of the land in a manner that is adverse to the interests of the true owner. (Tu'ifua v Tui & ors (supra) Fielakepa v Minister of Lands (supra), Tonga v Sikaleti (supra) and Ongosia v Tongia [2006] Tonga LR 239).

[70] Section 170 does not refer to adverse possession and I cannot see how the doctrine has a place in the law of Tonga. The Land Act is intended to operate as a code in respect of titles or claims to interests in land (OG Sanft & Sons v Tonga Tourist Development Co Ltd & ors [1981-1988] TLR 26 and Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale [2011] Tonga LR 71(CA)). Whilst I am not required to decide the point it appears to me to be contrary to the scheme of the Land Act that title to land might be extinguished (or created) otherwise than in a manner contemplated by the Act.

The burden of proof

[71] I am satisfied that it is the defendants who carry the burden to prove to the civil standard of on the balance of probabilities that section 170 applies to bar the plaintiff's claim against them. Despite decisions in some jurisdictions which have taken a contrary position (to which I referred Counsel) the position in Tonga is governed by the Evidence Act (Cap.15).

[72] Section 105 of the Evidence Act provides that at the beginning of any proceeding the burden lies upon that person who would fail if no evidence at all were given on either side. In this case that is plainly the plaintiff. It is therefore the plaintiff who must prove to the appropriate standard any fact that is necessary to found his cause of action.

[73] However, it is long established that if a defendant, other than as a denial of an essential ingredient of the plaintiff's cause of action, raises any matter that if

proven will constitute a good defence, then he has the onus to prove that fact (Currie v Dempsey [1967] 2 NSWR 532, 539 per Walsh JA).

[74] This 'ancient' principle (Abil Property Tauraraua Limited v Cozzolino [2010] NZHC 893 at [15]) finds expression in Tonga in section 106 of the Evidence Act which provides:

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any Act that the proof of that fact shall lie on any particular person.

[75] I am fortified in my view by Humphrey v Fairweather [1993] 3 NZLR 91 and the cases that have followed it. In Humphrey the plaintiffs' claim was for damages for negligent construction of a dwelling. Section 4 of the Limitation Act 1950 (NZ) provided that actions in tort were not to be brought after the expiration of 6 years from when the cause of action accrued. As a matter of law the cause of action accrued when more than minimal damage occurred which ought reasonably to have been discovered and appreciated as such by the ordinary prudent homeowner. Tipping J held that the burden of proof on the limitation issue fell on the defendant. Two of the reasons Tipping J gave for arriving at this conclusion are particularly relevant for present purposes.

[76] First, Tipping J noted that whilst the language of section 4 appeared to be a prohibition against the bringing of an action out of time in fact it was not. He held that the effect of the section is to bar a remedy but not the plaintiff's right. Section 4 had to be pleaded and if it was not pleaded the Court will not take a time point. The position is the same under section 170. A point of limitation is not a bar to the bringing of an action and it is more appropriately understood to be an affirmative defense requiring express pleading and therefore proof. In accordance with general principle the burden of proof should rest on the person taking the point. In this case that is the defendants.

[77] The second reason is that it is fairer to hold that a defendant has failed to prove the barring of the remedy than to hold that the plaintiff, for want of proof, has in effect lost his rights. A plaintiff who has suffered a legal wrong should not lose his remedy unless it can be shown the remedy is time barred.

[78] This last point has particular significance in a case such as this where Siaosi was unaware that any of the defendants had occupied his land. When they did so and what they have done upon the land since is peculiarly within their knowledge.

Discussion

Are the plaintiffs rights of action time barred?

[79] The plaintiff's action was commenced on 1 September 2014. To successfully rely on section 170 the defendants must prove on the balance of probabilities that the plaintiff's right of action first accrued prior to 1 September 2004.

'Ofa Fakahau

[80] 'Ofa Fakahau said he asked Lord Fohe for land in 2004. He did not say when in 2004 Lord Fohe granted his request. He also said that he cleared the land but he did not say when he cleared the land. There were no documents produced and no witnesses called to give evidence to prove when that work was done. The work must have been done after Lord Fohe said 'Ofa could live on the land but I am not satisfied, even to the civil standard, that that was before 1 September 2004.

[81] 'Ofa's evidence that he and his family cut the grass and maintained the land 'every week' from 2004 is implausible and I do not accept it. It may well have been the case that 'Ofa cut the grass from time to time but he did not occupy the land until his house was built in late 2009.

[82] 'Ofa has failed to satisfy me that he occupied the land prior to 1 September 2004. Accordingly the plaintiff's claim is not time barred.

Taniela Makahununui

[83] Taniela said that he began clearing the land and building his house in 2000 and that in 2005 he and his family moved into the house. He did not produce any documents, such as a building permit, invoices for building materials or tradesmen, receipts or banking records to support his evidence as to when the work was done. He did not produce his passport or travel documents to prove when he travelled between New Zealand and Tonga to build his house. He also did not produce bills for utilities or insurance which might have supported his evidence as to when he began living on the land.

[84] I have looked closely for anything that might support Taniela's evidence that the house was built between 2000 and 2005. Palasi said the house was completed in 2000. His evidence is in conflict with Taniela's evidence and is in my judgment incorrect. Palasi was an unreliable witness with a very poor recollection

for dates. I can take very little from Palasi's evidence. Lupe Fohe said that Taniela built his house between 2000 and 2005 but also that she could not really remember that. She too was a poor witness whose evidence was contradicted in important respects by witnesses I considered more reliable, such as Reverend Taukafa and the plaintiff. 'Ofa Fakahau said that when his allotment was given to him in 2004 the land was covered in bush and the only house built was owned by Latoa Mafua, although he also said he did not know the boundaries of the land and he may not have turned his mind to whether Taniela's house had been built. Haveapava said that when he began constructing his house at the end of 2005 or in 2006, Latoa Mafua had already occupied the land but did not mention Taniela's house. 'Isikeli Kivalu also referred to Latoa Mafua's house being on the land in 2004 and said that there were other houses but he made no reference to Taniela's house. Feleti Lavulavu's evidence was that when he was given his land in 2001 the property was covered in bush and the only houses around belonged to Latoa Mafua and a man called Malanata. Viewed as a whole the evidence of the other witnesses does not assist Taniela.

[85] It would have been a simple matter for Taniela to have produced documents that showed that building commenced before September 2004 had such documents existed but he did not do so.

[86] I note also that in 2007 Taniela applied to register the land. There is no explanation why he waited 7 years to do that particularly if he had already spent a large sum developing the land between 2000 and 2005. I also note that attached to his application is a plan of subdivision. The plan shows a building on the land which was identified as Malanata's house. Taniela's house is not shown. It does appear incongruous that Taniela would submit a plan for registration purposes which does not show his house if it had been built. However, I can take little from this as there was no evidence as to when the plan was actually prepared.

[87] Taniela has not satisfied me that he occupied the land prior to 1 September 2004 and the plaintiff's claim is not time barred.

Latoa Mafua

[88] Latoa was one of the first to occupy the land. The evidence satisfied me that he built his house in around 1995. A number of the defendants gave evidence that his house was built on the land by or before 2004.

[89] Mrs. Tupou argued that Latoa is not now living on the land. It is true that Siaosi Molitika and his family are living in Latoa's house but that is with his

permission and I accept that Latoa regularly visits the land. Whilst Latoa is not living in his house he has continued to exercise physical dominion over the land in denial of the plaintiff's rights of occupation.

[90] It was established that Latoa has occupied the land since before 1 September 2004. The plaintiff's claim against him is time barred.

[91] I should add that my ruling that Latoa cannot be evicted from the land by the plaintiff does not create in his favour any other interest or any title to the land.

'Ofa Aso

[92] The evidence established that 'Ofa Aso has never lived on the land and did not build a house on the land until 2005 or 2006. There is no evidence that he took any other steps to occupy the land prior to 2005.

[93] The plaintiff's claim is not time barred.

Haveapava Pasimi Vaea

[94] The evidence established that Havea had not entered on to the land to build his house until at least 2005. There is no evidence that he took any other steps to occupy the land prior to 2005.

[95] The plaintiff's claim is not time barred.

Feleti Lavulavu

[96] Feleti said that he started building a house on the land in 2002. He provided no documents to support his evidence. In 2001 and 2002 he was a school teacher and was building a house at Sopu. It is unlikely that he would have diverted his time and his financial resources to build a second house when the land at Puke was not required for his family and the land had been obtained for his son who was then just three or four years old and had no immediate use for it.

[97] I do not accept Feleti's evidence in part because I find it implausible and unsupported by any documents and in part because I found him to be an unconvincing witness. His answers to questions put to him were often self-serving or evasive. An example was his obvious unwillingness to respond directly to Counsel's questions as to when he acquired his land in Sopu. Another example was his surprising evidence that he has his building materials ready to complete the

house for which he produced no supporting documents. Feleti failed to satisfy me that he occupied the land prior to September 2004.

[98] Furthermore, in my judgment Feleti has not occupied the land since he left Tonga in 2007. No one has lived on the land. It has not been fenced. Clearly no work has been done on the house. I do not accept that Feleti mows the lawns. Feleti did not call any relative to prove that they look after the land for him either and in the absence of such evidence I find that they do not. In any event such minor and irregular work falls well short of establishing that he has occupied the land as he claims.

[99] The plaintiff's claim is not time barred.

Sione Mataele Makahununui and Alaivahamama'o Makahununui

[100] As noted earlier these two defendants did not give evidence. Neither has lived on the land and there is no evidence that they have ever physically been on the land or done any manner of work on the land. There is a fence around the land but the evidence fell well short of establishing that the fence was erected prior to September 2004 or by them.

[101] The plaintiff's claim is not time barred.

Reverend Folauhola Taukafa

[102] Reverend Folauhola Taukafa went to Lord Fohe asking for land in 2005 and 2006. He did not start to gather his building materials until 2009. The plaintiff's evidence was that when he visited in 2014 he was told then that the Reverend was building his house. This is confirmed by Reverend Taukafa whose evidence was that in 2014 Lupe Fohe told him to continue to build his house.

[103] The evidence established that Reverend Taukafa did not occupy the land until 2014.

[104] The plaintiff's claim is not time barred.

Menolo Tafolo aka Kilisimasi Tafolo

[105] Menolo Tafolo (Menolo) said that he did not build his house until 2005 and it was completed in 2006. There is no evidence that he was in occupation of the land before 2005.

[106] The plaintiff's claim is not time barred.

Siaosi Molitika

[107] Siaosi Molitika did not go to Lord Fohe until 2007. He has not lived on the land or built on it and all he has done is maintained it. There is nothing to suggest that Siaosi Molitika occupied the land before September 2004.

[108] The plaintiff's claim is not time barred.

Compensation

[109] The defendants argue they should get compensation if they are to be evicted from the land. Mr. Pouono did not provide any legal basis for such an entitlement.

[110] Mr. Pouono appeared to be arguing for equitable compensation because the plaintiff failed to take steps to prevent the defendants from occupying the land in 2000. The plaintiff was not then the registered holder of the land. He made no representations to any of the defendants that they might occupy the land. None of the defendants relied upon any representation of the plaintiff to move on to the land. To the contrary, they all relied upon Lord Fohe.

[111] I can find no legal basis for the defendants to recover compensation from the plaintiff.

Result

[112] The plaintiff's claim against the third defendant, Latoa Mafua, for possession of the land upon which he has built his house (presently occupied by Siaosi Molitika) is time barred and is dismissed.

[113] Except in relation to the third defendant and the twelfth defendant (against whom no claim is made) the plaintiff has established his right to immediate possession of his land. I order that the plaintiff do recover possession against the defendants (except the third defendant) and anyone else presently in occupation of all of the land contained in deed of grant 243A/29.

[114] The defendants' claim for compensation from the plaintiff is dismissed.

[115] The parties should file memoranda as to costs within 21 days.

Final remarks

[116] This is a sad case for the defendants and their relatives who are living on the land. In most cases their financial investment has been substantial. They may now (should the plaintiff insist upon it) be removed from the land. It is likely to be of little comfort to them that they can remove their houses.

[117] While the defendants could and should have done more to protect their own interests, I expect many Tongans would have acted as they have done on the faith of the word of Lord Fohe.

[118] This case also demonstrates the inequities that can arise when absentee landowners, who have chosen to live overseas, make no productive use of their land but then belatedly seek to enforce their title against those who have done so.

[119] Whilst the plaintiff is within his rights to seek immediate enforcement of this ruling, the Court expresses the hope that he will not act precipitously and that the parties will seek an equitable resolution. I direct that a copy of this ruling be provided to the Minister and to the estate holder in the expectation that they may be in a position to facilitate this.

Hemaloto v Tauelangi

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen JJ
AC 12 /2016

16 March 2017

Appeal — rehearing — gift of tractor — on appeal on evidence found to be conditional

The Appellant purchases a tractor in NZ where he then lived, and sends it to Tonga for the use of the Respondent. The Appellant retakes the tractor and the Respondent claims it was a gift and sues for its return and compensation.

Held

1. The Appeal is a rehearing that requires this Court to decide the case for itself as to both facts and law and give effect to its own judgment;
2. The Gift was conditional and that condition not being met, the gift returns to the donor;
3. The court declared that the appellant (donor) is the lawful owner of the tractor.

Cases considered

Fonua v Tonga Communications Corporation Ltd [2006] Tonga LR 278

Pacific Royale v Vakalahi [2007] Tonga LR 46

Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC

Counsel for the Appellant : Mr. L. M. Niu SC
Counsel for the Respondent : Mr. S. Tu'utafaiva

J U D G M E N T

[1] This is an appeal against a judgment of the Lord Chief Justice of 1 July 2016. The Chief Justice determined that a tractor then in the possession of the appellant, Vilisoni Hemaloto ("Vilisoni"), was the property of the respondent, Ma'asi Tauelangi ("Ma'asi"), and ordered the return of the tractor to him. His Honour's conclusion was based on his view of the evidence that Vilisoni, while having paid for the tractor, had gifted it to Ma'asi unconditionally with the result that Ma'asi owned the tractor.

[2] The following is an account of the principal facts as found by the Chief Justice that were not put in issue in the appeal. The tractor was bought in New Zealand in August 2013 where Vilisoni and his wife, Malia, were then residing as they had for approximately 30 years. They were members of a Catholic Church congregation in which Father 'Ofa Tauelangi ("'Ofa"), Ma'asi's brother, was serving as an assistant priest. Vilisoni and his wife were devoted parishioners and shared a close relationship with 'Ofa and he frequently visited their home and received their assistance. As the Chief Justice described it: "[a]t some stage, Vilisoni and Malia became aware that ['Ofa's] family in Tonga required financial assistance from him and expressed a general willingness to help ['Ofa] and his family".

[3] On 24 July 2013, Ma'asi travelled from Tonga to New Zealand with the intention of obtaining a tractor and returning with it to Tonga. His evidence, which his Honour clearly appears to have accepted, was that he was obtaining a tractor to generate food and an income for his family and he had discussed this with 'Ofa. His Honour found:

> Aware of Ma'asi having arrived in New Zealand, Vilisoni asked ['Ofa] whether Ma'asi needed anything. ['Ofa] told Vilisoni that his brother was a hard-worker and was able to grow crops to feed his family and sell in Tonga, but needed a tractor in order to do so.

[4] At some time before the purchase of the tractor, Vilisoni and Malia invited 'Ofa and Ma'asi to dinner. What was said at that dinner was of importance in the proceedings before the Chief Justice and is in this appeal. At some stage after the dinner Vilisoni suggested that he, 'Ofa and Ma'asi visit a business selling tractors to look for a suitable one. They did so on 30 August 2013. They saw one particular tractor, a Massey Ferguson, which was taken for a test drive. Its price was NZ$15,000. This tractor was purchased, and while it was paid for by Vilisoni, the invoice and the receipt was made out in the name of 'Ofa. Further work was later done on the tractor before delivery, apparently paid for by 'Ofa. The tractor was then shipped to Tonga arriving 4 November 2013. Vilisoni relocated to Tonga in early 2015.

[5] The Chief Justice recounted Vilisoni's evidence that before relocating, he visited Tonga on at least four occasions, once in December 2013 and three times in 2014. Vilisoni said that on each occasion he visited Ma'asi and observed that the tractor was not being used to cultivate any land or grow crops and when asked about this, Ma'asi said he did not have the necessary ploughing equipment to use the tractor to cultivate land. While the Chief Justice did not make express findings

concerning this evidence, the manner of its recounting in his Honour's reasons indicates he accepted it. This evidence is consistent with other evidence that the Chief Justice actually relied on, namely that had Vilisoni seen the tractor being used to grow food, he would not have taken possession of the tractor as he did in February 2015, registering it in his name and not returning it to Ma'asi notwithstanding repeated requests to do so.

[6] It was against this general background that Ma'asi commenced proceedings in the Supreme Court against Vilisoni seeking the return of the tractor and consequential relief as well as damages and interest.

[7] The central legal issue in the proceedings was whether the tractor had been an unconditional gift from Vilisoni to Ma'asi. A related factual issue with potential legal consequences was whether Vilisoni had paid for the tractor and allowed Ma'asi to take possession of it on the basis that Ma'asi would grow crops, including for his family, and send containers of crops to New Zealand that Vilisoni could sell to recoup the cost of the tractor. A subsidiary factual issue was what was discussed at the dinner referred to in paragraph 4 above and whether it included Ma'asi sending containers of crops to Vilisoni.

[8] In the course of his reasons the Chief Justice addressed, at some length, the credibility of the witnesses, namely Ma'asi, 'Ofa, Malia and Vilisoni. His Honour was critical of some of the evidence of Ma'asi but nonetheless indicated that, on the whole, he found him to be a guarded but not dishonest witness. One of the Chief Justice's criticisms was that on several occasions Ma'asi stated that his intention had been to start using the tractor (before it was taken by Vilisoni) but that he provided no evidence of any steps he had taken to acquire the equipment he claimed was necessary to operate the tractor. This, in context, was plainly a reference to the use of the tractor to cultivate land for the growing of crops. Similarly he said that he did not find 'Ofa dishonest though he had been an uncooperative witness. As to Malia, the Chief Justice said he had no doubt she was an honest witness though could say little that was relevant to the proceedings apart from the nature of her relationship with 'Ofa. In relation to Vilisoni, his Honour said that he was not a good witness. In particular, in his evidence he was unclear and confused about, amongst other things, what was exactly agreed about the sending of crops. The Chief Justice's ultimate conclusion in relation to Vilisoni was that where there was a conflict between his evidence and the evidence of Ma'asi and 'Ofa, he would prefer the evidence of Ma'asi and 'Ofa.

[9] No submission was made at the hearing of the appeal challenging these credibility findings. Indeed the transcript of the proceedings in the Supreme Court

did not form part of the appeal papers and is not before the Court of Appeal. In the absence of the transcript it would, at the very least in practical terms, be impossible to impugn or even review those credibility findings. In any event appellate courts have long recognised and accepted the distinct and considerable advantage a trial judge has, having seen and heard the witnesses, in assessing the credibility of witnesses: see, for example, the observations of the Court of Appeal in Pacific Royale v Vakalahi [2007] Tonga L R 46 at [19] and Wang v Fund Management [2008] Tonga LR 204 at [5].

[10] In his reasons, the Chief Justice addressed what was said at the dinner at two points (paragraphs [10] and [24] - [25]). On the first occasion his Honour recounted the various versions of the events of that evening given by the witnesses. Vilisoni said he, 'Ofa and Ma'asi discussed "the arrangement in greater detail" and that he would purchase a tractor for Ma'asi in return for the shipment of containers of crops back to him in New Zealand in late 2014. On the other hand, Ma'asi and 'Ofa "resolutely den[ied] that there was any discussion or agreement regarding containers of crops". In the later discussion of the dinner at [24] - [25], the Chief Justice did not expressly accept the evidence of Ma'asi and 'Ofa denying any discussion about containers though his Honour noted their denial. Nonetheless having regard to the credibility findings referred to earlier, he must have accepted that the provision of containers of crops was not discussed that evening. However, his Honour went on to say:

> "…… even if [there had been discussions to the effect that the purchase of the tractor was on the basis that Vilisoni would receive crops that had been grown using the tractor] …. I do not believe that in the circumstances anyone, including Vilisoni, would have taken those discussions as imposing a legal obligation on Ma'asi."
>
> This reference to "legal obligation" involves, in our respectful view, an erroneous approach that is discussed shortly.

[11] Of some importance are further comments of the Chief Justice in paragraph [25] of his reasons. He indicated that Malia's evidence did not assist because she admittedly did not hear what was discussed except she said there were references to tax allotments. His Honour then said he had no doubt she was correct as there clearly must have been discussions between Vilisoni and the other two men about how Ma'asi would use the tractor and how it would benefit his family. This was plainly a reference to the purpose for which a tractor was being sought in New Zealand by Ma'asi, namely to grow crops and generate food and income for

his family in Tonga. There was a finding that this quite specific use of the tractor was discussed.

[12] The Chief Justice had said at the conclusion of the preceding paragraph in his reasons (paragraph [24]) that Vilisoni's relationship with 'Ofa was close and his intention in offering to buy the tractor was entirely unconditional. It is difficult to reconcile this conclusion with the undoubted discussion that occurred at the dinner (discussed in the preceding paragraph of this judgment) that the tractor was being bought for the purpose of enabling Ma'asi to generate food and income for his family. That is to say, at the very least, the tractor, even if a gift, was being purchased for this identified and specific purpose and the gift was made on that basis.

[13] Indeed the Chief Justice immediately thereafter (in paragraph [26]) relied on evidence of Vilisoni to dispel a suggestion that the condition was more widely cast and involved not only using the tractor to grow crops but also the dispatch of containers of produce arising from the growing of crops to New Zealand. That evidence was that if he, Vilisoni, had not received the containers of food but had seen that the tractor was being used as he had imagined, he would not have taken the action he did (of taking possession of the tractor in Tonga in February 2015 and registering it in his name). At the very least, this evidence, accepted by the Chief Justice, is supportive of a conclusion that any gift was made on a clear understanding that the tractor would be used to grow crops to provide food for Ma'asi's family and generate income and thereby relieve 'Ofa from a familial obligation to provide support to Ma'asi and his family.

[14] This appeal is a rehearing: see Order 8 Rule 1 of the Rules of the Court of Appeal Rules and Fonua v Tonga Communications Corporation Ltd [2006] Tonga L R 278 at [20] and Pacific Royale v Vakalahi [2007] Tonga LR 46 at [19]. The role of an appeal court in such circumstances was recently discussed in a decision of a Full Court of the Federal Court of Australia in Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181:

> Appeals to this Court are by way of a rehearing (Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; (2001) 117 FCR 424 at [20]). An appeal by way of rehearing requires this Court to decide the case for itself as to both facts and law and give effect to its own judgment (Warren v Coombes (1979) 142 CLR 531 at 552). However, this does not remove the need to find error on appeal before intervening (Branir at 435 [21]). In practice, the application of these principles may involve accepting the

> findings of the trial judge, especially factual findings, including as to the reliability and credit of witnesses and the weight that should be given to competing evidence, unless shown to be wrong (Cabal v United Mexican States [2001] FCA 427; (2001) 108 FCR 311 at [223]-[224], quoted with approval in Branir at [23]).

[15] In the present case, as referred to in paragraph 10 above, the Chief Justice appears to have proceeded on the basis that any condition associated with the gift of the tractor must have, in terms, created a legal obligation on the recipient. This is erroneous. A gift can be conditional notwithstanding that the condition itself might not, independently, create a legal obligation (in this case a contractual legal obligation to provide containers of crops) beyond any obligation which has conditioned the gift. It is sufficient for there to be a condition capable of satisfaction expressed with sufficient certainty and not illegal: see Law of Personal Property in New Zealand: Garrow & Fenton 7th ed, 2010, Volume 1, p 321. If the condition is a condition subsequent, as we believe it was in the present case, then a failure to satisfy the condition subsequent divests the gifted property from the donee or determines a gift otherwise vested: ibid at 321.

[16] It may be accepted that the focus in the trial and in this appeal has been on the question of whether the condition involved the dispatch of containers to Vilisoni in New Zealand containing crops. But, properly analysed, that condition necessarily involves, on the facts of this case, one or both of two possible elements. The first element was that the tractor was to be used to grow crops (to feed and generate income for Ma'asi's family) and the second element was that at least some of those crops would be sent to Vilisoni in New Zealand. This is evident in Visiloni's counterclaim (which, amongst other things, seeks a declaration that he is the owner of the tractor) in which he pleads:

> That, the agreement about the tractor was the plaintiff would take it to Tonga on his own expenses, use same to plough land that he could not develop and his family and use the tractor to do work for other people, ship to the defendant two containers of food crops to sell in New Zealand so that he can be refunded his monies that he expended.

[17] The first element is more clearly illustrated by paragraph 6 of the defence which is in response to paragraph 6 of the statement of claim that pleads that Vilisoni and 'Ofa "were [like] members of one family up to the arrival of [Ma'asi] in New Zealand in July 2013". Paragraph 6 of the defence reads:

> That, he admits the allegations contained in paragraph 6 of the statement of claim. Further he says the defendant and his wife were like parents to the Priest 'Ofa Taueangi they kept and look after him as if he was their own son and helped him in all his needs and that of his family and that was the main reason why the defendant purchased a tractor because he wanted to let his family use it to find a living and not to burden the Priest with all the demands and requests instead concentrate on his religious role.

[18] In his brief of evidence, Vilisoni said that he confirmed all the allegations made in his statement of defence and counterclaim. Elsewhere in the statement of defence, Vilisoni refers to the tractor not being used for farming purposes (paragraphs [3] and [10]) quite independently of any contention that no containers of crops were sent to him.

[19] We are satisfied that the circumstances in which Vilisoni paid for the tractor and allowed Ma'asi to take possession constituted a gift of the tractor subject to a condition subsequent that the tractor be used by Ma'asi to grow crops for his family and generate income for his family (the first element referred to in [16] above). This condition was not satisfied. Whether, additionally, the condition included, as Vilisoni may have believed (even if not discussed at the dinner) that Ma'asi would send him containers of crops ultimately becomes irrelevant to the status of the tractor. In the result, the ownership in the tractor ultimately vested in Vilisoni and he was entitled to do what he did, namely take possession of the tractor and register it in his name.

[20] It is unnecessary to deal with another issue raised in the appeal. That is whether the Chief Justice should have addressed and answered the question of whether the gift was unconscionable. After a careful and helpful discussion of the authorities concerning unconscionable conduct, the Chief Justice decided it was inappropriate to treat that legal issue as having been raised and requiring determination. The Chief Justice's reasons for declining to determine that question were correct.

[21] The Court of Appeal orders:

1. The appeal should be allowed and the orders of the Chief Justice set aside.
2. In lieu the respondent's application in the Supreme Court should be dismissed.

3. The Court declares that the appellant is the lawful owner of tractor registration G804.
4. The appellant's claim for damages and interest is dismissed.
5. The respondent pay the appellant the costs in the Supreme Court proceedings and the costs in this appeal.

Yang v Manoa

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen JJ
AC 15 /2016

16 March 2017

Lease — commercial property — uncertain —unconscionableness discussed

A lease was signed in 2007 providing for 10 years occupancy from 2013 (when a prior lease expired) at a lump sum rent payable in 2007. The lease allowed subletting and allowed the lessee to build on another storey to the building. In 2009 the lessee sublet the ground floor to another.

The lessor returned to Tonga, objected to the sub-lease and in 2013 boarded up the shop. The lessor sought specific performance of the lease.

The judge found that the agreements were so vague, probably not understood by the lessor, arguably applicable to just the proposed new storey to be built, that it was unconscionable to uphold the lease.

Held

1. The lease, considering the history of the leases as a whole, did apply to both storeys;
2. A transaction is not, however, unconscionable simply because a party has made a poor bargain or just because there is an inequality of bargaining power;
3. The lease was valid, not unconscionable, and specific performance was ordered.

Cases considered

Yang v Manoa AC 22 of 2015
Gustav & Co. Ltd v Macfield Ltd [2008] 2 NZLR 735
Moehau v Westpac Bank of Tonga [2013] Tonga LR 71
The Commercial Bank of Australia v Amadio (1983) 151 CLR 447
Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51
Fullagar J in Blomley v Ryan (1956) 99 CLR 362

Counsel for the Appellant : Mr. L. M. Niu SC
Counsel for the First Respondent : Mr. S. Fonua

Counsel for the Second Respondent : Mrs. P. Taufaeteau

J U D G M E N T

The Facts

[1] Mrs. Yang appeals against a decision of Scott J in the Supreme Court refusing her claim for specific performance of a tenancy agreement dated 20 October 2007 relating to a commercial building at Haveluloto. Although executed in 2007, the agreement was for a term of 10 years commencing on 9 June 2013. The rental was to be TOP $35,000 payable in a lump sum in advance (in October 2007).

(a) The 1999 Agreement

[2] This unusual arrangement reflected prior dealings which it is necessary to describe. The respondent, 'Olioni Manoa, had a town allotment at Haveluloto on which he had erected a retail store and, behind it, his residence. On 29 June 1999 'Olioni as landlord rented to Meng Sen Tsay his "retail store" opposite Vaiola Hospital. The term of that 1999 tenancy was 9 years from 2 June 1999 until 1 June 2008. The rent for the first 5 years was set at $400 per month but it appears to have been decreased by subsequent informal agreement as there were in evidence receipts of rent at the rate of $3000 for the years 2001 and 2003. The tenancy was for a "retail store" only. There was a provision preventing the tenant, without the landlord's permission, from removing any fixture attached by the tenant. Importantly, there was no provision that prevented the tenant from assigning or sub-letting the tenancy. The 1999 agreement was personally signed by 'Olioni Manoa. He had the benefit of legal advice before signing.

(b) The 2005 agreement

[3] By 2005 'Olioni was living in Hawaii and Mrs. Yang had become Mr. Tsay's sub-tenant and was running the store. She approached 'Olioni by telephone with a proposal that she should build an upper storey above the store but she wanted to have a new tenancy to take effect from when Tsay's tenancy expired in 2008. A brief tenancy agreement was prepared and signed on 9 June 2005 by Mrs. Yang and by 'Olioni's wife Matelita Manoa. It was expressed to be with 'Olioni and Matelita, who had been given general authority from 'Olioni to sign any document for him while he was out of Tonga. (Despite the introduction of Matelita as a party, in all the agreements the landlord continues to be referred to as "he"). There was no clearly expressed mention in the 2005 agreement of the proposed upper storey. The subject-matter was ambiguously described as "the premises at

his ['Olioni's] residential place at Haveluloto, Tongatapu". But it has never been in dispute that Mrs. Yang was authorised by 'Olioni to construct the upper storey.

[4] The 2005 agreement was for 5 years starting on 9 June 2008 at a rental of TOP$16,500 payable in advance. There was again no prohibition on assignment or sub-letting by Mrs. Yang. In fact there was an express agreement by the landlord that the tenant had "the right and freedom to transfer [the] tenancy to a third party during the term of the tenancy". She could have done that anyway in the absence of a prohibition. There was no longer a restriction on the use that might be made of the premises, probably because it was known to both parties that Mrs. Yang was proposing to use the upper floor as a restaurant. There was also an agreement by the landlord that he would not terminate the agreement during the tenancy without paying "the losses of the tenant, such as the expenses of the improvement and repair of the building". That must have been directed to the upper storey works that had been agreed upon. There was also a clumsily worded clause (later repeated in the 2007 agreement) saying that "the landlord agrees to attach any fixture or renovated, alter or add to the premises to 230 square metres" (sic). It is likely that was supposed to mean that the landlord agreed to the attachment etc. of an extra area (the upper storey) to bring the total area of the premises to 230 square metres.

[5] By 2007 Mrs. Yang had constructed an upper floor above the retail store. It seems never to have been used as a restaurant. It was in fact used for residential proposes and latterly only for storage.

(c) The 2007 agreement

[6] We can move now to the 2007 agreement. There were actually two versions of this, one signed on 20 October and a replacement, identical in all respects except for the correction of a mistake in a figure, signed on 29 October. However, it bears the original date of 20 October 2007. It is the latter agreement of which specific performance is sought. The 2007 agreement provides for a further advance rent of TOP $35,000, payment of which was to be made "right away immediately after the agreement is signed". The respondents say that in fact Mrs. Yang paid Matelita only TOP$19,000, purporting to deduct (by way of a claimed set-off) TOP$16,000 which Mrs. Yang said Matelita owed her for goods supplied on credit. Scott J dismissed a counterclaim for the TOP$16,000 by the respondents because it was statute barred.

[7] The term of the 2007 agreement is 10 years from 9 June 2013, ie, from when the 2005 agreement would expire. There was again no restriction on user or prohibition of assignment or subletting.

[8] There was, however, a new covenant by the landlord that "he will not terminate this agreement during the period of the tenancy otherwise he will pay the Tenant the amount of $170,000" (which sum had been misstated as TOP$117,000 in the agreement signed on 20 October). The TOP$170,000 was intended to reflect the amount spent by Mrs. Yang in constructing the upper storey. (She now says it cost much more than that but has not provided any proof of actual expenditure).

[9] The 2007 agreement was again signed for 'Olioni and Matelita by Matelita. There is in the evidence a document of some significance to which Scott J made no reference. It is in Tongan (so plainly not drafted by Mrs. Yang) but we were supplied with a translation to which no objection was taken. It is from a Californian address and is addressed to the Registrar of the "Nuku'alofa Court" and is signed by 'Olioni. He asks for the Registrar to "legalise this letter" and says:

> 1. I authorise my lawful wife Matelita Manoa to have the same authority that I Olioni Manoa have for any legal matter relating to my town allotment situated at Haveluloto in the estate of Noble Fielakepa.
>
> 2. I also authorise Matelita Manoa to carry out any legal matter relating to my store which I built on it and which is rented by a Chinese couple if they wish to continue the renting of my store for some years all authority are given to Matelita Manoa to carry out the legal matters whilst I am away from Tongatapu.

(d) A sublease by Mrs. Yang

[10] On 1 June 2009 Mrs. Yang sublet the ground floor retail store to Zhufu Wei at a rent of TOP$2600 per month, which was retrospectively adjusted down to TOP$2000 per month when no liquor license could be obtained for the store.

(e) Subsequent events

[11] After 'Olioni returned from the USA in 2010 he realised that Mrs. Yang had allowed Zhufu Wei to operate the store. He raised objection and sought to bring the arrangements made with Mrs. Yang to an end. In June 2013 'Olioni boarded up the shop and had the water supply to the building disconnected. Mrs. Yang obtained an interim injunction requiring access and services to be restored. She brought an action for specific performance of the 2007 agreement in the Supreme Court in June 2014. Scott J tried a separate issue of whether the 2007 agreement offended against s.13 of the Land Act. He found that the agreement was illegal on that account but his decision was reversed on appeal to this Court: Yang v Manoa AC 22 of 2015.

The Supreme Court judgment

[12] The matter therefore came back before Scott J for full trial. In his judgment delivered on 14 October 2016, the Judge went through the various tenancy agreements. He particularly drew attention to the fact that whereas the rent in 1999 had been $400 per month, the payments of $16,500 and $35,000 in advance provided for in the 2005 and 2007 agreements worked out at $275 per month and $291.60 per month respectively for the 5 and 10 year terms.

(a) The oral evidence

[13] Scott J summarised the evidence given orally before him (and we of course take into account the advantage he enjoyed in seeing and hearing the witnesses). Mrs. Yang testified that prior to the 2005 agreement being signed she had spoken to 'Olioni by telephone and reached agreement with him. She had again telephoned him before the 2007 agreement was prepared and had got his consent to the building upstairs (although other evidence was that it already been completed). The 2005 and 2007 agreements had been prepared by her lawyer. She had given the 2007 agreement to Matelita and met her 3 or 4 days later in the presence of an engineer who acted as a witness. She accepted that she had deducted TOP$16,000 from the 2007 payment saying that was because of money owed for goods bought on credit from her shop. She said the building work was begun in 2006 and completed in 2007.

[14] The Judge recorded that it was put to Mrs. Yang that the 2005 and 2007 agreements related to the upper storey only and not to the ground floor. She emphatically denied this. She conceded that she could not read or understand English (though we interpolate that she must have had some degree of ability to hold a conversation in English as she did have telephone discussions with 'Olioni on several occasions, as he accepted). Mrs. Yang said she did not know how much English Matelita understood.

[15] Mrs. Yang's son gave evidence. He had been running the store in 2007 and was responsible for instructing the lawyer who prepared the agreement. He had taken it to his mother and Matelita and explained it. Both had said it was OK and signed it. Matelita had seen the agreement for the first time on 20 October.

[16] 'Olioni confirmed that Mrs. Yang had indeed rung him in the United States in 2005 and "asked for permission to use the upstairs of the building to make a restaurant". He had agreed but he asserted that he had "clarified that the first floor would belong to Mrs. Yang and Matelita but the ground floor would belong

to myself and Tsay". He had let Mrs. Yang negotiate with Matelita as the money for upstairs would go to her and their children. The agreement would be similar to the agreement with Tsay. Mrs. Yang had telephoned again in 2008 and asked for the agreement to be extended till 2013 "but for the ground floor to be under Tsay". He said he agreed. He accepted he had negotiated with Mrs. Yang about the 20 October agreement. "She rang me about renting the upstairs because she had completed the construction". He said he agreed with her and sent the letter of authorisation.

[17] 'Olioni also stated that he did not know that Mrs. Yang was subletting from Tsay. Tsay had stopped paying rent in 2003 but 'Olioni did not know this until 2010 because Matelita did not tell him. Tsay had refused to pay anything. He had trusted Mrs. Yang and it was not until 2010 that he found out that the new agreement was not the same as the one he had with Tsay. He did not know the 2007 agreement was to run till 2023. He too could not read or understand English (but obviously could speak it well enough to have a conversation with Mrs. Yang).

[18] Matelita's evidence was that Mrs. Yang had come to her in 2005 and asked if she could construct upstairs. She had called 'Olioni and he had said the agreement with Mrs. Yang was to be the same as the Tsay agreement. Matelita said construction of the upper floor finished in 2006. She said the 2007 agreements had been reached between 'Olioni and Mrs. Yang. Matelita also said that she did speak and read a little English but the agreements had not been explained to her. In cross-examination, however, Matelita admitted she had read and understood the 2005 agreement but she said it had concerned the upstairs only. She described Mrs. Yang as like a mother to her. She had trusted Mrs. Yang about the payment of the money and had at first not counted it, only discovering later there was only TOP$19,000.

(b) The Judge's conclusions

[19] Scott J said that it was plain to him that over several years Mrs. Yang and her son significantly improved their position in relation to the Manoas to the detriment of the latter and without their being aware of it. What had started off as a simple non-transferrable licence to operate a small shop, which could not be altered or added to, ended up as a right to occupy premises now at least twice as large, and to use the premises for any business and to transfer it to a third party. The original rent of $400 per month had shrunk to $291.60 per month until 2023. Scott J said it was "not in dispute" that neither Mrs. Yang nor 'Olioni understood English to a sufficient extent to be able to comprehend the documents. Having heard Mrs. Yang's attempt to recreate her telephone conversation with 'Olioni in 2005, the Judge was satisfied that "it was simply not possible for them to reach any

sufficient degree of agreement". The 2007 documents were prepared by her lawyer. Matelita was only given her copy on the day of signature. 'Olioni had not seen them till 2010.

[20] The Judge found that Mrs. Yang knew what the agreements contained. But 'Olioni was genuine in his understanding that the agreements only related to the upper storey. The proposed restaurant was quite a different business from a supermarket. To have a separate agreement for each storey was entirely reasonable. Matelita had seen her only duty to be to sign the agreements on behalf of the landholder, 'Olioni, not to examine them and assess their worth. Scott J commented that he could find nothing in the 2007 agreement either permitting or denying Mrs. Yang the right to remove the building at the end of the tenancy. The form of the agreement was unsatisfactory. To be fair to and binding on the parties this type of agreement should be drawn up in proper and adequate form, should be properly understood by both parties and should be the subject of independent legal advice. "All these fundamentals were missing in this case and in my opinion it would be unconscionable to uphold these agreements". He declined to order specific performance.

Submissions

[21] For Mrs. Yang, Mr. Niu submitted to us (a) that the 2007 agreement covered both floors of the building and (b) that it was not an unconscionable agreement. He said that Scott J had not properly analysed the overall fairness of the bargain that had actually been made, taking into particular account Mrs. Yang's expenditure on the upper floor. The respondents' submissions relied very much on the judgment of Scott J and contended that it should be upheld.

Our view

[22] We consider that Mr. Niu's criticisms are well made. When the 2007 agreement is considered against the history of the prior agreements and the construction by Mrs. Yang of the upper storey, it is plain that the subject matter of that agreement (and indeed the 2005 agreement) must have been the whole of the building. We say this both because of the language of the agreement and of the written authority given by 'Olioni to Matelita and because the economics of the transaction simply would not make sense if all Mrs. Yang was getting for her expenditure of at least TOP$170,000 plus TOP$35,000 = TOP$205,000 was a tenancy of the upper floor.

(a) The subject-matter of the tenancy

[23] We have concluded for three reasons that Scott J was wrong to find that the 2007 agreement was for the upper floor only or that 'Olioni and Matelita had a mistaken belief that was so. In our view the agreement was for the whole of the building and 'Olioni and Matelita must have known that.

[24] Firstly, if 'Olioni's claim that Mrs. Yang was leasing only the upper floor were correct one might have expected him to require that there be in existence a separate written agreement for the ground floor, and payment of a separate rental, after Tsay's tenancy ended in 2008, especially since on his account, the ground floor was to "belong" to him and Tsay (and the upper floor to Matelita and Mrs. Yang). Surely 'Olioni would have taken steps to get a new lease of the ground floor in place, and he would not have expected it to be with Tsay who had, 'Olioni complained, ceased paying rent in 2003. The only tenant with whom he was dealing was Mrs. Yang and he did not ask her for a separate agreement for the ground floor. Furthermore, it seems to have been only in 2013 that a claim was first made that the tenancy did not relate to the ground floor. By that time the parties had fallen out.

[25] Secondly, although the description of the subject-matter of the 2007 agreement is unhelpful ("premises at his residential place"), when 'Olioni gave Matelita the authority to sign on his behalf in 2007, he expressed it in terms of "my store which I built" (ie, the ground floor) and referred to the continuing renting "of my store". So the authorisation related to the store as well as to the upper storey that 'Olioni admits he had agreed on with Mrs. Yang. They had previously in 2005 agreed she would build it and now she was to have a new tenancy. The authorisation shows that it was to be a tenancy of more than just the upper floor.

[26] Thirdly, it would have been obvious that Mrs. Yang was wanting a tenancy that gave her a prospect of recovering over time her expenditure on the upper floor of TOP$170,000 plus the rent of TOP$35,000. We are handicapped by having no evidence about rental values in 2007 but it seems highly unlikely that the value to a tenant of occupation of the upper floor only over a period of 10 years (or even the 17 years from 2006 to 2023) would make the upfront expenditure by Mrs. Yang an economic proposition. She would not recover her expenditure. In this connection we should say that we disagree with Scott J's opinion that there was nothing in the document to stop Mrs. Yang removing the upper storey at the end of the tenancy in 2023, and even if she had that inclination and ability, she would hardly recover much of her investment by so doing. (The ground floor was not removable as it had been constructed by 'Olioni and/or Tsay and was not a tenant's fixture of Mrs. Yang). But in fact the clear import of the compensation clause in the agreement is that it is only if the tenancy is terminated early that the tenant has

rights to the building and a claim to receive anything by way of compensation because they have been disturbed. After the expiry of the tenancy in 2023 the respondents will be the absolute owners of the whole of the building including the upper storey.

[27] For these reasons we are satisfied that the 2005 and 2007 agreements related to both floors of the building and that 'Olioni and Matelita were under no misapprehension about that. On that basis, was the agreement unconscionable?

(b) Unconscionable conduct – the law

[28] A transaction may be unconscionable when one of the parties is suffering from a disability (sometimes called a special disadvantage), such as mental or physical infirmity, intoxication, dullness of intellect, inability to read a document or speak a language, financial stringency, lack of education or absence of independent legal advice. Where that disability exists and affects the understanding of that party, and the other party knows or ought to know of it and takes advantage of it, the Court may set aside the transaction or decline to enforce it. Tipping J recently summarised the position for the New Zealand Supreme Court in Gustav & Co. Ltd v Macfield Ltd [2008] 2 NZLR 735 at [6]:

> "Equity will intervene, when one party in entering into a transaction, unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware that the weaker party is unable adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances. The remedy is conscience-based and, in qualifying cases, the court intervenes and says that the stronger party may not take advantage of the rights acquired under the transaction because it would be contrary to good conscience to do so. The conscience of the stronger party must be so affected that equity will restrain that party from exercising its rights at law".

[29] A transaction is not, however, unconscionable simply because a party has made a poor bargain or just because there is an inequality of bargaining power. The disabling condition must seriously affect the ability of the affected party to make a judgment as to his or her best interests: Moehau v Westpac Bank of Tonga [2013] Tonga LR 71 at [27], citing The Commercial Bank of Australia v Amadio (1983) 151 CLR 447 (HCA) at 474 and Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51 (HCA) at [5] – [14].

[30] Inadequacy of consideration never of itself renders a transaction unconscionable but it is often a specially important element where circumstances may have placed a party at a disadvantage. It can, said Fullagar J in Blomley v Ryan (1956) 99 CLR 362 at 405, be important in either or both of two ways – firstly, as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion by the other party.

[31] Once the two essential elements ((a) special disadvantage/ disability and (b) a taking advantage of it) are established by the plaintiff (weaker party), the transaction will be set aside unless the stronger party can justify it by showing that the transaction was "fair, just and reasonable": Amadio at 474 (Deane J). This can be achieved by showing that the consideration passing to the weaker party was adequate and that the terms of the transaction were fair in all the circumstances.

(c) Unconscionable conduct – this case

[32] With these principles in mind we now consider the transaction involved in the 2007 tenancy agreement.

[33] The respondents complain that they were unaware of or misled about two particular matters:

(a) that the tenancy was of both floors of the building; and
(b) that Mrs. Yang was able to sublet the ground floor, which she had done on terms very advantageous to her.

[34] They painted a picture of Mrs. Yang's having first come to the property without their knowledge as subtenant of Tsay of the ground floor and then having negotiated herself into a position of holding a 10 year tenancy of a two storey building without any obligation to make ongoing rent payments.

[35] But the respondents' picture ignores or plays down the fact that it was Mrs. Yang who paid for the construction of the upper floor, with their assent, and that they are going to have it back for their own use in 2023, having not themselves incurred any expenditure. They eventually get the full benefit of the enlargement of the building.

[36] The respondents may have been unaware of the subtenancy to Zhufu Wei but, consistently throughout all the agreements, including the one signed in 1999

on which ‘Olioni had legal advice, they had placed no restriction on assignment or subletting.

[37] It was said for the respondents that they suffered a disability of which Mrs. Yang took advantage because they could not read documents written in English and misunderstood what Mrs. Yang was proposing in 2007. They did not have the benefit of independent legal advice. But as we have observed, they were not misled about the matters that they principally say are of concern (scope of tenancy and ability to sublet) and, although it is possible Mrs. Yang and ‘Olioni may have struggled with their English in the telephone calls, they do appear to have been able to reach an agreement that there would be a new tenancy beyond the term of the 2005 agreement.

[38] Moreover, contrary to the Judge’s finding, Matelita did have an ability to read and understand a short document in English. She admitted that she had read and understood the 2005 agreement. She did not in 2005 raise a concern about how the arrangements differed from those in 1999. That is hardly surprising when she was aware that its purpose was to enable Mrs. Yang to build the upper storey with some security of tenure. The 2007 agreement then altered the conditions of tenancy only in relation to (i) the term, (ii) the amount of the advance rental and (iii) the insertion of a compensation figure. Those matters were not complicated or difficult for a lay person to comprehend. The Judge found that Matelita saw the 2007 document only on the day of signing but in fact she had ample opportunity to read it in the 9 days that elapsed before the corrected version (changed only in one respect) was presented to her for signing.

[39] Matelita says that Mrs. Yang, whom she regarded like a mother and trusted, then took advantage of her by withholding TOP$16,000 of the 2007 advance payment of rent. But, assuming Mrs. Yang in fact had no right to make a deduction, that action in breach of contract did not make the transaction itself (the tenancy agreement) unconscionable. Matelita and her husband could have brought proceedings to recover the TOP$16,000. They failed to do so until their claim was time barred.

[40] The 2007 tenancy agreement was not well drafted but does state the fundamentals of the transaction, as did the 2005 agreement. We are satisfied that, even without independent legal advice, Matelita must have understood that the term was 10 years from 2013 and the rental TOP$35,000. She must also have understood that the purpose of the extended term was to compensate Mrs. Yang for her large expenditure on the upper storey. Counsel did not suggest to us that the explanation of the agreement given to Matelita by Mrs. Yang’s son was

misleading. We have already found that she must have known the tenancy was of the whole building.

[41] But, even if we had been of the view that 'Olioni and Matelita suffered from a disability and that Mrs. Yang took advantage of it, we nevertheless would conclude that the transaction was fair, just and reasonable in the particular circumstances.

[42] Much has been made for the respondents about the level of rent obtained from the subtenant of the ground floor (TOP$2000 per week) as compared with the advance payments, which if spread over the term of the lease would equate to only $291.60 per week. But that fails to factor in the cost to Mrs. Yang of constructing the upper storey which was at least the agreed compensation amount of TOP$170,000 – a figure not challenged as being exaggerated or unrealistic. Furthermore, the rent payable for the ground floor till 2008 was $400 per month (and even that seems to have been reduced by agreement). We know nothing of the circumstances in which the building was let in 2009, and whether they were substantially more favourable for a landlord than in 2007, nor do we know why Zhufu Wei was prepared to pay as much as $2000 per week.

[43] Mrs. Yang had paid out or agreed to pay immediately at least TOP$205,000 for the construction of the upper floor and the advance rent relating to the 2007 tenancy. She had borrowings incurred to fund that expenditure. Tongan rates of interest are comparatively high. She needed to be able to recover her expenditure by 2023 out of rentals to be received from the building and it was reasonable for her to expect to make some profit after that recovery. She also bore the risk of any default by her sub-tenant. None of these matters appears to have been considered by Scott J in coming to the conclusion that the transaction should not be enforced. When proper allowance is made for the factors we have mentioned and for the respective timings of the expenditure in 2006 – 2007 and the receipts of rent spread over 15 years, the transaction does not seem to us to be an unfair one.

[44] Finally, we should mention two submissions made by Mrs. Taufaeteau, appearing on behalf of Matelita. She argued that the construction costs should not be taken into account in determining the fairness of the tenancy agreement because they had been incurred before the agreement was made and were past consideration. However, we are not concerned with whether a contract came into existence. It clearly did and the agreement to pay TOP$35,000 advance rent provided "true" contractual consideration. We are, rather, concerned with whether the bargain made between the parties was fair, just and reasonable in all the

circumstances, including the history of the relationship of the parties. Justice requires that all benefits received by the respondents be brought into account. It would be artificial and unfair to Mrs. Yang not to do so. The second submission was that the respondents had suffered a detriment because of the failure of Tsay to pay rent from 2003 to 2008. But that was not something for which Mrs. Yang had any responsibility. Her obligation until 2008 was to pay rent to Tsay and it was for him to pay the respondents.

[45] The defence of unconscionability fails. We make the following orders:

(1) The appeal is allowed.

(2) The respondents must specifically perform their obligations under the tenancy agreement signed on 29 October 2007 according to its terms.

(3) The respondents are enjoined from taking any steps either personally or by their contractors or agents to prevent or interfere with (a) access to the building by the appellant or her subtenant or invitees of either of them and (b) the operation therein of the business of the appellant or her sub-tenant, such injunction to apply during the currency of the said tenancy or until any earlier order of the Supreme Court.

(4) The appellant is awarded costs in the Supreme Court and in this Court, to be taxed in the respective Courts if not agreed upon. The respondents are jointly and severally liable for the costs and for such disbursements as are ordered by either Court to be paid to the appellant.

Maile and Ors v Kalaisi

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen JJ
AC 17 /2016

16 March 2017

Land law — gift — elements of — estoppel under Evidence Act — estoppel by acquiescence

The Tokaikolo Christian Church International (TCCI) began operating at a small church in 2009. In 2013 there was a schism and the plaintiffs were excluded from the church. The plaintiffs claim that TCCI own the church and associated dwellings and the defendants should be ejected. There was confusion in the Land Ministry by which Cabinet approved leases to both TCCI and one of the defendants and only the TCCI lease was registered.

The breakaway group (Mo'ui Fo'ou) with about half the former congregation took over the church in 2013 and TCCI sought its return in 2015.

Mo'ui Fo'ou claimed that they were gifted the church and other property on the land.

Held

1. For a gift to be established there must be authority to give, intention to give and delivery of the gift and there was no gift in these circumstances;
2. There is no defence of estoppel under the provisions of the Evidence Act and no estoppel by acquiescence;
3. The doctrine of estoppel by acquiescence gives the Court a wide discretion to grant relief when an owner of land (a) induces, encourages or allows the claimant to believe that he or she has or will enjoy some right or benefit over the land, (b) the claimant acts to his or her detriment to the knowledge of the owner and (c) the owner then seeks to take unconscionable advantage of the situation by denying the claimant the expected right or benefit.

Cases considered

Olsson v Dyson (1969) 120 CLR 365, 380
Tafolo v Vete [1998] Tonga LR 164
Ongolea v Finau [2003] Tonga LR 152
Vea v Filipe [2009] Tonga LR 293

Li v Finefeuiaki [2013] Tonga LR 39

Statutes considered

Evidence Act s.103 (2) and (3)

J U D G M E N T

Introduction

[1] The respondent (Tokaikolo) is a church, founded in Tonga in 1978, and registered in Tonga under the Charitable Trusts Act 1993. It has followers in Tonga, New Zealand, Australia and the United States. One of Tokaikolo's churches in Tonga is at Ha'ateiho. It was dedicated in 2003.

[2] In July 2013 the first-named appellant (Sione Maile) established a new church, the third named appellant (Mo'ui Fo'ou). With the second-named appellant (Sione 'Amanaki) and others who followed him, he took possession of the church and other buildings at Ha'ateiho comprising the church itself, a residence, a hall and a school (together the church property). They remained in possession, using the church as their place of worship. Those members of the congregation who remained loyal to Tokaikolo worshipped at the house of one of their number.

[3] Relying principally on statements made at the time by the leader of Tokaikolo, the appellants claim the church was gifted to them. Alternatively, they say that, by virtue of the statements made and the conduct of Tokaikolo's representatives, an estoppel arises which would make it inequitable for Tokaikolo to assert its rights as owner. They resisted proceedings brought by Tokaikolo in the Land Court to regain possession of the church property.

[4] In a Ruling given on 9 November 2016 the Lord President found against the appellants. He held there had been no gift and that there were no grounds for an estoppel or any other basis on which the appellants could assert a right to ownership or possession of the church property. He made a declaration that Tokaikolo is the lawful owner of and entitled to possession of the property; ordered Mo'ui Fo'ou and its associates to vacate the property; and ordered the Minister of Lands to register a lease of the property issued in 2012 in the name of Tokaikolo.

[5] The appellants appeal against the Ruling.

Further background

The church is established

[6] Tokaikolo was established by Senituli Koloi. On his death in 1980 Dr Liufau Saulala was ordained as First Minister and Leader. In 1994 his title changed to President.

[7] Sione Maile joined Tokaikolo at an early stage. He was a Minister and became Secretary General, the most senior position in the church after the President. The responsibilities of the Secretary General under the Constitution include record-keeping and assisting the President in the management, safe-keeping and welfare of the church.

[8] The Tokaikolo church at Ha'ateiho began when a small group began worshipping in a shelter at Sione Maile's town allotment there. In 1997 two leases of land were obtained from the government, each for a term of 50 years. Additional reclaimed land was later added, the leases cancelled and a new lease approved and issued. The lessee is Tokaikolo. The lease has yet to be registered.

[9] Between 2000 and 2010 the land was progressively developed. The church itself was completed in 2003 together with an adjoining residence. A school building was opened in 2008, a hall in 2010. It is common ground that Sione Maile was, as the President said, ''an organiser and a force behind mobilising resources and monies''. But the development was very much a collective effort. Members of the Ha'ateiho congregation made voluntary contributions supplemented by donations of labour, money and food by other branches of Tokaikolo.

The breakaway

[10] On 8 July 2013 Sione Maile abruptly resigned from Tokaikolo. Both he and Liufau Saulala were in Auckland, New Zealand at the time. Having assured Liufau Saulala on 5 July that he was committed to Tokaikolo, on 8 July Sione Maile submitted a letter of resignation from his position as Secretary General in order to move to 'a New Life' and to establish a fellowship called Mo'ui Fo'ou 'Ia Kalaisi Fellowship (New Life Fellowship in Christ).

[11] The following Sunday, 14 July 2013, at the evening service at Ha'ateiho, Sione Maile's son-in-law, Sosaia Tautalanoa, announced that Sione Maile and others (himself included) had left Tokaikolo and that the church building would now be called Mo'ui Fo'ou 'Ia Kalaisi Fellowship. He said anyone who did not wish to join Mo'ui Fo'ou would have to leave. In what the President called 'an act of pronounced symbolic significance', Sione 'Amanaki preached the sermon. He had been told of ''the breakaway'' the previous day. He joined Mo'ui Fo'ou, is the

chairperson of its land committee and assumed occupation of the Minister's residence at Ha'ateiho.

[12] From 14 July 2013 the Ha'ateiho church and associated buildings were used by Mo'ui Fo'ou to the exclusion of those members of the congregation who wished to remain with Tokaikolo. Numbering over 40 or, we were told, something under half of the congregation at 14 July 2013, they have since worshipped at the home of one of their number. The President found they had left the church ''peacefully but not voluntarily''.

The alleged gift

[13] On 10 July 2013 Liufau Saulala spoke to a bible study of Tokaikolo at Auckland. (The Lord President rejected the evidence of a witness who claimed the address took place in Tonga on 14 July 2013). Liufau Saulala spoke at length about the breakaway. His remarks were recorded and a transcript prepared. Those parts of relevance to the case are reproduced in the Lord President's judgment. The passage on which particular reliance is placed is set out below. The words which the President said he understood to be particularly relevant to Mo'ui Fo'ou's defence are highlighted.

> "It is now clear brethren, that some members are breaking away from us. If Sione should come for something that Tokaikolo has any claim to, I will tell Sione to take it with him. Not only that, Ha'ateiho was built by Sione Maile alone. That's the only chapel that did not have a loan. He's the servant of the Lord. Whilst we pay off these other loans. If Sione should come for something that Tokaikolo has a claim to, I'll sign for whatever it is to be given to Sione. All of it. About their little school, Lavengamalie is always ready to offer it any help it may need, because it's a good school. It emphasizes The Word of God. It is God's hand. Let's leave this other matter aside. We will help them out, dear brethren. Whatever it is. We won't fight over any worldly goods".

[14] The President unhesitatingly accepted the evidence of Liufau Saulala that he did not intend to convey by what he said that he was giving the church property at Ha'ateiho to Sione Maile or anyone else. Liufau Saulala had explained in evidence that Sione Maile's resignation had come as a shock. It followed a period of tension in the church community. There had been disparaging remarks made publicly that focussed on Liufau Saulala. In what the President described as convincing evidence Liufau Saulala said he saw it as his obligation to pacify members of the Tokaikolo congregation and to remember the good work of Sione

Maile and his followers. As the President said, this is supported by passages in the transcript. At one point Liufau Saulala said;

> "I don't want you to be angry at those joining the breakaway. Because there are some who just go, this one family told me, the reason why, Sione called us to follow him, because we owe Sione a lot. Similarly, a lot of people owe Sione a lot of things, they owe him their status of being a pastor, bible study, healing and other material assistance, and it tells us, and I tell them it's all right, don't be angry at them".

[15] Liufau Saulala also made the point in his evidence that he did not believe the Ha'ateiho property was his to give away even if he wanted to.

[16] The President found there was nothing to show Sione Maile knew of what Liufau Saulala had said when the decision was made to take possession of the church at Ha'ateiho. Sione Maile did not give evidence, an omission the President said assumes significance given the onus on the defence to establish estoppel and numerous gaps in the evidence particularly as to Sione Maile's knowledge, belief and intention at relevant times. The only witness whose evidence could have provided some support for a finding that Sione Maile knew of what had been said at the bible study when the church property was taken over was found to be not a credible witness.

Subsequent events

[17] On 18 October 2013, Sione Maile wrote to the Minister of Lands. He asked for the existing lease to be cancelled and a new lease granted to Mo'ui Fo'ou. He said he had formed the Fellowship on 7 July 2013. He claimed that the improvements to the land had been ''done solely by myself'' and asked that the lease be registered to the Fellowship "as this is the church building where those who have left Tokaikolo in Tonga meet.".

[18] The President noted that Sione Maile did not say the church property had been gifted to him or the Fellowship. Nor had he sought to obtain the consent of Tokaikolo to his application. The President described this as ''strong evidence'' that Sione Maile did not believe the church property had been gifted at all. He saw it as a ''notable feature'' of their case that Sione Maile and Mo'ui Fo'ou did not claim the property had been gifted until after recovery proceedings were issued.

[19] Between May 2014 and June 2015 Mo'ui Fo'ou did work on the property. The church and the minister's residence were repainted in the colours of Mo'ui

Fo'ou, the signage of the church was changed and the school playground filled and sealed. The cost of these works was some $35,000. A further $100,000 was spent extending the school onto adjoining land.

[20] There was no evidence that Tokaikolo was consulted about the works or knew of plans to undertake them. The President rejected a submission that the Mo'ui Fo'ou defendants were encouraged to undertake the works by letters sent by Tokaikolo in January 2014 in response to letters of resignation from Ministers who had followed Sione Maile to Mo'ui Fo'ou. The letters wished them ''all the best in the works that you are now doing''. The President accepted the reference to ''works'' was to spiritual work and the good wishes simply good manners. In any event, the President pointed out the letters could not have been intended or taken as encouragement for work that did not commence until months later.

[21] Late in 2014 Tokaikolo resolved to take legal action. The President accepted that it did not act sooner because it wanted time to pass to allow emotions to cool and in the hope that those who left would return. A letter demanding return of the property was sent in January 2015. The demand was rejected. Proceedings were issued in June 2015. In November 2015 representative of the two churches met. The Mo'ui Fo'ou representatives apologised and asked to be gifted the church property. That approach was also seen by the Judge as inconsistent with a belief that the property had been gifted. The request was declined.

Gift

[22] The appellant's case is that on 10 July 2013 Liufau Saulala gifted "the physical property situated on the land" and the right to claim to lease the land. The gift is said to have been complete when Sione Maile "accepted the gift and took possession of the properties gifted" on 14 or 18 July 2013.

[23] It is convenient to begin our consideration of this aspect of the appeal, by identifying the essential elements of a gift as the President did, by reference to the following passage from Garrow and Fenton's Law of Personal Property in New Zealand Vol 1, 7th ed at 4.3 and 4.4:

The donor and donee are both competent to give and receive what is intended;

> The donor actually intends to gift the immediate ownership of the property or, where the legal title is retained, to relinquish immediately the beneficial ownership in favour of the donee;

An act or acts adequate to give complete effect to that intention. An attempt to gift property which is not in existence or does not belong to the donor cannot operate as a complete gift and is unenforceable in the absence of consideration; and

Acceptance of the gift by the donee, which will be presumed subject to the donee's right to disclaim the property when he or she has knowledge of the gift.

[24] The President found that the appellants had failed to establish the first three elements. In particular:

(a) Liufau Saulala had no authority to gift the Ha'ateiho property.
(b) There was no intention to gift the property.
(c) There was no act sufficient to complete a gift of the property.

All findings were challenged on appeal. It is convenient to consider each separately.

Authority

[25] The President found that the right to obtain a registered lease of the land is a mere expectancy that cannot be the subject of a lease. Mr. Niu SC argues there is an equitable interest which can be gifted. We do not need to resolve that as the President's finding that Liufau Saulala did not have the authority to gift the property or Tokaikolo's interest in the lease presents a much more formidable obstacle. The Constitution and Bylaws (the Constitution) of Tokaikolo makes detailed provision for the governance of the church. There were two Constitutions in evidence, one dated 2004, the other 2007. As the President understood a challenge was mounted to the later one, he referred to both. The relevant provisions are not materially different anyway. We agree with the Lord President that neither can be understood as conferring on the President power to give away church property. We do not understand that finding to be challenged on appeal. Mr. Niu's argument, which was also mounted in the Court below, is that Liufau Saulala had been given general authority to dispose of property as he saw fit. This was said to be implied from the way he had been allowed to conduct himself in the past and what he himself asserted at the bible study meeting.

[26] The President emphatically rejected the submission. He held that the evidence "did not go close" to establishing that Liufau Saulala had or was held out as having such authority. We were not referred to anything in argument that might

cause us to doubt the President's conclusion. Even if, as the appellants contend, Liufau Saulala was allowed considerable latitude in conducting financial transactions on behalf of Tokaikolo, we were not referred to any evidence which would support an inference that he had general authority to do as he pleased with church property. We agree also with the President that Liufau Saulala could hardly confer authority on himself by what he said at the bible study.

Intention

[27] There was nothing said in argument to bring into question the President's finding that in saying what he did at the bible study Liufau Saulala evinced an intention to give away the Ha'ateiho church property. It is easy to understand why, faced with an audience that was unsettled and possibly angered by recent developments, he should seek to calm the situation and speak generously of Sione Maile's contributions.

[28] Mr. Niu asked us to have regard to the evidence of one of those present who recalled Liufau Saulala saying "to willingly let Sione go with all his workings because all his workings belonged to him wholly and was his individual undertaking". He also referred to Liufau Saulala's evidence that he told the meeting: "Sione Maile can leave the church and take with him what he has done". In each case Mr. Niu is relying on the witnesses' paraphrase of what was said. With a verbatim transcript of what was actually said available, there is no profit in considering what one member of the audience took away from the meeting or Liufau Saulala's attempt in his evidence to capture what he was endeavouring to convey. What he actually said speaks for itself.

Delivery

[29] A gift, other than a gift by deed, must be accompanied by delivery. Words alone are not enough. As Windeyer J said in Olsson v Dyson (1969) 120 CLR 365, 380:

> "[The owner of a thing] must not only say it is a gift, he must give it to the donee, who must, by words or conduct, accept.".

As Windeyer J goes on to say, how a thing can be given away depends on what it is. In the case of a building, the handing over of a key or something similar could be expected. Obviously, there was nothing of that nature. Sione Maile's followers simply took possession. There was no action on behalf of Tokaikolo that could be understood to constitute delivery.

[30] The Lord President's finding that there was no gift is unassailable.

Estoppel

[31] In the Land Court the defence of estoppel was argued on two distinct bases. First, s.103 (2) and (3) of the Evidence Act 1993 was relied on. Alternatively the Lord President was asked to consider the application of estoppel by acquiescence.

Evidence Act

[32] Section 103 (2) and (3) of the Evidence Act provides:

> (2) If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of fact.
>
> (3) If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

Section 103 (2)

[33] Unsurprisingly, given his earlier findings, the President found the elements of a defence under s103 (2) had not been established. The representation relied on by the appellants is, as pleaded, a declaration by Liufau Saulala that Sione Maile "could leave and that he (Sione Maile) take with him the works he had done for the church". It was put somewhat differently in argument before the Land Court as a representation that Mo'ui Fo'ou could occupy and use the Ha'ateiho church property as its own and Tokaikolo would not seek its return.

[34] Whatever the precise formulation of the representation, it is not supported by the transcript itself as the President pointed out. What Liufau Saulala said twice in his course of his address is: "If Sione should come for something….." he can have it. As the President said, that is not a representation as to a state of facts. At best it is a statement of future intention.

[35] However Liufau Saulala's words are characterised, what cannot be disputed, given the President's findings of fact, is that he did not intend Sione Maile or anyone else to act on his words and take possession of the church property. Nor on the facts as found, is there evidence that, in occupying the church property, Sione Maile acted on the words of Liufau Saulala.

Section 103(3)

[36] Section 103(3) requires conduct that would be taken by a reasonable person to mean a representation of fact. The conduct relied on (in submissions, it was not pleaded) was Tokaikolo's ''peaceful departure'' from the property; the lack of any objection to the work Mo'ui Fo'ou did and its increasing the number of pupils and teachers at the school; standing by for 18 months while Mo'ui Fo'ui treated the property as its own; and the tenor of its correspondence with the Ministers who resigned. These circumstances were submitted to mean that "the works at Ha'ateiho were to be [the appellants] forthwith". It appears that by "works'' was meant all improvements to the land.

[37] The President found the conduct relied on could not have been understood and acted on by Mo'ui Fo'ou in the way contended. He pointed out that while the departure from the church was peaceful, it was not voluntary. Mo'ui Fo'ou had no reason to think it was entitled to take possession. There was no evidence Tokaikolo was aware of the planned works or of what was going on at the school. Further, while works were underway Tokaikolo gave clear notice it wanted the property back.

[38] Before us, as he had in the lower Court, Mr. Niu argued that if Tokaikolo had not intended its conduct to encourage Mo'ui Fo'ou in the belief there was agreement to its taking possession of the property, it would have immediately objected. But as the President said, that overlooks Tokaikolo's view that the better course was to let emotions cool in the hope that some who had left Tokaikolo would return. Moreover, as the President also pointed out, Mo'ui Fo'ou was well aware from what was said by one leading member of the congregation that the takeover was objected to.

[39] We agree with the President that the conduct of Mo'ui Fo'ou is inconsistent with a belief that Tokaikolo intended it to remain in possession of the property. As previously noted, Sione Maile and Mo'ui Fo'ou at no stage asserted that they understood Tokaikolo had surrendered its right of ownership. Sione Maile made no such claim when asking for a new lease to be granted to Mo'ui Fo'ou, and when, in January 2015, Tokaikolo make demand for the return of the property,

again there was no claim of a right to remain in occupation. The apology and request for the property to be given to the Mo'ui Fo'ou in November 2015 speaks for itself.

Estoppel by acquiescence

[40] Estoppel by acquiescence or proprietary estoppel as it is sometimes called, is to be distinguished from estoppel under s103 of the Evidence Act which may be seen as an evidential rule that prevents a person denying what he or she has by words or conduct asserted. In contrast, estoppel by acquiescence is a means by which property rights may be affected or created. It has been recognised and applied in a number of Tongan cases – see for example Tafolo v Vete [1998] Tonga LR 164 (CA), Ongolea v Finau [2003] Tonga LR 152, Vea v Filipe [2009] Tonga LR 293, Li v Finefeuiaki [2013] Tonga LR 39.

[41] The doctrine gives the Court a wide discretion to grant relief when an owner of land (a) induces, encourages or allows the claimant to believe that he or she has or will enjoy some right or benefit over the land, (b) the claimant acts to his or her detriment to the knowledge of the owner and (c) the owner then seeks to take unconscionable advantage of the situation by denying the claimant the expected right or benefit.

[42] It will be apparent that a claim for relief on this basis is doomed to fail for essentially the same reasons as those under the s103 of the Evidence Act. The appellants have been unable to show that they were induced, encouraged or allowed by Tokaikolo to believe that they had or would enjoy a right or benefit over the land. Certainly, they expended money on the property, although most of it seems to have been for maintenance and little for improvements except on the adjoining land. Whatever its purpose, it was not undertaken with the knowledge or approval of Tokaikolo. The element of unconscionability is necessarily absent.

[43] The Lord President observed that Tokaikolo could perhaps be criticised for failing to reclaim the property earlier. But, as he says, that would have made no difference. When put on notice of Tokaikolo's intention to reclaim the land Mo'ui Fo'ou rejected the demand and continued with the works.

Result

[44] All grounds of appeal having failed, the appeal is dismissed. The appellant is to pay costs in this Court to be taxed if not agreed.

Ve'ehala v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen JJ
AC 15 /2016

16 March 2017

Employment — unfair dismissal — damages — expectation of continued employment

The Plaintiff was a police officer. He was dismissed for sexual misconduct but no charges were brought and the defendants accept that the dismissal was wrong. Damages were to be assessed.

Under the old Police Act, appointments were to be for 5 years but the plaintiff claimed that he would have remained as a police officer until retirement age and that renewals were usual and expected after 5 yearly periods. The Judge found that damages should be limited to the date of expiry of the 5 year contract (March 2011) for the plaintiff.

Held

1. The dismissal was unlawful but effective to terminate the employment because the Court will not specifically enforce an employment contract terminated by notice of dismissal;
2. Damages are to be based on salary lost to the date of expiry of the employment contract.

Cases considered

Leiola Group Ltd v Moengangongo [2010] Tonga LR 85
Miliangos v George Frank (Textiles) Ltd [1976] AC 443
Johnson v Agnew [1980] AC 367

Counsel for the Appellant : Mr. L. M. Niu SC
Counsel for the Respondent : Mr. S. Sisifa SC

J U D G M E N T

[1] In 2007 Mr. Ve'ehala was a sergeant of police in the Tonga Police. He had been a police officer since 1986. On 29 May 2007 he was suspended without pay while a complaint against him of sexual impropriety was investigated. It is important to say that he has never faced disciplinary proceedings, nor any criminal

charge, in relation to that complaint. Nevertheless, on 9 October 2007, without any reasons being given, he was dismissed from the Police with effect from 29 May 2007. It is now accepted by the respondent that this was an unlawful dismissal in respect of which Mr. Ve'ehala is entitled to damages.

[2] In the Supreme Court, Lord Chief Justice Paulsen correctly directed himself that in assessing damages for breach of a contract of employment the Court proceeds on the basis that an employer would perform the contract in the manner least disadvantageous to itself, citing Leiola Group Ltd v Moengangongo [2010] Tonga LR 85 at [30]. This principle applies to contracts generally. The Chief Justice found that Mr. Ve'ehala was in 2007 enlisted for a 5 year period under s.12 of the Police Act (Cap. 35) which provided:

> 12 Duration of service
>
> Every police officer shall, in the first instance, be engaged to serve for a period of 5 years and subsequently for further periods of 5 years, each re-engagement being at the option of the Minister of Police and subject to retirement or discharge or any other provision of this Act.

[3] The five year period of Mr. Ve'ehala's employment at the time of his dismissal was to end on 12 March 2011. Therefore, the Chief Justice held, Mr. Ve'ehala's damages for ''lost salary" should be calculated to that date. Mr. Ve'ehala, on the other hand, maintains that, if not unlawfully dismissed, he would have remained a police officer until compulsory retirement at 60, namely on 22 December 2022, and that his damages should have been calculated by the Supreme Court on that basis.

[4] The matter is complicated by the fact that after Mr. Ve'ehala's dismissal but before the 5 year period would have ended, the Police Act was repealed and replaced by the Tonga Police Act 2010.

[5] That Act came into force on 2 February 2011. We were referred by counsel to the following provisions of the new Act:

> 42 Police Employment Committee may appoint persons
>
> (1) The Police Employment Committee may, in accordance with this Division, appoint persons as members of Tonga Police.
>
> (2) A person may be appointed as:
>
> (a) a police officer; or

(b) an administrative staff member.

43 Appointment of members and conditions of appointment

(1) The Police Employment Committee may appoint a member:

(a) on an ongoing basis; or

(b) for a period specified in the instrument of appointment.

(2) The conditions of appointment are as the Committee determines in writing.

183 Police officers

This section applies if, immediately before the commencement of this section, a person was enlisted to serve in the Tonga Police Force, under section 11 of the Police Act (Cap 35).

On the commencement of this section, the person is taken to have been appointed as a police officer in Tonga Police under section 42(2)(a) of this Act:

Until the end of the term of the original engagement; and

On the conditions of the original engagement that are consistent with this Act; and

At the same rank as under the Police Act (Cap 35)

[6] Mr. Niu's argument on this appeal concentrated on these sections of the 2010 Act but before dealing with it we should describe the way in which the Chief Justice approached the old s.12. He found that the meaning of s.12 was clear. Police officers were enlisted to serve for fixed periods of 5 years. The respondent had admitted that in practice s.12 was not observed. Apparently re-enlistments were not notified to a police officer each 5 years. But, as the Chief Justice rightly said, that did not mean that s.12 was not good law or could be ignored. The continuance of employment beyond the end of the set period of engagement had to be regarded as the exercise by the Minister of the option expressly given to him in s.12 to re-engage an officer. He said that what s.12 contemplated was that the Minister might make a positive decision (to re-engage) not a negative one (not to re-engage): "The failure to exercise the option does not bring the employment to an end and cannot amount to a dismissal when the police officer's period of engagement has simply expired".

[7] We agree. It is unfortunate that the Minister did not adopt a practice of formally notifying re-enlistment when an officer's 5 year period of employment came to an end. But, in the absence of a notice bringing the employment to an end at the expiration of a 5 year period, the employment should under s.12 be taken to have been rolled over for another 5 year period. That meant that at the time of Mr. Ve'ehala's dismissal the earliest date on which his employment could have been terminated without cause (ie. discharge under s.17 of the old Act), was 12 March 2011. Accordingly, if the 2010 Act had not been passed, damages would properly be calculated on the assumption that the Minister would have lawfully brought the employment relationship to an end on that date.

[8] Did the new Act alter that position? Paulsen CJ thought not, and we agree. The Chief Justice said that the position was governed by s.183 of the 2010 Act. Subsection (1) applies the section to a person who was immediately before the commencement of the section (on 2 February 2011) enlisted as a police officer under s.11 of the old Act, which Mr. Ve'ehala still would have been but for his unlawful dismissal. (We comment that the dismissal was unlawful but, because the Court will not specifically enforce an employment contract at the behest of an employee who has been given notice of dismissal, it was effective to terminate the employment).

[9] Subsection (2) of s.183 then provides that on the commencement of the section such a person is to be taken to have been appointed as a police officer under s.42(2)(a) of the 2010 Act until the end of the term of "the original engagement" and on the conditions of the "original engagement" that are consistent with the 2010 Act.

[10] The Chief Justice said that the requirement that a person be enlisted immediately before the commencement of the section required only that the person retained their status as an enlisted officer upon its commencement, and that the "original engagement" meant the engagement under which the police officer was employed on the commencement of the section. There would otherwise be a lacuna whereby there would be no provision in the 2010 Act in relation to the continued service of existing police officers other than those serving their first engagements. Again, we agree with him.

[11] Mr. Niu's argument on this appeal relied upon the fact that the Police Employment Committee has not taken any steps under s.42(1) of the 2010 Act to re-appoint members who were serving police officers under the old Act after their current 5 year periods elapsed. Under s.43 it could appoint them either on an ongoing basis or for a specified period. Just as the silence of the Minister under the

old s.12 was taken to be a re-appointment for another 5 years, counsel said that the silence of the Committee amounted to an exercise of its authority under ss.42 and 43 to appoint those serving officers on an ongoing basis after their current 5 year periods. Mr. Niu submitted that the Committee, unlike the Minister, had no option of the kind referred to by the Chief Justice in relation to s.12. Its only choice was to re-appoint for a specified period or on an ongoing basis. Therefore, the argument went, when Mr. Ve'ehala's period of re-engagement would have otherwise ended on 12 March 2011, the Committee had to be regarded as having re-appointed him under the new Act on an ongoing basis until his compulsory retirement age. Mr. Niu pointed out that as Mr. Ve'ehala was not then facing any disciplinary or criminal charge, there was nothing to prevent this.

[12] This argument, which appears not to have been advanced below, is ingenious but we do not accept it. It may be that police officers serving 5 years terms under s.12 of the old Act are to be taken to have been appointed on an ongoing basis under s.43(1)(a) of the 2010 Act in the absence of action by the Committee on the expiry of their 5 year appointment current at the commencement of the 2010 Act. But if so, that does not assist Mr. Ve'ehala. The exercise the Court is engaged upon in fixing his damages is to pinpoint the date upon which his employer could have lawfully terminated the employment. In the absence of the 2010 Act, that date was 12 March 2011. Section 183(2)(a) preserved that position. The Police Employment Committee did not have to re-appoint him on any basis after that date. If he had actually been a serving officer and the Committee had done nothing, it is arguably the position that he should be taken to have been re-appointed after 12 March 2011 on an ongoing basis. But in reality his employment had long since ceased (as from 9 October 2007) so the Committee's silence is not a relevant matter. For the purpose of assessing his damages the critical factor is that the Committee had the power not to appoint him, just as it can decline to appoint anyone who is not a police officer but is applying to become one.

[13] This result is consistent with the "breach-date" rule for the assessment of damages for breach of contract, namely that damages are normally to be assessed as at the date of breach which is when the cause of action arises: Miliangos v George Frank (Textiles) Ltd [1976] AC 443 at 468 and Johnson v Agnew [1980] AC 367 at 400. Since the 2010 Act did not exist when Mr. Ve'ehala was dismissed, the better approach may therefore be to disregard it entirely in assessing the damages payable to him.

[14] The Chief Justice was therefore right to direct calculation of the "lost salary" damages from the date of dismissal to 12 March 2011. (It was not disputed

in the Supreme Court that Mr. Ve'ehala was entitled to his salary for the period of suspension prior to dismissal). The appeal therefore fails.

[15] The orders of the Court are:

1. The appeal is dismissed;
2. The appellant must pay the respondent's costs in this Court, to be taxed if not agreed;
3. Costs in the Supreme Court are to be determined by that Court.

R v Vaka

Supreme Court, Nuku'alofa
Cato J
CR 103/2016

21 April 2017

Criminal law — indecent assault — rape — guilty plea set aside

A schoolgirl of 16 accepts a lift from a stranger who she says assaulted and raped her. The accused signed a confession but later denied making it. The Judge was concerned about conflicting evidence and adjourned the trial so the Crown could make further enquiries.

Held

Not guilty because Crown had not proved guilt beyond reasonable doubt.

Counsel for the Crown	:	Ms. Moa
Counsel for the Accused	:	Mr. Corbett

VERDICT

[1] The accused Saimone Vaka elected judge alone trial on three counts; two of serious indecent assault contrary to section 124(1)(2) of the Criminal Offences Act, and one of rape contrary to section 118(1) (a) of the Criminal Offences Act. The trial lasted several days.

[2] The accused had originally pleaded guilty to the indictment on the 9th November, 2016 after which when his new counsel, Mr. Corbett, sought to have his pleas set aside primarily on the basis that he had been let down by his former counsel, who through it seemed ill health, had not appeared on the day he was to be tried. The next week, when unrepresented, he had pleaded guilty to the charges. Having heard from Mr. Corbett and read the accused's affidavit, I was satisfied that the pleas should be set aside in the interest of justice and that he had an arguable defence. For that reason, a trial was ordered to commence on the 10th April 2017.

[3] The trial lasted a number of days before and after Easter and was adjourned on the 18th April 2017 for me to deliver this verdict. Although the

evidence, particularly of the complainant and the accused was quite lengthy and there were a number of other witnesses as well, I am able to summarise it reasonably succinctly.

[4] The complainant was aged 16 and a schoolgirl. On the day in question, the 18th April, 2016 she had been with another witness in town whom I shall refer to as P. She was also about the same age and also attending school. Both girls had been in or about the Kings Road, in Tongatapu where there was a funeral, and had been allowed to go into the markets by the complainant's mother to shop for toiletries for the complainant who was to attend school where she was a boarder, that evening. The complainant and P were in the area of the One-Way road in the town when they were approached by the accused, who had his young child in the car, and asked if they wanted to go for a ride. They accepted and after getting them some food, he drove them to an area at Utulau where P went into a house with an older man who gave evidence that the accused had worked for him, and whose car the accused had borrowed. The complainant gave evidence that the accused took her to a smaller house on the property where she says that the accused threw her on a bed and an indecent assault took place. She then said that the accused drove them back into town and around the area of the King's road, her mother rang and this was answered by her friend P who was outside. The complainant said she went to get her purse in the car when the accused grabbed her and forced her to remain in the car as he drove off.

[5] She said they drove to an area in the vicinity of the Ocean of Light School where there was a track and a mango tree. They spent a considerable amount of time in that area, the accused still having his child with him. During this time, the complainant says she was forcibly raped by the accused, who ripped a part of her shirt in removing her clothing and subjected her to an indecency. It would seem the couple spent several hours together before the accused, at the complainant's request, drove her to another destination to meet her boyfriend. Her boyfriend saw that she was with the accused whom he says she introduced as family. He said he had been her boyfriend for about six months which the complainant denied saying that they had not been in such a relationship for much more than a week. The accused left her there and drove home to his residence where he lived with his wife and family. He gave evidence he was woken up the next day to find the complainant, her mother, P and the police present. Later, he was taken to the police station where investigators gave evidence that he had made a signed record of interview admitting that he had had consensual sexual intercourse with the accused in the area of the mango tree. Later, at trial, he gave evidence disputing this record of interview, and denied he had ever signed or initiated it. He asserted that he never

had intercourse with the complainant despite the fact that she had made overtures to him.

[6] The evidence of the complainant who had given evidence first, I found unremarkable. She appeared to me to give a clear account of what had happened. However, the second witness, P, gave me reason for considerable concern when she gave evidence. Although she confirmed much of the complainant's earlier evidence about being taken to 'Utulau and going into a big house with an older man and later seeing the complainant outside chasing the accused in the area of the smaller house, it was her evidence that when they returned later to the area of the Kings Road that gave me real concern.

[7] For no apparent reason, she burst into tears when about to recount what had arisen when the girls got out of the car, at the Kings Road after returning from 'Utulau. She said that outside the car she had been given the complainant's phone to talk to the complainant's mother who she said had been angry with her daughter. She said that she had not told the complete truth in her statement to the police when she had said she turned around to see the accused driving off with the complainant. According to Crown counsel, Ms. Moa, she had twice maintained to her that her statement was the truth before she gave evidence. Her evidence, however, at trial was that the complainant had got out of the car when she was talking with her mother, on the phone and had later got back into the car because she was concerned at what her mother might to do to her, and told the accused to drive off. This was in conflict with the complainant's evidence (which P did not support) that she had gone to retrieve her purse from the car and that, when she had tried to do so, the accused had grabbed her and driven off. Later P said that after she had made her statement, the complainant had told her to say she had been kidnapped.

[8] At this point, I indicated to the Crown I was very concerned about this evidence, and I adjourned the case in the late afternoon for the Crown to make such inquiries as it thought fit regarding this unforeseen evidence. The trial continued with the mother and other witnesses being called including the accused who gave evidence. The complainant, however, was not recalled about P's evidence. No evidence was adduced to suggest that P was a witness I should not find credible and indeed her rather spontaneous teary outburst inclined me to the view that she was telling the truth. If so, the complainant was embellishing her evidence that the accused had abducted her from the Kings' Road and had driven off to an area under the mango tree where the complainant said non-consensual sexual intercourse had taken place.

[9] The remaining evidence did not advance the essential issue as to whether indecencies had taken place and, or rape as the complainant had testified. There was no evidence adduced which had the effect of supporting the complainant's testimony aside from a partially ripped shirt, which she had said had been ripped in the encounter, so I was dependent upon the credibility of her evidence alone in relation to the charges. I direct myself that before I can convict on any of the charges, I must be satisfied beyond reasonable doubt that the complainant is telling the truth.

[10] I have not overlooked the accused's evidence, which I did not find satisfactory, concerning his denial that he did not sign the admission of consensual intercourse, or, indeed much of his explanation by way of denial. I did not find the police to have overborne his will as he suggested at the police station. I found him an evasive and unsatisfactory witness whose evidence I could not rely upon. However, at the very most, he had admitted only to consensual intercourse in his record of interview. In disclaiming his admission as to non-consensual intercourse and in maintaining at trial that intercourse had not taken place, he was advancing plainly inconsistent accounts of his actions, that afternoon or early evening which rendered him, in my view a very unreliable witness. However, his denials and unsatisfactory evidence went no further than to impeach his credit, and could not, in my view, be advanced affirmatively to support the prosecution's case of rape and indecency.

[11] I remind myself that an accused person in electing to give evidence assumes no burden of establishing innocence. The Crown, throughout a criminal trial, bears the onus and burden of proof to establish the elements of the offending beyond reasonable doubt. Although I accept that the accused, as the Crown pointed out, was with the complainant under the mango tree for a very long time, that in itself does not prove they had intercourse whether consensual or not. At the end of the day, I am left with considerable concern about P's evidence which suggests that the complainant had embellished her account when she said he had forcibly taken her away from the Kings Road area leaving P behind. As a consequence, there being no apparent reason why I should reject P's account, I am left in a state of doubt as to the reliability of the complainant's evidence and cannot exclude the possibility that her account of rape and indecency is also embellished. In that state of mind, I cannot convict the accused of any of the charges. I am left in doubt as to where the truth lies. He is acquitted on all charges and discharged from the indictment.

R v Ngaluafe

Supreme Court, Nuku'alofa
Cato J
CR 113/2016

21 April 2017

Criminal law — driving causing death — severe intoxication of driver does not impose strict liability

A very drunk driver (more than twice the limit) hit and killed a man sitting in the road. The Judge could not conclude that the driving was negligent or that the driver was speeding. The Judge considered whether this was a case of strict liability in Tonga, whereby merely proving the very drunk driving proved guilt.

Held

1. Drunk driving does not create strict liability where the defendant is guilty regardless of other factors;
2. Fault of some kind with the driving causing death is required;
3. Acquitted on charge of causing death while driving under the influence.

Cases considered

Clarke (1990) 91 Cr App Rep 69
Gammon (Hong Kong) Ltd v AG of Hong Kong [1985] AC 1
Sweet v Parsley [1970] AC 132
R v Hughes [2014] 1 Cr App R 6
Kilbride v Lake [1962] NZLR 590
R v Ten Bohmer [2000] 3 NZLR 605

Counsel for the Crown : Mrs. Langi
Counsel for the Accused : Mr. William Edwards

V E R D I C T

[1] The accused, Mr. Poasi Ngaluafe, appeared before me for trial initially on one count of causing death whilst driving with alcohol in his body in excess of 250 micrograms per litre of breath contrary to section 26A(1) of the Traffic Act. During the course of the trial, the indictment was amended to include a charge of driving a motor vehicle whilst under the influence of alcohol in excess of 250 microgram per

litre of breath contrary to section 26(1) (2) (b) of the Traffic Act. He pleaded guilty to that charge, but the Crown did not accept his plea in discharge of the indictment and his trial continued.

[2] The evidence was quite brief. The accused admitted to driving with a breath level limit of 660 micrograms per litre of breath or well in excess of twice the legal limit. The evidence revealed that the offence took place after the accused had been driven home, on the 8th May 2016 late in the evening. He decided to take his motor vehicle out and drive elsewhere. During the drive which was not far from his home, he ran over a person sitting, it would seem upright in his path that is on his side of the road. He appeared to drag the body under the car, before trying to reverse, the deceased suffering head and other injuries and suffering an instantaneous death. The deceased was Tongan and was dressed in dark clothes. The area in which the collision took place was unlit and said to be dark, although there may have been some light coming from an oncoming car which passed the deceased on the other side of the road shortly before the collision.

[3] Mr. 'Isitolo 'Ali was driving his car towards the deceased on the other side of the road and noticed that he was sitting in the middle of the other side of the road. He said that he would have been about 25-30 metres from him when he noticed the man. He noticed, as he drew level, his head nodding as though he were asleep. He had decreased his speed and, as he had passed, he told him to get up. He had passed the deceased by about four metres when he observed an oncoming car and, shortly after, the deceased was hit by that vehicle. He said he had been travelling around 40-45 kilometres per hour before slowing down. He thought the other vehicle was travelling very fast. It did not brake before impact and its lights were on. The evidence suggested that Mr. 'Ali's lights had to some extent illuminated the deceased in the road.

[4] It did not appear, however, that Mr. 'Ali had much of an opportunity to observe the speed of the oncoming vehicle. Indeed, in his evidence, he said that he did not notice the vehicle approaching, his attention at the time being directed, understandably to the deceased sitting in the road. I am unable to conclude what speed the accused was travelling prior to the collision and unable to infer that he was driving in excess of the speed limit.

[5] Although his lights were on and evidence from a vehicle examiner was given that they were in working condition, no evidence was given as to the range of the beam of these lights or the opportunity the accused would have had to see the deceased in the rood prior to impact. There were no skid marks suggesting that the accused had not been aware there was anyone in the road prior to impact. The

state of the evidence is such that I am unable to infer that, while the accused was driving and in control of the vehicle considerably in excess of the breath alcohol limit, that there was anything errant or at fault about his actual driving of the vehicle that evening that resulted in the collision.

[6] During the course of the evidence, I mooted with counsel whether this offence was one of strict liability, as Mrs. Langie had suggested. I drew to their attention such authorities as had been raised by Professor John Smith in his book on Criminal Law, (Smith and Hogan, 10th ed, 2003, at page 44,) when he refers to an old English case, of Dalloway (1847) 2 Cox CC 273. Dalloway had been driving a cart on a highway without his hands being on the reigns and a very young child had crossed the road a few yards ahead of the horse and was killed. The issue was whether Dalloway was guilty of manslaughter or not. The direction to the jury by Earle CJ was that, if the prisoner had reins and by using those reins could have saved the child, he was guilty of manslaughter. If they thought he could not have saved the child by the use of those reins, he was not guilty of manslaughter. Professor Smith commented;

> "If D had not been driving the car at all the incident could not have occurred; and in that sense he " caused' it but it was necessary to go further and show that the death was due to his negligence in not using reins.".

[7] I also referred to the discussion in Clarke (1990) 91 Cr App Rep 69 (also mentioned in Smith and Hogan at pg 44,) where Russell LJ in a comment directed at drunkenness, recklessness and the Lawrence direction (1981) 73 Cr App R 1 said;

> "If Mr. Elias is right in his submission that drink is relevant when considering the first limb of Lawrence, but not the second, a surprising result is produced. Suppose a person gets into a car when indisputably unfit through drink to drive it; he drives at a snail's pace and is involved in a collision that is wholly the other driver's fault; the other driver is killed. On Mr. Elia's definition, the driver drives recklessly because he is driving while unfit through drink to do so. If another road user happens to be killed, he is guilty of causing death by reckless driving. That in our view cannot be correct.".

[8] At the conclusion of the evidence, Mrs. Langi submitted that the case was one of strict liability although the maximum penalty was 15 years imprisonment. In her view, even if I found the driver here was not at fault in his driving,

nevertheless, by driving the vehicle with excess breath alcohol, he was liable for the death of man he collided with sitting in the road. I expressed some unease with this view, but appreciating that the issue raised a matter of considerable importance for the application of the Traffic Act, in Tonga, I adjourned the hearing for a lengthy period for both counsel to consider their positions and produce any relevant authorities they were able to do before me for argument.

[9] Strict liability, sometimes referred to as absolute liability, had its origin in public welfare regulatory offences in the nineteenth century. It seems in convicting defendants, in the absence of fault on their part, the courts were motivated by pragmatic, utilitarian considerations such as efficient operation and development of schemes to promote welfare and health. In early times, strict liability offences were usually accompanied by lower penalties, the stigma of conviction being reduced in these cases. However, over time, it came to apply in cases where penalties were significant. See Smith and Hogan at page 132, and Gammon (Hong Kong) Ltd v AG of Hong Kong [1985] AC 1, at 17 where the Privy Council applied strict liability to a case where the offence was punishable by a fine of $250,000, and three years imprisonment, although the Court acknowledged that the fact the offence carried such heavy penalties was a formidable point.

[10] The application of mens rea in cases that were truly regarded as criminal, that is, as Lord Reid said, cases that were not absolute liability involving only "quasi-criminal acts", was affirmed in Sweet v Parsley [1970] AC 132, a case involving the issue whether means rea applied where premises were being used for the purpose of drug offending. There, Lord Reid said after discussing absolute liability and its application in cases of quasi-criminal acts;

> "...but when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or disgraceful the offence, the greater the stigma. So he would have to consider whether in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men should escape. And equally important is the fact that, fortunately, the Press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration. But, I regret to observe that in recent cases where serious offences have been held to be absolute offences, the court

has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence".

[11] Whilst in the vast majority of cases involving death or injury, driving above the prescribed limit will be plainly causative of death and the driver will be at fault in some way, this may not always be the case. Cases come to mind where a defence in the nature of inevitable accident might arise; a child who runs out into the road without warning and is in collision with a car driven by a drunken driver; or an approaching car who suddenly crosses the centre lane into the path of a drunken driver. Once there is evidence adduced that suggests a collision was inevitable, then in the absence of the offence being characterized as one of strict liability, the prosecution will have to prove beyond reasonable doubt that the defendant was materially at fault in more than a de minimis way. In order to do this, the prosecution will have to adduce evidence that establishes beyond reasonable doubt that a sober person driving within the limits of the law would have been able to have avoided the collision.

[12] Mrs. Langi had submitted throughout the trial that the offence was one of strict liability, and all the Crown had to establish to success, was that the accused drove a motor vehicle under the influence of alcohol namely above the limit of 250 micrograms of alcohol per litre of breath, and that, whilst driving, a fatality had resulted. Mr. Edwards submitted that the offence was not one of strict liability pointing to the serious consequences that conviction carried namely liability of up to 15 years imprisonment and a heavy fine.

[13] Whilst I recognise that legislation of this kind is aimed at reducing road accidents which all too often result in injury or death, when a driver is in under the influence of alcohol, the fact that conviction carries with it such heavy penalties had tended to persuade me that the offence should not be characterized, in the words of Lord Reid, as a "quasi criminal offence" in the strict liability category. During the trial, I had indicated that I was uneasy about the submission that this was an offence of strict liability and that the accused should be convicted even if the prosecution had not established that he was at fault.

[14] Before I had head final submissions, the case of R v Hughes [2014] 1 Cr App R 6, (SC), reversing R v Williams (Jason) [2011] 1 WLR 588, CA (mentioned in Archbold, (2016 ed, at para 32-76) came to my attention. This was a decision of the Supreme Court. There, the appellant had been driving a motor vehicle without compulsory third party insurance and had been on a probationary license as well which rendered him liable to offences involving fines and penalty points and

disqualification, but not imprisonment. The Supreme Court considered that these were strict liability offences.

[15] Mr. Hughes, the appellant, had driven on a road and had a collision with a driver who was found to be on drugs. The latter had been driving erratically and had crossed into the path of the appellant's motor vehicle with the result that he was killed. Although the trial Judge had accepted the appellant was not at fault and had acquitted him, on appeal, he had been convicted by the Court of Appeal following their earlier decision, in R v Williams (Jason) [2010] EWCA Crim 2552; [2011] 1WLR 588. This case also involved an uninsured driver who had been driving in a proper manner along an urban dual carriage way when a pedestrian had jumped over the central reservation and stepped out in front of his car. It was held in Hughes by the Court of Appeal, consistently with Williams, that the appellant had caused the death and that it was not an element of the offence that the prosecution was required to prove fault with the defendant's driving, that is it was a strict liability offence. Mr. Hughes appealed.

[16] Under the new section 3ZB of the Road Traffic Act 1988, as added by section 21(1) of the Road Safety Act 2006 (UK), it was provided that a person was guilty of an offence if he caused the death of another person by driving a motor vehicle on a road, and at the time when he was driving, the circumstances were such that he committed an offence under Section 87(1) of the Act, (driving other than in accordance with a licence); section 103(1)(b) (driving while disqualified); or section 143 (using a motor vehicle while uninsured or unsecured against third party risks). This offence carried a maximum sentence of two years imprisonment.

[17] The Supreme Court rejected the argument that a driver, who had committed the offence of driving while uninsured which was said to be a serious matter, was guilty of the aggravated offence of driving causing death unless there was present, in his driving, some act or omission in the control of the car, which involved an element of fault, whether amounting to careless, inconsiderate driving or not and which had contributed, in some more than minimal way, to death. It was unnecessary that such act or omission be the principal cause of the death. The Court rejected the argument that merely driving the car on the road whilst uninsured was sufficient to amount to legal causation and was no more causative than setting the scene for the collision to occur. (See further, "setting the stage", an expression of Woodhouse J in the case of Kilbride v Lake [1962] NZLR 590, at 592 on fault and actus reus so well known to New Zealand students of criminal law many generations, ago). The Court, in Hughes, observed;

> "to give effect to the words" causes... death... by driving and to constitute the offence, there must be something more than "but for" causation for the driving to be a "legally effective cause" of the death.

The Court, further, observed that:

> "It may well be that in many cases the driving will amount to careless or inconsiderate driving, but it may not do so in every case. Cases which might not could for example include driving slightly in excess of a speed limit or breach of a construction and use regulation. If on facts similar to the present case, D was driving safely and well 34 mph in a 30 mph limit, or at 68mph in a 60 mph limit was unable to stop before striking the oncoming drunken driver's car, but would have been able to stop if travelling within the speed limit, his driving would be at fault, and one cause of death, but would have been able to stop if travelling within the speed limit, his driving would be at fault, and one cause of death, but would be unlikely to amount by itself, to careless driving. The same might be true if he could not stop in time because a tyre had become underinflated or had fallen below the prescribed tread limit, something which he did not know but could by checking, have discovered."

[18] I referred Hughes to counsel prior to hearing their submissions. Mrs. Langi quite properly conceded in the light of Hughes, that she was unable to maintain her argument that the offence was one of strict liability. She referred me, however, to a New Zealand case of R v Ten Bohmer [2000] 3 NZLR 605(CA) per Thomas J, where a drunken driver had been convicted of driving causing death after he had taken a right turn into the path of the deceased who was on a motor bike. The appellant had argued that the Crown must prove a causative link between the excess blood alcohol level and the collision, which the trial judge and the High Court Judge had rejected. The Court of Appeal held that the lower courts were correct in dismissing this argument, and in so doing observed that causation involved linking the accused's behaviour to the prohibited result in a way which could be described as not insubstantial or not insignificant. Thomas J, however, went on to say that the requirement for causation does not import any element of fault in driving which the use of the word 'act or omission' in previous legislation, had been held to import. His Honour observed at para 30;

> "The defendant, by virtue of being of or driving a motor vehicle, may cause the death of the accused without being guilty of careless or reckless driving or the like. The question is whether the Defendant's driving

> caused the deceased's death, not whether any act or omission on his or her part amounting to negligent or otherwise blameworthy conduct caused the death. The element of fault is not to be reintroduced into the provision by way of an expanded approach to causation.".

Despite disclaiming fault as an feature of causation, which would suggest a strict liability approach, the Court did suggest that, in cases where a death had been caused by a pedestrian suddenly running out in front of the car, or a car being hit by a driver travelling on the wrong side of the road, the defendant's conduct could not have caused the resulting bodily injury or death and he would not be liable for causing a collision. These observations suggest that whilst dismissing fault as an element of causation, the Court, was understandably reluctant for blameless drivers to be convicted of serious driving offences and accordingly, appeared, in an appropriate case, prepared to depart from the full rigour of a strict liability approach.

[19] The leading English case of Hughes, unlike R v Ten Bohmer, asserts, however, that fault of some kind with the driving that caused the death is required to be established in cases of this kind, and that is the approach I am required to adopt in Tonga, as Mrs. Langi acknowledged.

[20] Mrs. Langi, attempted to persuade me that the accused was at fault in failing to be able to avoid the deceased sitting in the road and that he had been unable to see him and do so because he had been driving too fast and was well over the legal limit. I have given close consideration to this submission, but, as I have already said, the evidence does not persuade me that the accused was travelling in excess of the speed limit and would, with his headlights on, have been able to see the deceased and stop in time to avoid him. Nor did I have any evidence before me to suggest that a sober driver travelling at a lawful speed, in all the circumstances, would have been able to detect the deceased sitting in the road and have avoided him. I am therefore unable to conclude beyond a reasonable doubt that anything errant in Mr. Ngaluafe's driving caused the collision.

[21] In these circumstances, I acquit the accused of count 1 causing death while driving under the influence of alcohol in excess of 250 micrograms per litre of breath, contrary to section 26A(1) of the Traffic Act.

[22] I, however, convict him of the alternate charge of driving a motor vehicle while under influence of alcohol in excess of 250 microgram per litre of breath contrary to section 26(1) (2)(b) of the Traffic Act to which he pleaded guilty. This is his first offence of driving whilst over the prescribed limit. In my view, because

his reading was high, a fine of $1000.00 payable forthwith, and in default, 2 months imprisonment, is appropriate.

R v Sele

Supreme Court, Nuku'alofa
Cato J
CR 140/2016

12 May 2017

Rape — serious indecent assault — serious housebreaking

A girl 16 and boy 19 know each other, live nearby, have sex which he says was consensual. The girl's mother finds the couple undressed and beats her daughter with a broom thinking she was consenting. There was a mix up with the police file and the initial statements were lost. There was a 2 year delay in prosecuting and the mother wanted to withdraw the complaint. There was inconsistent evidence by the complainant about how well she knew the accused and a doubt if there had been previous sexual activity.

Held

Accused is acquitted

Counsel for the Prosecution:	:	Ms. 'Akau'ola
Counsel for the Defendant	:	Mr. Fili

V E R D I C T

[1] The accused Mateo Sele was charged with attempted rape contrary to section 120 of the Criminal Offences Act, serious indecent assault contrary to sections 124(1) and (2) of the Criminal offences Act and serious housebreaking contrary to sections 173(1) (B) and (4) of the Criminal Offences Act.

[2] On the 9th May 2017, his trial, by judge alone, commenced. The Prosecution alleged that on the 17th December, 2014 the accused had attempted to rape the complainant and had committed an act of serious indecency upon her, having entered her house to do so. At the time the complainant was aged 16 and the accused aged abut 19. They lived near each other. The incident was alleged to have taken place in the Vaini area. The evidence relating to the incident came from the complainant and her mother. The accused did not give evidence but a record of interview dated the 7th February 2017 was admitted by consent into evidence. He said that the activity was consensual and that he had consensual sexual contact with the complainant the day before the incident.

[3] The complainant claimed that she had been present with her mother at a third person's residence where they had gone to do some washing, and her mother some weaving. This was, apparently, a reasonably regular occurrence. The accused had lived at the premises with his wife for a lengthy period. The wife was the third person's daughter. The complainant said that she had been doing some washing and told by her mother to return to their home which was close by to bring back two younger children who were in their home. She returned to her home and was away for over half an hour. The complainant said that she had been locked up when she was confronted by the accused, who came into the house uninvited, grabbed her and proceeded to take her into a rear room, where he threatened her, removed her lower body clothing, touched her breast and proceeded to undo the zip on his shorts when her mother appeared. She said she had struggled. The accused left and mother proceeded to beat the complainant with a broom handle. The complainant admitted apologizing to her and said nothing happened. She said in evidence that she had told her mother, as she was beaten, that it was not her that had initiated this but the accused. She said her mother had beaten her because she thought she had been consenting.

[4] Mother gave evidence and admitted being concerned about the complainant not returning with the children and a premonition had caused her to return to her house and she heard her daughter say don't do it as she entered the room to find she thought the accused fiddling with his zip area. She saw her daughter had no clothes in her lower area. Later that day, a complainant was made to Vaini Police.

[5] At the trial, it emerged during cross-examination of the complainant that the complainant's statement that had been disclosed as a part of the police brief was dated 19th August 2016 many months after the incident had occurred. I remarked upon this and counsel for the Prosecution rightly chose to lead evidence on this topic. It emerged, in later evidence, that the complainant had made a statement, as did her mother, at or about the time of the complaint in December, 2014. I am satisfied that this was the case having heard evidence from the interviewing officer, Loni Pakelani, both as to the taking of a statement from the complainant in 2014 that is at the time of the incident, and, later in 2016, after it had been requested by Senior constable Lelea who was the investigating officer. The complainant also confirmed that a statement had been taken when the complaint had been filed. SC Lelea said in evidence that the file which he had given to prosecutions at Vaini in February 2015 had later been returned to him for further action on the 19th August, 2016. His station diary note which was exhibited evidenced this. He noticed, after seeing the file on its return, that there was a record of interview taken by Sergeant Fuavai, who was the head of prosecutions at Vaini, that he had not seen before. He

also noted that the statement of the complainant and her mother which had been on the file before were missing. Officer Lelea said that he decided to re-interview the complainants because the defence in the record of interview, which he had not seen before, had suggested that there was previous sexual activity between the two prior to the incident of the 17th December, 2014.

[6] I note that, in Lelea's investigation diary No 378, of which I received a translation there is an entry recording (No 20) that on the 10th February 2015 he had handed the case to the Prosecution for trial. He said that was to the prosecuting officer at Vaini, Sergeant Fuavai. That was after he had interviewed the accused on the same day and the accused had said that he chose to only speak at trial. (Note 19 of his investigation diary which was exhibited). I note that this was after Sergeant Fuavai had taken a statement from the accused on the 7th February which Lelea had said he knew nothing about until he saw the file again in 2016.

[7] Sergeant Fuavai, who said he was the prosecuting officer at the Vaini police station, gave a different account. He said that he had given the file to officer Lelea after taking it to the Magistrates Court for preparation and its submission to prosecution but despite several attempts to get the file back from SC Lelea, he had not been given it. Although he expressed some concern at this, he admitted that he had not insisted on its return. He said he did not know that any statements were missing, nor that the complainant and her mother had been re-interviewed by Lelea before the file had been submitted to the Crown for committal in 2016. He said the first he had known of this was when the Prosecution had contacted him the day before to give evidence, at trial. Officer Lelea had given evidence before Sergeant Fuavai and was not recalled to answer the claim that Sergeant Fuavai had repeatedly called for the file to be retuned which was plainly in conflict with Lelea's evidence.

[8] I found the evidence concerning, both because two important original statements had gone missing and had not been accounted for, and because the case had only been committed for trial on the 19th August 2016, apparently after the file had been handed back to Lelea for further work to be done on it. Consequently, the case had reached this Court in early December 2016 that is nearly two years after the alleged incident. SC Lelea said that when he received the file the mother had asked him to withdraw the complaint which he said he could not do. Later at trial, the mother confirmed that she had said this because the case had taken so long and matters had been resolved.

[9] I do not know where the truth lies and who was responsible for causing the loss of the statements and the unacceptable delay in the case proceeding to

committal which is plainly serious omissions. A failure by the prosecution to be able to produce an original statement by a complainant or witness may have very serious consequences. A witness's statement that is consistent may assist to further the reliability or otherwise of the witness's evidence. Counsel are entitled to expect that original statements are available for examination before trial so that their reliability of a witness's evidence may be considered and assessed both before and during trial. A later statement may be the product of recall affected by the passage of time or later events and may be a less reliable basis for assessing the consistency of the complaint evidence. The delay in having the case committed for trial is also serious. Justice delayed may cause justice to be denied because witnesses may not be able to be located for trial, or they may with time have a diminished recollection of events. As was the case here, it seems the complainant and or her mother's wish for the prosecutions to proceed had diminished by the time they were re-interviewed. Prosecutions should proceed in a timely way which was plainly not the case here, and neither the loss of the statements nor the delay in committal were adequately addressed by the evidence I heard. Delays add to the stress associated with the prosecutorial process for all concerned. For this reason, I recommend that this case be referred to the Commissioner for appropriate investigation which I was able to undertake only in a limited way.

[10] Returning to the facts of the case, I was concerned at an aspect of the complainants' evidence at trial, however, that she had not seen the accused on the 17th December 2014 when the first paragraph of her statement of 19th August, 2016 plainly suggested the contrary. I did not find her answers when questioned about this inconsistency convincing, she mentioning a second and younger Mateo being at the house. This suggested to me that that she may have been trying to distance herself from seeing the accused that day and eliminating any opportunity for the two to arrange a meeting at the complainant's house. There was evidence also that the accused had lived with the third party and her daughter for about three years and their residence, was close to where the complainant lived. The mother and her daughter, the complainant, it seems reasonably regularly visited the home where the accused lived yet she said she was not familiar with him until the day of the incident and knew him only by face. I considered this rather unlikely.

[11] The accused, when he had been interviewed by Sergeant Fuavai, in early February 2017, had stated an earlier incident of consensual sexual activity between them the day before this incident which the complainant did not accept. Nor had she accepted that the meeting at her home had been arranged between her and the accused.

[12] Mr. Fili submitted that the mother had said she had been away longer than half an hour and when the children came without her, she commenced to get a premonition that something was wrong and returned. He submitted that instead of remaining in the house after the children had gone that the complainant should have returned with them, and the fact she had not gone with them but she said had stayed to lock up, leant some weight to the defence case that the meeting at the complainant's house was planned.

[13] As well, the complainant said in her evidence that when her mother walked in the accused was fiddling with his fly when in her statement he had said his shorts were off. She said she was meaning his zipper was already down and he was about to take off his trousers. I did not find her answers convincing, in this respect.

[14] She also said that she and her mother after a month sought to withdraw the complaint. She said that she volunteered to her mother that it had been the accused's doing after what appeared to be a beating by her mother of her with a broom stick. A complaint was made to the police after this.

[15] I was left consequently in a state of mind of uncertainty about the reliability of the complainant's evidence that she had not known the accused and had not been involved with him in consensual sexual activity prior to the 17th December 2016. She did not strike me as a timid child then of 16 who would be readily overborn by the accused, then about 19. Although she may have been telling the truth about the incident and that what occurred had not been consensual, I was left in reasonable doubt about this. Accordingly, I acquit the accused of all the charges, and he is dismissed from the indictment.

R v Falevai

Supreme Court, Nuku'alofa
Cato J
AM 1/2016

21 May 2017

Appeal from acquittal by Magistrate — firearms —shooting of pig — late appeal

There were delays in the case by the police and the court system, so the appeal was heard 30 months after the incident. The gun was not produced and there was no proof that the accused had an operable firearm. The Magistrate dismissed the charge on this ground.

Held

Court is unable to say that the Magistrate was wrong in finding insufficient evidence.

Counsel for the Appellant	:	Mr. Aho
Counsel for the Respondent	:	Mr. Tu'utafaiva

JUDGMENT

[1] This is an appeal against the dismissal of charges after acquittal delivered by Principal Magistrate Mafi on the 10th February, 2016, on charges relating to possession of an arm namely a .22 rifle without a licence contrary to section 4(2)(b) of the Arms and Ammunition Act, using an arm namely a .22 rifle without a licence contrary to section 4 (2)(b) of the Arms and Ammunition Act, and carrying an arm namely a .22 rifle without a licence contrary to section 4 (2)(b) of the Arms and Ammunition Act.

[2] The prosecution related to the shooting of a pig allegedly by the Respondent on the 23rd September 2014. The Respondent had been charged and arraigned later in this Court on the 5th June, 2015. Later, the prosecution was remitted by consent to the enhanced jurisdiction of the Principal Magistrate on the 22nd July 2015. The Respondent's trial commenced on the 20th October, 2015 and was adjourned part heard. It recommenced and the evidence was concluded on the 10th February 2016, the Principal Magistrate dismissing the charges that day.

[3] An appeal was filed by the Crown on the 1st March 2016 and on the 4th October, 2016 the Notice of Appeal was received in this Court, that is about 7 months after the appeal had been filed. This delay is contrary to the provisions of section 77 of the Magistrates' Court Act which requires the appellant's notice of appeal, recognizance of the appellant, and a correct transcript of all proceedings of the case in the Magistrates' court to be forwarded to the Registrar of the Supreme Court as soon as the provisions of section 75 have been complied with that is the notice of appeal and fee deposit, where appropriate, paid. I see no reason why the need for similar compliance should not arise where it is a Crown appeal. On the 25th October, 2016, a direction was given by the Registrar of this Court for the folio or record of proceedings to be translated. This task was not apparently completed until after the 3rd April 2017, when a further direction was made by me for a transcript to be prepared. On the 22nd May 2017, after a transcript was received, the matter was set down for hearing on the 24th May 2017. I would add that Mr. 'Aho for the prosecution had filed a memorandum of argument on the 23rd February 2017.

[4] Plainly, delays of this kind do not assist the orderly passage of justice. The matter arose out of an incident in September 2014. It is now two and half years later that the appeal is heard. There was an unacceptable delay in the matter being transferred to this Court, and an unacceptable delay also in the processing of the appeal and the provision of a transcript in this Court. These are systemic delays which can in exceptional circumstances lead to remedial measures being taken by this Court, to ameliorate injustice. Very exceptionally, that may mean a stay of proceedings is appropriate if injustice cannot otherwise be meaningfully remedied by some other measure such as a reduced sentence on conviction. See R v Williams [2009] 2 NZLR 750 (SC).

[5] This case was straightforward and only four witnesses were called by the prosecution. The nature of the evidence was recorded by Mr. 'Aho in his memorandum and is more comprehensive than the transcript. I rely on Mr. Aho's summary, in these circumstances, as being accurate. Evidence was given by the Complainant, a Mr. Palu, that a person named Villiami Fonua came to his house and informed him that the Respondent had killed his pig. The Complainant went to the Respondent's home and located the pig which he identified as his. He noticed a puncture hole on the pig's side which he suspected was caused by a gunshot. He said it was the size of a 6 inch nail. However, he did not dissect the pig and did not locate any bullet. He is recorded in the transcript as saying he had heard a gunshot whilst at home and had gone to the area after he had been told what had happened by Mr. Fonua. The pig was worth $200.00.

[6] Mr. Fonua gave evidence that he was in a paddock in Vaini when he was distracted by dogs barking and he saw the Respondent carrying what was a firearm in one hand and dragging a pig with his other. He said that the pig belonged to the Complainant. Mr. Fonua went to the Complainant's house and told him what had happened. Mr. Fonua is the owner of a licensed .22 firearm and had owned one since 2000. He considered that the Respondent had a .22 rifle.

[7] Also called as a witness was a police armourer who gave evidence that the Respondent did not have a firearm's licence. He also gave evidence under cross-examination that a .22 bullet could pass through a one year old pig. The suggestion was that there would be an entry and exit hole but he said this was not always the case. Due to a small amount of powder in the round, the round may have remained in the pig's body. A Constable Lolohea said that he had searched the Respondent's residence and no weapon had been found.

[8] At the conclusion of the evidence, Mr. Tu'utafaiva submitted in his closing submissions inter alia that the prosecution could not succeed because it had had not adduced evidence that the rifle met with the definition of arm in the Arms Act, section 2 which reads;

> "(1) a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile; or
>
> (2) A weapon of any description designed or adapted for the discharge of any noxious liquid, gas, or other things dangerous to persons and includes any component part of any such weapon.".

[9] He declined to call evidence and closed his case after the prosecution evidence. He submitted in closing that the firearm had not been produced and that there was no satisfactory evidence, in any event, that the gun was capable of discharging a shot, bullet or other missile. He pointed out that it was only the belief of Mr. Fonua that it was a .22 rifle. No one had seen the actual shooting. There was no evidence of any round being located inside the pig. Mr. Aho's submission was that circumstantially there was sufficient evidence to convict based on the fact that Mr. Fonua, with familiarity gained through owning a .22 rifle for some years, had said that the Respondent was carrying one, and the Complainant had observed what he suspected to be a bullet hole in the pig. The Respondent was seen by Mr. Fonua to be holding a firearm and dragging the pig, at the same time.

[10] In this Court, Mr. ‘Aho submitted that it would be sufficient for conviction for the Prosecution only to show that the Arms Act definition was satisfied if there were an “adaption” in terms of section 2 (1) or a “component” in section 2(2) of the legislation. I consider, however, that the prosecution whether it be a double barrelled weapon, or an adaption of it such as perhaps a sawn off shotgun, has to establish that, at the material time, a defendant was in possession of the barrelled weapon and that it was in an operative condition namely a shot, bullet, or other missile could be discharged from it. Mr. ‘Aho conceded he was entirely dependent on circumstantial evidence for the Court to be able to draw this inference. Pausing there, I do not think that his argument that all the Prosecution had to show was that the Respondent had a component of a weapon under section 2(2) of the definition, which he had not sought to argue before the Magistrate or in his written submission in this Court, has relevance, here. That appears to be directed at other weapon defined in section 2(2) defined as designed or adapted for the discharge of any noxious liquid, gas, or other dangerous things.

[11] The Principal Magistrate’s reasoning as translated for me is rather difficult to comprehend, but I gain the sense that he was not prepared on the evidence to convict the Respondent because it had not been proven to his satisfaction beyond reasonable doubt that the weapon the Respondent was said to be carrying was operative in the sense required. It had not been produced or located and accordingly there was no forensic evidence to say that it was in working order. Nor, in his opinion, was the circumstantial evidence sufficiently persuasive for him, as the trier of fact, to infer beyond reasonable doubt that the Respondent had used the firearm to shoot the animal. This view of the Magistrate’s judgment is borne out in his assertion that he would have convicted if it had been shown that witnesses actually saw the shooting.

[12] In the circumstances, whilst the evidence circumstantially discloses to my mind a high probability or likelihood that the Respondent had shot the pig said to be worth $200.00, I am not able to say that the Magistrate was wrong in his finding that the evidence did not meet the standard required to establish guilt of the charges beyond a reasonable doubt, as undoubtedly it would have, in his opinion, if there had been eye witness testimony evidencing the pig being shot by the Respondent.

[13] For these reasons, I dismiss the appeal.

Attorney - General v Yin Lin Wei

Supreme Court, Nuku'alofa
Cato J
CR 79/2013

29 May 2017

Criminal procedure — illegal medical practice — tainted money found — confiscation under the Money Laundering and Proceeds of Crime Act

The Defendant was convicted of unqualified practising as a medical practitioner. The conviction was in the Magistrates Court. The police sought to confiscate $28,290 found at the premises as tainted property under the Money Laundering and Proceeds of Crime Act. The Magistrate had no jurisdiction to order confiscation but when the proceeding came before the Supreme Court there was such a power.

Held

1. The money was found at the premises at which the defendant carried out the illegal medical practice and was derived from the business and was tainted property;
2. The money found was ordered to be paid into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and Proceeds of Crimes Act 2000;
3. The jurisdiction to seek confiscation and pecuniary orders in the Supreme Court operates after conviction and that is what occurred here.

Cases considered

R v Pederson [1995] 2 NZLR 386
Regina v Rezvi [2002] UKHL 1

Statutes considered

Money Laundering and Proceeds of Crimes Act 2000 s 48A

Counsel for the Applicant:	:	Mr. Aho
Counsel for the Respondent	:	Mr. Tu'utafaiva

J U D G M E N T

[1] This is an application commenced under section 28(1) of the Money Laundering and Proceeds of Crimes Act 2000 by the Attorney General on the 27th January 2017 for an order that the sum of $28, 289.0O T, USD $91.00 and CYN 985.00 (the property) that was seized by Tonga Police from the Respondent as tainted property under sections 2(1) and 34 of the Money Laundering and Proceeds of Crimes Act 2000, in respect of a serious offence of which the Respondent as convicted on 28th January 2015 in the enhanced jurisdiction of the Magistrates Court, be confiscated to the Crown. Further ancillary orders were sought that the Applicant shall be responsible for converting the foreign cash that is part of the Property into Tongan currency, and then depositing the total Tongan currency of the property into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and Proceeds of Crimes Act 2000, and that such funds be managed and utilized in accordance with the relevant statutory provisions governing such a fund.

[2] Although the legislation has been in force in Tonga since 2000, I am informed this is the first time it has sought to be used in this jurisdiction. Overseas, similar legislation has been used very successfully against particularly organized crime to attach the profits derived from criminal activity such as drug related offending by confiscation orders and pecuniary penalty orders directed at offenders' disgorging profits. In some cases, very large sums have been involved and confiscated to the Crown, and, or pecuniary orders have been made. The legislation is a potent reminder to offenders that property derived from criminal activity may be attached by confiscation orders (under sections 28, 29, 31, 34 and 35 of the Act) and that, where appropriate, profits that can be shown to have been derived from criminal offending may be subject of pecuniary penalty orders under sections 28, 41-45 of the Act. It has been said in a number of cases that these measures were enacted to deter serious criminal offending. Thus, in R v Pederson [1995] 2 NZLR 386 the Court of Appeal in New Zealand emphasised the deterrent purpose of these remedies by, in the words of Cooke P, demonstrating emphatically that crime does not pay.

[3] In this case, the application for confiscation arose out of a conviction which had been entered in the enhanced jurisdiction of the Magistrate's Court by Principal Magistrate Mafi on the 28th January 2015 for the offence of holding out expressly to be a medical practitioner, contrary to section 11 of the Medical and Dental Practice Act 2001. This is an offence punishable by up to five years imprisonment. The prosecution had been commenced in this Court in July 2013, and a not guilty plea had been entered by the Respondent in November 2013.

Later, by consent on the 12th May 2014, the prosecution was transferred for trial to Principal Magistrate Mafi in his enhanced jurisdiction given under section 4(4) of the Magistrate's Court Amendment Act, 2012. Later, there was a change of plea and conviction was entered on this and a related count, on the 28th January 2015, the Respondent being convicted and sentenced on each count to a fine of one thousand dollars.

[4] Principal Magistrate Mafi had originally ordered that the money located by the Police in the respondent's bedroom and alleged to be tainted property be returned to the Respondent less the amount owing under the fines. The Crown (Mr. Lutui) sought an order from the Magistrate and was successful in having the original order varied so that the money was retained by the Police. Mr. Lutui had foreshadowed that the Attorney General intended to commence proceedings under Money Laundering and Proceeds of Crimes Act 2000 for confiscation of the money as tainted property. The proceedings for confiscation were not however, commenced until 27th January 2017, that is a day before the two year limitation period under section 28 was to expire. The delay, Mr. 'Aho candidly admitted on this occasion had been his fault.

[5] Mr. 'Aho also attempted to couple this application or amend it to include a much greater claim for a pecuniary order alleging a sum of $325, 491.00 T should be paid as a pecuniary penalty in addition to the tainted property sought to be confiscated. During the course of the Police search of the Respondent's premises, they had found documentation which established that the Respondent had remitted very significant sums of money to China over a period of time dating back to about 2009. The evidence that was presented before me suggested that some of this money had been used to acquire medicines and related products in China for her business. Mr. 'Aho sought to amend the application to include a claim that these moneys also, represented profits acquired from this illegal activity, and should be the subject of pecuniary penalty order under section 41. It appeared to me on further inquiry that the bulk of the moneys sent to China were derived outside the period alleged in the offending. Mr. Aho, on re-examination of the claim, conceded that this was so and those that fell outside the period to which the conviction related could not now be the subject of a pecuniary penalty order. That left only about $75, 000.00 that could be the subject of a pecuniary penalty order as tainted profits from her illegal dealing. I questioned Mr. 'Aho further whether I could grant an amendment under section 30 (1)(a) of the Act because it appeared the Police had obtained the information during their original search and thus, it could not be said that the property or alleged benefit was not reasonably capable of identification when the application was made. If this were the case, then amendment could not be made. However, there was a fundamental objection, it

seemed to me in allowing any amendment for a pecuniary penalty order at this stage, because the application or amendment to include a pecuniary penalty was statute barred as being commenced beyond the two year limitation period. I indicated to Mr. 'Aho that I agreed with Mr. Tu'utafaiva's submission to this effect. For all these reasons, I indicated to Mr. 'Aho that any application for a pecuniary penalty could not succeed, and I would not allow any amendment.

[6] Mr. Tu'utafaiva submitted to me that the confiscation application should not proceed either because he argued by committing itself to trial in the enhanced jurisdiction of the Magistrate's Court, the Attorney - General could not now seek to argue for a confiscation order of the money on the basis that it was tainted property. He contended that either the Application should have been made before the Principal Magistrate in his enhanced jurisdiction or not at all. He submitted also that the order sought was penalty and the Magistrate in this case was responsible for sentencing the Respondent in his enhanced jurisdiction and this was a further reason why this Application could be brought.

[7] Mr. 'Aho submitted that remitting a matter to the enhanced jurisdiction of the Magistrates Court did not in any respect covert the jurisdiction of a Magistrate into that of a Supreme Court Judge. In the absence of his being given jurisdiction to determine applications for confiscation and pecuniary penalty orders under the Act, he could not determine these applications. The Magistrate's Court Amendment Act 2012 simply, he submitted, gave the Principal Magistrate additional jurisdiction in relation to the penalties he could impose for offending not exceeding 7 years imprisonment or a fine of $50,000 but it did not include jurisdiction to make orders under the Money Laundering and Proceeds of Crimes Act 2000. That jurisdiction belonged exclusively to the Supreme Court, and with that I agree. Nor do I agree that the fact that the Crown consented to trial in the enhanced jurisdiction of the Magistrates' Court means that the Crown should be precluded from now seeking a confiscation order in the Supreme Court. The jurisdiction to seek confiscation and pecuniary orders in the Supreme Court operates after conviction and that it what occurred here. Although in a sense, confiscation order and pecuniary penalty orders supplement general sentencing powers, I do not think that the fact the Magistrate sentenced the Respondent under his general sentencing jurisdiction means that this Court is now precluded from making additional orders concerning tainted property, or tainted profits under the provisions of the under the Money Laundering and Proceeds of Crimes Act 2000. Nor does the fact that an application is made in this Court suggest that the Respondent is placed under any additional or fresh accusation of any other offence. (Her Majesty's Advocate v McIntosh [2001] UKPC D1, DR A No 12 of 2000, Regina v Rezvi [2002] UKHL 1) I consider, however, that where the Crown

intends, as was plainly the case here, to seek orders, under this Act, the Crown should ordinarily resist any application to have trial in the enhanced jurisdiction of the Magistrate's Court.

[8] In this case, I observe that the application to the Magistrate that was brought by Mr. Lutui to vary the original order that the money seized by the Police be returned to the Respondent less an amount representing the fines imposed against the Respondent, should have been by application for a restraining order in this Court under section 57 of the Act. I doubt that the Magistrate had the jurisdiction to make such an order relating to tainted property sought to be preserved under this Act. To further preserve and regulate the security of the money said to be held by the police in safe keeping at the Longo Longo Station, I made a restraining order for its preservation by the Police until further order of this Court. Mr. Tu'utafaiva indicated, in any event, that his client had no intention of claiming it from the Police.

[9] Accordingly I consider that this Court has jurisdiction to hear this application and the application is not affected by the trial and sentencing having taken place in the enhanced jurisdiction of the Magistrate's Court. This Court has jurisdiction to make the order sought because the offence for which the Respondent was convicted qualified as a serious offence, the Act defining a serious offence as being one where the maximum penalty is not less than 12 months imprisonment. Further, the unchallenged affidavit evidence adduced by the Applicant was that the Respondent had no other source of income from which the money located in her bedroom could have been derived (see the provisions of section 34(2) of the Act). I find that it was tainted property acquired form the illegal operation of her medical clinic (see the provisions of section 34(2) of the Act) as the Applicant claims.

[10] No evidence was presented from the Respondent alleging that the Money was from any legitimate source or that a confiscation order would lead to hardship of any kind. That said, Mr. Tu'utafaiva argued strenuously for his client that the jurisdiction to confiscate was discretionary, and drew my attention to the provisions of section 34(4) of the Act. The essence of his plea was (and this was accepted by Mr. Aho) that the Respondent could have legitimately have operated a business dealing simply in Chinese herbal medicine, and some of the money was sent to China to acquire Chinese herbal medicines and was the product of their sale and thus legitimate revenue. Mr. 'Aho in response drew my attention, however, to the affidavit of Chief Inspector 'Atevalu and in particular annexure 3, which I agree would suggest the presence of many drugs and medicines that were not Chinese traditional medicines. That said, no evidence was presented for the consideration of this Court on this issue, nor was any attempt made to provide a

sensible basis for the Court to apportion the money, or to disentangle that which was tainted and co-mingled with that which was not. At the end of the day, the Respondent admitted the offence of holding herself out as a medical practitioner under section 11 of the Medical and Dental Practices act from her premises known as Wei's Chinese Medical clinic in Havelu which she owned and operated, and the money I accept was derived from her operation of this business.

[11] Consequently, I grant the application and I make the following orders;

that the sum of $28, 289.0O, USD 91.00 and CYN 985.00 (the property) that was seized by Tonga police from the Respondent as tainted property under sections 2(1) and 34 of the Money Laundering and Proceeds of Crimes Act 2000, in respect of a serious offence of which the Respondent was convicted on 28th January 2015 in the enhanced jurisdiction of the Magistrate's Court, is confiscated to the Crown.

the Applicant shall be responsible for converting the foreign cash that is part of the Property into Tongan currency, and then depositing the total Tongan currency of the Property into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and Proceeds of Crimes Act 2000, and that such funds be managed and utilized in accordance with the relevant statutory provisions governing such a fund.

Kivalu v Taufu'i

Court of Appeal, Nuku'alofa
President Paulsen
AC 4 of 2017, LA 3 of 2015

8 June 2017

Practice and Procedure — leave to appeal to Court of Appeal against consent Order — counsel's authority to make consent order — considerations when granting leave to appeal

Appeal — leave to appeal to Court of Appeal against consent Order — counsel's authority to make consent order — considerations when granting leave to appeal

Law Practitioners — Counsel has general authority to conduct and settle litigation notwithstanding the absence of particular instructions to settle on specific terms

Counsel for the applicant who was not present agreed on an order by consent to dispose of an action in the Land Court. Counsel advised the applicant of the need to make the consent order before the order was made.
Applicant says counsel had no authority to make the consent order and that he wants to be heard.

Held

1. Counsel has general authority to conduct and settle litigation notwithstanding the absence of particular instructions to settle on specific terms. There is, however, a qualification to this legal rule, namely counsel has no authority to settle on specific terms if counsel has express instructions which would preclude the settlement on those terms;
2. Counsel had authority to settle the action with the consent order and there is no basis to set it aside;
3. There is nothing in the applicant's affidavit to indicate that if the action is reheard it has any prospect of success;
4. The case does not raise any issue of public importance. The interests of the applicant in pursuing an appeal are outweighed by the public interest in ensuring finality of litigation; The amount at stake is modest and does not justify the costs of an appeal.

Cases considered

Kalaisi v Tu'i'onetoa and Ors [2017] Tonga LR 24
Vaitu'ulala v 'longia [2011] Tonga LR 75

Counsel for the applicant at Hearing : Mr. 'O Pouono

R U L I N G

[1] This is an application for leave to appeal from consent orders made in proceedings before the Land Court between and the applicant as plaintiffs and the respondent as defendant under LA 3 of 2015.

[2] The consent orders were made during the hearing of the action. The applicant was not present in Court when his lawyer sought the consent orders and says that he is disappointed with his lawyer and wants to be heard to present his side of the case.

[3] The application has been dealt with on an ex parte basis.

The relevant facts

[4] Uilisoni Kivalu (Uilisoni) and the applicant are father and son. Proceedings were commenced by them against the respondent in the Land Court under LA 3 of 2015.

[5] The statement of claim alleged that in 1995 Uilisoni made an agreement with the respondent to pay TOP$3,000. In return the respondent was to allow Uilisoni to occupy 10 perches of the respondent's town allotment and once the full TOP$3,000 was paid the 'allocated land will be given' to Uilisoni. The statement of claim goes on to allege that in breach of the agreement the respondent was reluctant to give the sole right to use the 10 perches of his land to the plaintiffs'.

[6] The statement of claim also pleads that the applicant 'joins in' the action because Uilisoni was 'of old age' and Uilisoni had empowered the applicant 'to be joined in this proceeding'. No application was made for the applicant to act as Uilisoni's next friend and having heard evidence from Uilisoni it is clear there was no basis to do so.

[7] The action was defended and came on for hearing on 10 January 2017. Mr. Pouono appeared for the plaintiffs. Uilisoni was in attendance and gave evidence but the applicant was in the United States. I do not need to traverse Uilisoni's evidence except to say that it was plain that Uilisoni had no grievance

with the respondent (who he described as a good friend) and was happily living on the respondent's land with his consent. Far from being 'reluctant' the respondent had taken no steps to remove Uilisoni.

[8] Uilisoni said that he had come to Court because he had been told to be there and I was left with the clear impression that he had not been consulted about being named as a plaintiff in an action against the respondent and would not have given his consent had he been so. It appears this is not an uncommon occurrence in Tonga particularly in land cases and ·is a major concern.

[9] After Uilisoni had given his evidence, the Court took an adjournment. Unsurprisingly, given Uilisoni's evidence, following the adjournment Mr. Pouono sought consent orders which were made in the following terms: The claim is withdrawn Costs are awarded to the defendant in the amount of his return airfare to Tongatapu from Vava'u. I reserve leave for the defendant to apply to fix the amount payable in the event of any dispute.

The applicant's affidavit

[10] The applicant's affidavit in support of his application for leave to appeal is a terse and unsatisfactory document. He says that he could not attend the hearing because he had 'some misunderstanding with Fiji Airlines' but he does not say what the misunderstanding was or how it prevented him from attending the hearing.

[11] The applicant says that he received email advice from Mr. Pouono that because of Uilisoni's evidence the claim must be withdrawn. He also says he communicated with Mr. Pouono but, importantly, does not state the content of the communication.

[12] The applicant says he wants to be heard but does not say what his evidence will be and how it can overcome the evidence of Uilisoni that he has no claim or grievance against the respondent.

[13] The applicant also rather cryptically describes himself as "the guardian of the land" in which the proceeding was related to without any explanation of what that means.

The law

[14] The applicant requires leave to appeal to the Court of Appeal from an order made by consent (section 10(1)(a)(iii) Court of Appeal Act). The application

for leave may be made to the Judge of first instance or to a single Judge of the Court of Appeal. This application has been made to the Court of Appeal and under 0.7 Rule 1 Court of Appeal Rules, an application made to the Court of Appeal may be made on an ex parte application supported by an affidavit and determined without a hearing.

[15] The application does not identify the principles that determine whether it is appropriate to grant leave to appeal. I recently dealt with an application for leave to appeal from an interlocutory order in Siasi Tokaikolo 'Ia Kalaisi v Tu'i'onetoa and Ors (Land Court, LA 22 of 2015 31 January 2017, Paulsen LCJ) and made the following comments which are apposite in this case:

> It is implicit in the fact that leave is required to appeal from an interlocutory order that the granting of leave should not be given as a matter of course. The circumstances where leave is granted are likely to be uncommon ('Utoikamanu v Lali Media Group Ltd [2003] Tonga LR 184). This is particularly so given the desirability of the expeditious resolution of court proceedings and the elimination of unnecessary delay.

[16] The thrust of the applicant's case is that Mr. Pouono should not have agreed to withdraw the action. Based on the limited evidence before me I am satisfied that Mr. Pouono had authority to withdraw the action. The issue was dealt with by the Court of Appeal in Vaitu'ulala v 'longia [2011] Tonga LR 75 at (8] and (9] where the Court said:

> The general rule, as a matter of law is that if counsel is briefed to appear for a party in litigation then counsel has an implied authority to conduct the litigation as counsel thinks fit (though plainly he or she must do so having regard to the interests of the client) and has authority to settle or compromise litigation without express instructions to do so: see generally Halsbury's Laws of England, 4th ed, Vol 3(1), Barristers, para 517 and following. That is not to suggest it is not a regular and desirable practice for counsel to get express instructions to settle on particular terms before doing so. It has been, in our experience and knowledge of practices of the bars of common law countries, usually the case that counsel does get those express instructions. But these practices do not derogate from the legal rule that counsel has general authority to conduct and settle litigation notwithstanding the absence of particular instructions to settle on specific terms. There is, however, a qualification to this legal rule, namely counsel has no authority to settle on specific terms if counsel has express

instructions which would preclude the settlement on those terms, such as express instructions not to settle at all or express instructions not to settle on specified terms which are different from those that are proposed (for example express instructions not to settle for less than a specified sum). There is precedent which suggests counsel's apparent authority to compromise cannot be limited by instructions, not even the withdrawal of instructions, unknown to the other party: Taylor v Cogswell (1965) 109 S.J. 495. But it is unnecessary for us to consider whether this is correct because, on the appellant's own affidavit, it is not apparent that counsel appearing for him in the appeal before us had express instructions which prevented him from agreeing to the terms on which the appeal was settled and the consent orders which were made.

[17] Mr. Pouono correctly sought instructions from the applicant before withdrawing the action notwithstanding the hopeless position he faced. Nowhere in the applicant's affidavit does he say that he gave Mr. Pouono instructions that he was not to settle the action or that he gave express instructions not to settle on specified terms. I am satisfied therefore that Mr. Pouono had authority to settle on the terms reflected in the consent orders and there is no basis for them to be set aside justifying the grant of leave to appeal.

[18] But that is not an end of the matter and I would refuse leave for other reasons in any event.

[19] The action is based on an alleged agreement between Uilisoni and the respondent. The applicant was not a party to that agreement and he has no right to sue on it. He should never have been a party to the action and has no standing to bring an appeal.

[20] Secondly, even if the applicant had standing there is nothing in his affidavit to indicate that if the action is reheard it has any prospect of success. The applicant says he wants to be heard but not what he wants to say. The prayer for relief in the statement of claim seeks "An order of [sic] directing the parties to carry on what was agreed between them" and in the alternative the cancellation of the agreement and repayment of the TOP$3,000. Uilisoni made it plain that he is happy with how the parties are presently carrying on.

[21] Finally, the amount of money at stake is very modest and the case does not raise any issue of public importance. The interests of the applicant in pursuing an appeal are outweighed by the public interest in ensuring finality of litigation.

[22] Having given careful consideration to the application I refuse leave to appeal for the following reasons:

(22.1) I am satisfied that Mr. Pouono had authority to settle the action.

(22.2) Even if the consent orders were to be set aside the applicant has no standing to bring the action and the action has no merit in any event.

(22.3) Uilisoni has given evidence that he has no grievance with the respondent.

(22.4) The amount at stake is modest and does not justify the costs of an appeal.

10 (22.5) No issues of public importance or principle arise.

Result

[23] The application for leave to appeal is dismissed.

'Otani v Tanaki

Land Court, Nuku'alofa
President Paulsen
LA 21/2015

9 June 2017

Land – leasehold not claimed by heir – in error another registered – court leaves allocation to the Minister

An allotment holder dies, heir (plaintiff) fails to claim within time under section 87 of the Land Act. Another child (defendant) is mistakenly registered as lease holder. The court ordered by consent that the registration of the defendant was illegal and cancelled. The Plaintiff sought also to have himself declared as the rightful lessee.

Held

1. The land had reverted to the estate holder when no claim was made by the heir within the time set by section 87 of the Land Act;
2. It is a matter for the Minister to now weigh the competing applications for the land and the Court will not intervene.

Cases considered

Land Act, section 87

Counsel for the plaintiff:	:	Mrs. F. Vaihu
Counsel for the first defendant	:	Mr. L. Niu SC
Counsel for the second defendant	:	Mr. J Lutui

R U L I N G

The issue

[1] The issue in this case is whether having ordered the Minister to cancel the registrations of the first defendant as the holder of certain tax and town allotments the Court should also declare the plaintiff to be lawful heir of the said town and tax allotments.

The agreed statement of facts

[2] The parties called no witnesses and presented an agreed statement of facts as follows.

[3] Tevita 'Otani Kula was lawfully registered as holder of a town allotment on Salote Road at Ma'ufanga on 21 September 1937. He was also lawfully registered as holder of a tax allotment which comprised two separate lots, one at Umusi and the other at Ha'amoko, both in Ma'ufanga, on 21 September 1939.

[4] All that time, Tevita 'Otani Kula was living together with Fakaanga Hopoi as husband and wife but they were not married to each other. Neither of them had been married to anyone else. They had the following children:

Kalolaine Tangakina Hopoi, born 7 September 1939, female;

Samisoni 'Otani, born 18 August 1942, male (the plaintiff); and

Fine Hopoi, born 26 December 1947, male.

[5] On 15 August 1949, Tevita 'Otani Kula and Fakaanga Hopoi were lawfully married to each other, and thereby rendered the said three children legitimate children by virtue of section 3 of the Legitimacy Act (Cap. 32). Thereafter, the following children were born to them:

Toeumu Kula, female;

Pita Kula Tanaki, male, born 14 June 1951, (first defendant);

Kongika Kula, male, and

'Ilemaile Kula, female.

[6] The wife, Fakaanga Kula, died on 2 January 1958 and Tevita 'Otani Kula then married Lute 'Otani Kula, but they had no children.

[7] On 26 June 1987, Tevita 'Otani Kula died, and [counsel] are not aware if the town and tax allotments were transferred to his widow, Lute 'Otani Kula, but after the widow died on 10 May 2010, the first defendant, Pita Kula Tanaki, filed his affidavit of claim as heir stating therein that Lute 'Otani Kula had held the said town and tax allotments, and claiming that they be transferred to him, on 3 May 2011. The first defendant has been registered as the holder of the town and the allotments.

[8] Samisoni 'Otani, the plaintiff, who is the eldest legitimate son of Tevita 'Otani Kula, did not make any claim for the said town and tax allotments of Tevita 'Otani Kula, either, after Tevita 'Otani died, or after his widow, Lute 'Otani Kula, died, either by himself or by his children or by anyone else for him.

The agreed orders and the agreed issue

[9] Based on these agreed facts the plaintiff and the first defendant stated that the following orders could be made by consent:

(a) The Court declares that the registrations of the first defendant as holder of the said town and tax allotments to be invalid.
(b) The second defendant Minister of Lands is directed to cancel the said registrations of the first defendant forthwith or in the event that the first defendant has not yet been registered as the holder of the town and tax allotments the Minister should proceed no further with the registrations.
(c) There will be no order as to costs.

[10] The only issue for determination is whether the plaintiff is also entitled to an order that he is the lawful heir to the said town and tax allotments of Tevita 'Otani Kula.

[11] I understand from Mr. Lutui that the Minister will abide by the decision of the Court.

The submissions

[12] For the plaintiff, Mrs. Vaihu argues that the plaintiff's birthright as heir cannot be removed and is protected by the Land Act. She relied on the proviso to section 82 of the Land Act and submitted that the plaintiff was entitled to effect posthumous registration of the land.

[13] Although the plaintiff had failed to claim his father's tax and town allotments as required by section 87 of the Land Act, Mrs. Vaihu submitted that the land had not reverted to the estate holder because the first defendant had claimed the land.

[14] In what appears to me to be something of a contradiction to her previous submission, Mrs. Vaihu also argues that there is no prejudice to anyone in the Court making the declaration sought as upon cancellation of the first defendant's registrations the land would revert to the estate holder and be available for grant by the Minister to anyone else who applied for it.

[15] I am unable to accept Mrs. Vaihu's submissions. The proviso to section 82 has no application to this case. It applies upon the 'failure of the deceased

lawful holder of any tax or town allotment to register the same'. In this case the deceased lawful holder was Tevita 'Otani Kula and he did register his tax and town allotments.

[16] It is not correct either that the land did not revert to the estate holder under section 87 because the first defendant applied for it. Under section 87 land reverts if no claim has been lodged 'by or on behalf of the heir' within 12 months from the death of the last holder. The first defendant was not the heir of the last lawful holder. The plaintiff was the heir and he failed to apply for the land as required by section 87. It follows that Mrs. Vaihu is also not correct when she submits that the plaintiff cannot be deprived of his birthright as heir as that is both the intent and effect of section 87.

[17] Finally, I do not accept Mrs. Vaihu's argument that there is no prejudice in me making the order sought. Certainly there will be no prejudice to the plaintiff, but the same cannot be said for the first defendant who, although he has had his registrations cancelled, is entitled to apply for the land. There is force in Mr. Niu's submission that the plaintiff is seeking to gain support for an application for the land that will be made by him or his sons which would be unfair and prejudicial to any application that the first defendant may make for the land. It is up to the Minister to weigh competing applications for the land and it would be wrong for the Court to make orders that could be perceived to express a view or preference.

Result

[18] By consent:

(a) The Court declares that the registrations of the first defendant as holder of the said town and tax allotments formerly registered to his father Tevita Otani Kula to be invalid.

(b) The Minister of Lands is directed to cancel the said registrations of the first defendant forthwith or in the event that the first defendant has not yet been registered as the holder of the town and tax allotments the Minister should proceed no further with the registrations.

(c) There will be no order as to costs.

[19] I do not make the further order sought by the plaintiff.

R v Lao

Supreme Court, Nuku'alofa
Cato J
CR 116/2016

14 June 2017

Evidence — Arson — propensity evidence admitted

The accused was drunk and he sprinkled benzine and set fire to his house, knowing that there were people inside.

Held

1. Convicted on weight of evidence;
2. Propensity evidence is admissible of an earlier incident of arson at the home – the test is whether value of evidence outweighs the prejudicial effect; to exclude the evidence would be an affront to common sense.

Cases considered

Boardman v DPP [1975]AC 421; [1974] 3 All ER 887
R v White (1922) 17 Cr App R 60
R v Carrington [1969 l NZLR 790

Counsel for the Prosecution : Ms. Fakatou
The accused was unrepresented.

V E R D I C T

[1] The accused, Mr. Tevita Lao, was charged with one count of serious arson of a residential dwelling where he was living with others of his family on or about the 7th December 2015, contrary to section 117(1) and (3) (a) of the Criminal Offences Act. He stood trial on the charge before me in a Judge alone case on the 12 -13th of June, 2016. After concluding the evidence and hearing submissions, I adjourned the hearing for a verdict to be delivered on the 14th June, 2017.

[2] The evidence was in a narrow compass. Late in the evening of the 7th December 2015, the accused was drinking with a group of young men in the vicinity of the residential home belonging to an elderly relative Amelia Lao. A witness, a girl named Kaneisini Kioa aged 14, said the accused was her uncle. On the 7th December 2015 she was at her residence where she lived with the accused, his partner, child and others, including her grandmother Po'uha, great grandmother

Amelia Lao, and another relative ‘Apiloni Lao who was also a witness. The accused was her uncle. She was watching movies on a laptop on the 7th December when, at about 1am, she said she saw the accused who was drunk. He had been angry with his little brother who is aged 4 whom she said he beat up. He left and went away again and called for his partner Silivia. She saw him go into the kitchen and take a bottle and used it to sprinkle something in the hallway in the area of two bedrooms one of which was identified as belonging to the accused and his partner, being the one facing to the road. About three minutes later, he was standing in the entrance door to the kitchen calling out for a match or lighter. She said she did not have a match or lighter. After that the accused left and went outside. She said she did not know what else he did after that. She did hear him shouting from outside “when it’s called for burning there will be burning, when it’s called for fire, there will be fire”. She admitted to the accused she did not give him a match and she did not see him lighting a match.

[3] After that, she said her grandmother Po’uha woke her up and she then went and assisted her mother, aged about 90 from the house. She herself did not see any fire until she went outside. She said that it was a short time between seeing him sprinkling and seeing the burning for the first time. She saw fire when outside from the area of the accused’s bedroom. She saw him going about shouting for someone to get him a pair of scissors to cut his hair with.

[4] Po’uha Lokosuka who is the aunt of the accused said that the house belonged to her mother Amelia Lao. The house was in Tatakamotonga in the Eastern side of Tongatapu. She confirmed that she was the grandmother of Kaneisini Kiao. She did not see the accused before or after the fire. She had been sleeping in the living room with Kaneisini who was watching movies on her laptop before the fire. She ran to the other side of the house where her brother ‘Apiloni Lao was sleeping, and kicked the door open. They managed to get her mother out of the house. She said she did not see Silivia, the accused’s partner, or a boy in the house.

[5] When asked about problems with Tevita in the household, she said one of the problems was when Tevita got drunk. Tevita was her nephew. She gave evidence of an earlier incident where the accused had set clothes alight after an argument with his partner. I considered after consultation with the Crown that this was sufficiently relevant in the circumstances of his present alleged offending for the Crown to lead this evidence from the witness. It emerged that a month before the accused had set fire to a suitcase of clothes belonging to his child, because he had been upset with his partner. The burning of the suitcase had taken place outside.

[6] Mr. ‘Apiloni Lao, aged 41 gave evidence that the accused was his nephew. He said a lot of people lived in the house. He said Tevita had gone and got drunk. He said Tevita’s girlfriend was outside. He said he met up with Tevita outside when the house was burning. He said the fire was in the two bedrooms on the other side. He said that he had not gone into Tevita’s room and he had not smelt anything. At this point, the Crown Prosecutor Ms. Fakatou asked that he be made hostile. Having had translated for me a relevant part of the witness’s police statement and it being read over to him, because he could not read, and he admitting the truth of what he had said to the Police, I allowed the Crown to further approach him as a hostile witness. ‘Apiloni admitted that he saw the room that belonged to the accused was burning. The fire came from that room and he smelt benzine in the room. The fire came from the burning of clothes in a suit case in the room.

[7] He also said he had seen the accused’s partner, Silivia made it outside . She was hiding from Tevita who was calling out for her. He was calling out to her to fix him food. He said he had seen Tevita earlier in the living room. He said Tevita was drunk and his partner was afraid of him because when he asks for food and he is drunk and there is no food he beats her up. He said he saw him on that night beat her up.

[8] The accused gave evidence and said he had gone for a drink up with the boys. He had got initially $50 pa’anga from his partner and bought one bottle of spirits. Then he got more money he said $150.00 from her later after they had finished that bottle. She had told him that he was being foolish. After that, she went outside and he asked Kaneisini for a match to light his cigarette. He continued drinking about 50 metres away from the house. From then someone screamed out and saw the house on fire. He called for his girlfriend and child. He went inside and part of the ceiling came down on his back. He said he went outside and used water to spray on his back. He said that he saw Po’uha and Amelia and they hugged and he had said to them it was all right because no lives were lost and that it was all right to think about how to rebuild the house. He said the Police came and he was taken to hospital. He had not asked any questions of any of the witnesses concerning returning to the house or receiving burns, or being taken to hospital.

[9] Under cross-examination, he admitted slapping his partner during their argument, and going back to the group drinking. He admitted going to Kaneisini before going out, but denied picking up any bottle and said there was no kerosene or benzene at their house. He said he asked Kaneisini because she was the one who often used cigarettes to light tobacco for the old lady. He did not spray anything

around. He admitted to an earlier incident of burning a suitcase full of clothes. He denied this was because he was angry but because clothes were too big for his child. His girlfriend had become angry and said it was a waste of the yams of his that had been given to his mother for the clothes. He said that Apiloni had attacked him outside. He denied lighting fire to the clothes in his room. He denied using a match to light any fire. He said he got a match from a Chinese shop 50 metres away and smoked there. He said he did not come back to the house before the fire. He said he only ran to the house later after it was burned suffering some injury from a falling ceiling. He admitted he got on well with Kaneisini but that maybe she was lying.

Findings

[10] I accept the evidence of the witness Kaneisini that she had seen the accused come back drunk in the late evening and had seen him with a bottle scattering some liquid in the area of the hallway around his bedroom. I found her a well-spoken, 14 year old who gave a careful account of what she saw, and I had no reason to doubt the accuracy of her account. Her grandmother confirmed that she had been earlier watching videos on a laptop that evening as she had said before the fire. I accept Kaneisini had heard the accused shouting outside "when it's called for burning there will be burning, when it's called for fire, there will be fire." She assisted her great grandmother to get out of the house. I consider that the accused's words outside before the fire could be taken to evidence his awareness of the fact that a fire would occur.

[11] I accept that, on the night in question, the accused was drunk. He had slapped his wife at least during an altercation they had that evening. I accept the evidence of 'Apiloni that his partner was frightened of him. He was I find in a bad mood. I also accept the evidence of his aunt Po'uha Lokosuka that when he had been drinking there could be problems. I consider of relevance the evidence that a month before the residence was burnt down the accused had been involved in another incident where he had set fire to clothes after an argument with his partner. I found unconvincing his explanation that this was because she had complained that the clothes were obtained from his mother for yams were too big for the child. In my view, the evidence was relevant because it established the propensity of the accused when agitated or annoyed with his wife and under stress to react by burning property. Although this was a suitcase of clothes and burned outside and there is no evidence that he had been drinking, at that time, his conduct in my view is so unusual that its probative value in this case outweighed its prejudicial effect, and it was relevant in the circumstances of this case as an item of evidence to identify the arsonist. Boardman v DPP [1975] AC 421; [1974] 3 All ER 887 has been qualified in a number of later English cases (eg OPP v P [1991] 2 AC 447) to

diminish the need to show a "striking" similarity, to justify admissibility of propensity evidence. What is required is that the cogency of the propensity evidence outweighs the prejudicial nature of it. In the circumstances of this case where the accused has had a domestic argument with his partner, has been seen sprinkling some substance from a bottle in the vicinity of the accused's bedroom and has asked for a lighter, and then, outside is heard making comments suggesting his knowledge that a fire might take place, it is of considerable relevance, in my view, that the accused on a previous occasion after an argument with his partner, had reacted by burning property. To exclude this evidence to adopt a phrase used in Boardman would be an affront to common sense.

[12] I accept the evidence adduced from 'Apiloni Lao, albeit that he had been declared hostile, that he saw clothes burning in a suitcase in the accused's room, and the smell of benzene. Although often evidence from a hostile witness is of value only to impugn the credit of that witness as where he admits making a previous inconsistent statement but denies the truth of that statement or resiles from it, see R v White (1922) 17 Cr App R 60, it can be otherwise if the witness admits the truth of what has been said in the earlier statement, when giving evidence (R v Carrington [1969 l NZLR 790 (CA)). In this case, I am satisfied that, although initially denying having gone into the accused's bedroom after being confronted with his earlier statement to the contrary, he admitted that he had gone into the room and had smelt what he thought was benzene. I can take this evidence into account generally on the issue of identification of the instigator of the fire. I would add here that I considered that this witness until he was confronted with what he had said earlier to police was being guarded concerning his nephew's involvement, but that after he appreciated he was on record as saying much more, he admitted the truth of what he had told police earlier and I take this evidence into account on the issue of identification.

[13] In my view, the combination of the evidence of Kaneisini concerning seeing him with a bottle taken from the kitchen and sprinkling liquid around, asking for a match even though he did not receive one, the fact that the seat of the fire is seen by 'Apiloni to be in the accused and his partner's bedroom and involved the burning of clothes and a suitcase also, as well as his noticing a smell of benzene, the consistency of this with other witnesses who saw the fire start on that side of the house,·point to the accused's involvement in starting the fire. I also add to this the accused's very strange remarks before the fire that suggested a knowledge a fire would occur and his earlier actions in setting fire to clothes after an earlier argument with his partner, all of which in combination without reasonable doubt point in my view to the accused's guilt in deliberately commencing a fire which he would know would spread to the house.

[14] I did not accept the evidence of the accused. I can well understand when sober the grim reality of what he did and the grave danger his actions posed for several members of his family, is understandably something which he would want to deny. I accept he was angry and drunk that evening. I accept that his actions as reported by Kaneisini that night demonstrated a callous disregard or indifference to the danger he was putting the occupants in, all who seemed to be members of his family, and were consistent with his being very angry. I do not accept his denials of sprinkling the area with substance from a bottle and I cannot see any justification for this in the circumstances of this case other than his using some accelerant. This is also consistent with the observation of 'Apiloni that he smelt benzene in the accused's bedroom. Nor can I see any justification for his strange utterance outside "when it's called for burning there will be burning, when it's called for fire, there will be fire other than as his awareness a fire would arise.

[15] Accordingly, I accept beyond a reasonable doubt that the Crown has proven on or about the 8th December 2015 at Takamotonga, Tongatapu, the accused Tevita Lao did wilfully and without lawful justification set fire to a house which belonged to "Amelia Lao"; and knew or was reckless that human life is endangered when he set fire to that house because he knew it was occupied by people at the time he set fire to the house. I find him guilty of serious arson. He is remanded in custody for sentence.

R v Finau

Supreme Court, Nuku'alofa
Cato J
CR 34/2017

21 June 2017

Criminal law — perjury — untrue affidavit regarding heirship — mistake of fact may negative mens rea

The accused was the third son but the eldest had died and the next lived in the USA and had said he had no intention to claim after his father died. Some land had reverted to the Crown when unclaimed by an heir and the accused had claimed but that claim was pending with the Ministry. The accused had also made an informal application to the Court for letters of administration in the estate. The accused knew he was not the heir, but since he was the eldest son left in Tonga, he thought he had stepped into the shoes of the heir.

Held

1. Unable to conclude beyond reasonable doubt that the accused knowingly made a false statement and he is acquitted;
2. A genuine mistake, of civil law, may negative mens rea.

Cases considered

R v Smith [1974] QB 354

Counsel for the Crown: Ms. Akauola and Ms. Fakatou
Counsel for the accused: Mr. Tu'utafaiva

V E R D I C T

[1] The accused, Mr. Kaitu'u 'I Pangai Finau aged 62, appeared before me on one count of perjury contrary to section 63(1) of the Criminal Offences Act in that he did make an affidavit stating that he was the rightful heir to his deceased father's money and land and knew such statement to be false.

[2] The evidence established that in the affidavit which he swore before Principal Magistrate Mafi on the 15th April 2011, and had confirmed the contents

to be true and correct, he recited in paragraph 3 that his father had died on the 2nd April 2010 at Nukunuku and further, in paragraph 4 said;

> "I hereby solemnly swear and affirm that I am the heir to the land and all other properties and monies in the Westpac of Tonga A/No20007585 saving account $3032.00 belonging to my father (Finau Latu aka Laulotu Finau)".

[3] During the course of the hearing it emerged that the affidavit had been sworn to enable him to make a claim to the moneys in the bank account from the bank. This had not been successful and shortly after the accused had filed an application by letter to the Supreme Court on the 19th May 2011 for authorization to claim and use that money. This application was made under the Probate Act, and was I am told essentially a claim under section 12 for letters of administration of the estate. In this application, he had also described himself as "Kaitu'u 'I Pangai Finau, heir to all the lands and property of my father, Laulotu Finau, who has passed away on the 2nd April 2011". It would seem clear that his father had died much earlier in fact than the 2nd of April 2011 as recited in the affidavit. Indeed, the accused in evidence had not been able to give the date of his death and seemed rather uncertain as to when this had arisen. It seems likely, however, that his father had died sometime in 2009 or 2010.

[4] The evidence established to my satisfaction that Solomone, the accused's eldest brother and the first in line to his father, Laulotu's estate, had died without issue and as such the heir under Tonga's succession law of primogeniture was Fetaliaki Finau, who was the second male child, and not the accused, who was the third male child. Solomone Finau had died in about July, 2010. I am satisfied, however, that Fetaliaki had lived in America for many years, had never returned to Tonga, and had made no claim to any of his father's estate in Tonga. He had no children. At the time of the swearing of the affidavit, it would appear that the only male members of the family still living in Tonga was the accused and one other younger brother, Valamalua. The complainant, who was the fourth son, had left Tonga in 2009 for New Zealand and had returned in 2015, being an overstayer. There was, I heard a dispute between the accused and the complainant concerning the latter living on an allotment registered in the name of the accused's son Matafonua on which I heard little. In about 15th August 2016 however the complainant brought to the attention of the police the affidavit sworn by the accused and shortly after, on the 22nd August 2016, the accused was interviewed by police.

[5] At the time of the swearing of the affidavit, in or about 15th April 2011, I am satisfied that, as the accused said in his statement in answer to charges, Fetaliaki had lived overseas for many years and had waived any exercise of any rights he might have to be heir after this father had died. No evidence was led to contradict the assertions that the accused made further to police that he had met with Fetaliaki at his elder brother Solomone's funeral which took place in 2010, and that Fetaliaki had told him he did not intend to go back to Tonga, had no children or wife and he understood had waived any claim to property in Tonga. I am satisfied that Fetaliaki made no claim for either land or other property of his father in Tonga, and had never evinced any intention to do so. At the time the affidavit had been sworn by the accused Fetaliaki was still alive.

[6] It was the accused's case that he did not knowingly swear a false affidavit and that he honestly believed that he was the heir to the land and property of this father because Fetaliaki had no intention of taking up any property. At an earlier time, the suggestion, according to the accused, was that at his father's insistence Fetaliaki should take up the allotment at Matafonua which he did not do. Apparently, this had been registered in the accused's son's name. When he came to make application for any remaining land or the money in the bank account, the accused asserted he was able to do so because, as the next male in line living in Tonga, he was the heir to what remained. During the course of his evidence he indicated also that he believed, as the eldest son living in Tonga and because he had borne much of the family expense, he became the heir to his father's property in Tonga.

[7] In a claim first filed in 2010 and it seems continued in 2012 the accused made claim to some land in Fatai that had formed part of a taxation allotment belonging to his father. This had not been claimed within the statutory time period of 12 months from his elder brother Solomone's death by the lawful heir Fetaliaki, and had reverted to the estate holder. A claim for this land, I was informed, could be made by any member of the family and was usually favourably entertained by the Minister if the heir did not claim it, and thus the land would remain within the family. I was told that the accused had applied for this land as he was entitled to do but that it has not been granted as of today.

[8] The father had apparently not left a will, so that under section 11 of the Probate Act, from the death of the intestate until administration, his personal property had been vested in the Court. Under section 12, if within three years of the date of being vested in the Court no claimant or other person has been found to be the next of kin to the deceased or to have established a right to the property, the proceeds of the estate became the property of the Crown and are paid into general

revenue. The accused would have been entitled to claim the money in equal shares with his siblings still alive or their grandchildren under clause 12 of the First schedule to the Act. It would seem his claim was made shortly after the affidavit had been sworn and although this was not produced to the Court the letter produced in evidence to the Court for authorization to claim and use that money was submitted in the name of the accused in or about the 19th May 2011 as the son and heir to the lands and property of his father who had passed away on the 2nd April 2011.

[9] The accused was interviewed about the matter on the 22nd August 2016, after a complaint had been made by his younger brother to the police concerning his affidavit a few days before. The accused then gave as a reason that he swore the affidavit because he was trying to get lands back which had been lost. In fact there were two portions of land one at Fatai and another at Matafonua as I have said, that had reverted to the estate holder. The affidavit, I am satisfied, was not advanced in support of any application for land. However, in relation to the Fatai application, I am satisfied that the accused had represented that he was the heir to his father's property in Tonga. In another part of his record of interview he said;

> "The reason why I had sworn the affidavit was because the second heir was not here and it has been forty years since he has been in America and he has never come here".

[10] In his record of interview, he had acknowledged that the heir to his father's property was Fetaliaki. In a subsequent statement in answer to a charge of perjury, he maintained, however, that he did not have any thoughts like that. In a further voluntary statement, he said under caution:

> ''I had signed because my elder brother had been in America for 43 years and we met in America for my elder brother, Solomone Finau's funeral, and Hua Fetaliaki told me that he will not go back to Tonga and he had no children or a wife therefore I understood that my brother had waived everything and I was working on two lands that were lost, and when I say I am, it is understood that there is no one else to take back our lands. No one else had the right over the money but me and my younger brother Valamalua and I shared with my younger brother".

[11] The accused gave evidence and, although not altogether clear at times, I considered that his testimony was essentially consistent with what he had told the police. He admitted however, on more than one occasion that he knew his brother was the heir. His affidavit, he said, had been sworn on the basis that his brother

remained in the United States for many years and had made no claim to any of the land or property in Tonga. As such as the next son who was alive and living in Tonga, he believed that he was the heir. He justified this belief also by the fact that he was the eldest brother living in Tonga and had spent money on family matters since his return to Tonga from New Zealand.

[12] This was a belief which was wrong. Fetaliaki was, according to the law of succession and primogeniture, in Tonga still the lawful heir even though he may have made no claim for any of the property in Tonga. The accused was not the heir in law, although this did not prevent him from claiming land that had reverted to the estate holder and he had a valid claim at least for part of the money on deposit under the Probate Act.

[13] The central issue in the case as Mr. Tu'utafaiva pointed out was whether he had knowingly made·a materially false statement that he was the heir to his father's property in his affidavit. I consider there was a further issue in this case however, and one I alerted counsel to, which was closely related to the issue of whether a false statement had been knowingly or wilfully made. If I were satisfied that the accused had possibly sworn the affidavit in a genuine but mistaken belief that he was entitled to regard himself as the heir to his father's estate, in the circumstances as they had developed to the point where he swore the affidavit, then was he entitled to an acquittal? Although the law is not completely clear in this area, there is authority that a genuine mistake, of civil law may negative mens rea. Thus, in R v Smith [1974] QB 354 the Court of Appeal quashed a conviction for criminal·damage where the appellant had removed speakers he believed were his own but in fact belonged as fixtures to his landlord because he had attached them to the wall in his rented house although he was aware of the facts that made the property the landlord's namely when he had attached them to the wall, he was not aware that by his actions they belonged to the landlord and consequently he was not entitled to remove them. The Court of Appeal considered that the gravamen was the destruction or damage of property that was known or suspected by the appellant to belong to another, and on this the appellant wrongly believed he was the owner. Simester and Sullivan "Criminal Law", 2nd ed 2003, Oxford and Portland Oregon, at page 556, comment;

> "Another way of categorizing the appropriate ruling in Smith is to say that a mistake of civil law was in issue and questions of civil law are equivalent to questions of fact".

Although, as these commentators point out, the cases are not altogether consistent in this area, I consider that I am required to address this issue as it pertains to the

accused's belief and whether the statement complained about in his affidavit was wilfully or knowingly false at the time it was made.

[14] Whilst at times, the accused meandered and was sometimes uncertain in his recall of events such as the date of his father's death, causing his counsel some irritation and I had certain difficulty at times in following his evidence and accordingly had intervened more often than I would have liked, I have paid close attention to his claim that he honestly believed, for the reasons he gave, that he was at the time of signing the affidavit the heir to his father's property in Tonga. He had, as Mr. Tu'utafaiva said, given his explanation to the police several years after swearing the affidavit, when first interviewed about the matter, without it seems any advance warning, and so it was not an explanation that could be seen as opportunistically advanced at trial for the first time. Whilst it is true that stating he was the heir may have given his claim to the land the appearance of greater substance and likewise the claim to the money, he was as the next surviving son in a stronger position in any event to claim the reverted land from the Minister, and in the absence of any other claimant also make a strong claim to at least part of the money. I was informed that in fact the Court paid out the money to him under a grant of administration. He gave evidence that he had shared the money with his younger brother and other relatives and I have no reason to doubt this. Whilst it may be that he advanced the affidavit to strengthen his claims to the bank to the money's distribution, for which he was not successful, and likewise made a similar assertion to the Minister in his application for the land which remains in abeyance, and also in his correspondence with this Court concerning probate, I am left in a state of doubt as to, when he made out his affidavit, his claim to be the heir in Tonga of his father's property was beyond reasonable doubt knowingly false. There was no suggestion he had taken legal advice on the question. Nor had he been given advice that he could not describe himself as his father's heir, even in circumstances where Fetaliaki had been living overseas for a long period and had not evinced any desire to claim property in Tonga, or had waived any interest in property, as he said. I heard no evidence that he was a well-educated man having worked for a sawmill in New Zealand. Nor did he strike me as a man who was plainly deceptive.I also note, as I have said that, in any event, he had strong claims to both the land in reversion and the money or at least some of it, which was a small sum anyway. This would lessen any motive to deliberately create a false impression concerning his status as heir. Nor did I find his explanation in all the circumstances to be so unreasonable or disingenuous that it had to be false and mere suspicion that this could well be so is not sufficient basis for conviction. Accordingly, I cannot find beyond a reasonable doubt as the prosecution submitted was the case, that the statement he made although false and materially so, was one that he knew was false at the time he swore the affidavit.

[15] Accordingly, I acquit the accused on the charge of perjury, and he is discharged.

R v Sio Vaka

Supreme Court, Nuku'alofa
Cato J
CR 90/2016

13 June 2017

Criminal Law — manslaughter —accused earlier beaten — stabbed in fear — self-defence?

The accused had been beaten and returned home to arm himself with a knife and return. The fighting continued from stronger men and the accused stabbed the deceased. The Judge accepts that the accused stabbed when he was in fear of being seriously injured or killed.

Held

Crown was unable to disprove that the stabbing was in self-defence; the accused was acquitted.

Cases considered

Palmer v The Queen [1971] AC 814, at 831-832
R v Mcinnes (1971) 55 Cr App R 551

Counsel for the Prosecution : Mr. 'Aho
Counsel for the Accused : Mr. Tu'utafaiva

V E R D I C T

[1] The accused, Sio Vaka, was charged on indictment with one count of manslaughter contrary to sections 85, 86(1)(a) and (2), 92 and 93, of the Criminal Offences Act, and in the alternative, one count of causing grievous bodily harm contrary to section 106(1) and 2(a) of the Criminal Offences Act. His trial commenced on the 5th June, 2017 and ended with submissions on the 9th June, 2017. At the conclusion of the submissions, I adjourned the trial to consider my verdict.

[2] The evidence is in a fairly narrow compass. On the 17th January 2016, the accused aged 20 had been on the receiving end of several assaults, in Fua'amotu; the worst being that he had been hit by a rock which caused him sufficient

discomfort. He had tried with this mother who had been informed of his injury in early evening to get assistance to travel to the hospital for treatment. The account of earlier assaults was given by the accused in his police record of interview and corroborated by his mother who had seen injuries to his head and face. I accept that he had been the victim of earlier assaults, and that one had been quite serious.

[3] I accept also that the accused, as he admitted in his record of interview, was plainly so angry after being assaulted that he went home and obtained from the kitchen a sharp knife. The knife was produced in evidence. The blade was narrow and sharp and looked to be about 6-7 inches in length. The accused admitted in his record of interview that he was furious about being beaten, went home and took the family's cooking knife, then walked through a cemetery. He got a rock in one hand and had the knife in the other and then returned to the area where he had been attacked. He said that if he were to find anyone there who had beaten him that he would injure and beat the person with the knife and a rock.

[4] He went back to the area known as the "fale kapa" around where the incident had happened and met up with other young men. One was Aleki Vea who was a witness in the case aged about 15, and another Sione Fakatene who was the younger brother of the deceased, aged about 17. I accept, contrary to the accused's account that he did show the group the knife and said that if he would see anyone·he would stab that person with the knife. He also punched Aleki and he asked where the. boys were who had attacked him. After this, he left.

[5] Probably within half an hour, he met up with his mother, Talafaiva. She had learned that he had been injured and found him in the street. The two then proceeded to try to locate someone with a car who could drive the accused to hospital. They were walking in the township around an area known as the cross roads when the deceased Lipine, aged 35, and his young brother Sione came up to them. The evidence revealed that Lipine had been informed that the boys had been threatened by the accused at the "fale kapa". I find that this resulted in Lipine and Sione approaching the accused and his mother and then Lipine punched the accused with sufficient force to cause him to stagger back. I accept that Lipine was a strongly built man and bigger than Sione who also appeared to be robust. The accused by comparison was slightly built, and rather thin. I also accept that the mother Talafaiva intervened, attempted to stand between Lipine and her son and tried to hold Lipine back but was unable to do so.

[6] I accept the evidence of Sione who was present nearby that he fronted up to the accused and was prepared to fight but that he did not become further involved because the accused pulled the knife on him in a stabbing movement or

movements which he avoided. I accept that, shortly after this, Lipine punched the accused several times so he quite possibly saw the deceased produce the knife in his confrontation with Sione. During this assault, the accused may have attempted to cover his head and then retaliated by stabbing the deceased with a knife twice with sufficient force to enter deep into the body and sever an artery close to the heart. This caused bleeding and lung and heart complications. The deceased collapsed shortly after and died before reaching hospital.

[7] As one would accept, witnesses to the incident vary in their accounts. The area where the fatal incident took place seems to have been dark, and the incident was over in a short period of time. From about 15 metres, a witness, Aleki Vea, who had been assaulted by the accused earlier, saw Lipine punch only once and the accused retaliated with the knife. He did not see Sione punch the accused, but he was nearby and he saw him run after the accused after the stabbing. He said he saw the accused fall down after the punch and appear to guard his head and face; although he seemed to be rather uncertain about this, suggesting that the accused held up only his right hand and the deceased was stabbed shortly after this. He confirmed that Lipine had been informed by a member of their group the accused had threatened their group with a knife; and he had been expecting a fight to occur.

[8] The accused, in his evidence, did not mention Sione being involved in any punching until after he had stabbed the deceased, and Sione then attacked him. He denied pulling a knife on Sione. Talafaiva said that Sione was also involved fighting her son before the stabbing and that she had not seen the stabbing because she had turned away to see other people approaching. She saw the accused run off as his brother approached.

[9] As I have said, I prefer the evidence of Sione who, I thought, was a witness who did not appear to embellish his evidence. He was adamant that the accused had first pulled a knife on him as he had fronted him, also after Lipine had first punched him. I accept his evidence that he was prepared to punch the accused ·but did not because the accused had pulled the knife on him. I accept that, about that time, his brother Lipine became further involved with the accused retaliating by stabbing Lipine twice with the knife causing the fatal wound from which he died. The accused then ran away towards his brother and ran home.

[10] No question was asked by the interviewing officer as to why the accused had used the knife which he admitted he knew could cause injury or death. The accused in examination in chief, had responded, in answer to a question put by Mr. Tu'utafaiva as to why did you get your knife, that he was trying to find a way he could move away from him. He said the accused kept punching him while he was

guarding himself and that he had stabbed him because firstly he was afraid and, secondly, he was trying to push him away. He said that the next thing he could see was the deceased falling backwards with blood on his shirt and he ran away. He said Sione attacked him and then he fell back when he saw the knife. He ran towards his brother and then home with the knife. I have said I prefer the account given by Sione on that point that he had confronted the accused prior to the stabbing.

[11] Under cross-examination from Mr. 'Aho who had received negative answers to a series of questions suggesting that he had been angry when he used the knife, the accused, whilst asserting that he had been afraid, admitted, in his voluntary statement, that what he did had been wrong and he was a sinner. In re-examination, Mr. Tu'utafaiva asked the accused if he knew what he was doing was wrong, why had he done it. The accused's answer was "Just because I was afraid and I feel I was going to die to what they have done to me.".

[12] Whilst I do not accept the accuracy of the accused's evidence in all respects, I paid close attention to his evidence on this issue which was of central importance to his state of mind at the time of the stabbing. I consider that when giving this answer, he was quite possibly telling the truth. He was a slightly built man and had been the victim of a serious assault earlier in the day. As I have said, the deceased and his brother Sione, both strongly built men, were very close to him when Lipine had hit with a punch that had made him stagger. I accept that Lipine then punched him several times after Sione had commenced to become involved and the accused had produced the knife. Although his mother was present she had been unable to stop the assault. I am satisfied that the stabbing took place during the period when Lipine was further assaulting the accused with several punches and the two brothers were close together. I am further satisfied that the stabbing took place when the accused was in an obvious state of fear that he could be seriously injured if not killed. I accept that, at that stage the stabbing was defensive and was not the subject of reprisal or revenge. This would have been otherwise, if contrary to my finding, any threat of serious harm had passed when the accused had stabbed Lipine.

[13] The remaining question is, has the Crown discharged the onus of proof it bears of negativing self-defence because the use of a knife, in these circumstances, involved excessive force? Mr. Tu'utafaiva submitted that it was not and that, in all the circumstances, it was a reasonable and indeed he submitted the only response he could have made. Mr. 'Aho contended it was an over-reaction to the threat the men presented and was consistent with the angry attitude of revenge or retribution he had displayed earlier when he had taken out the knife determined to use it on his

attackers. Whilst I acknowledge that the accused was in an angry mood when he went out with the knife and shortly after assaulted Aleki Vea at the "fale kapa"·area, it is at the time the accused stabbed Lipine that I must judge whether his response to the assault was reasonable defence, or, as the Crown submitted, excessive.

[14] I am greatly assisted by the leading Privy Council case of Palmer v The Queen [1971] AC 814, at 831-832 which has been followed in England in R v Mcinnes (1971) 55 Cr App R 551 where Lord Morris when delivering the judgement of the Board observed;

> " It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous, others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter: if there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of self-defence. But their Lordships consider .... "that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this they will acquit.".

[15] Applying this approach, I am satisfied that the actions of the accused in stabbing the deceased were in self-defence he, believing that he was in peril of death or, it follows, at least serious harm. In these circumstances, I accept that in his moment of anguish he did what he honestly and instinctively believed was necessary to avoid the serious peril that confronted him. In those circumstances, applying the approach in Palmer, the use of the knife to stab is potent evidence that only reasonable defensive action had been taken. As I have said, I am unable to reject his evidence that at the time of the stabbing he believed that he was in peril of serious harm. In his state of mind I cannot say that the actions of the accused were, beyond any reasonable doubt excessive, being the standard of proof the Crown is required to attain in order that the self-defence is rejected. Accordingly I accept that the accused at the material time of the stabbing had acted in self-defence and not out of revenge. The accused is accordingly acquitted of manslaughter and discharged from the indictment.

[16] I wish to make it clear that this judgement does not condone the accused's foolish action in taking a knife from his home to use in retribution or to avenge the actions of others who had assaulted him, earlier in the day. Had he used the knife to avenge the actions of others who had assaulted him he, likely, would have been prosecuted had others been harmed. As events developed, he was assaulted by the deceased Lipine who was likely motivated by the accused's actions earlier at the "fale kapa" after he had assaulted Aleki Vea in the presence of Sione and had produced the knife stating his intention to use it on those who had attacked him, earlier. There was no evidence, however, that Lipine or Sione had been involved in any earlier assault. What followed as a consequence of the accused's wrongheaded decision to return home, take a knife from the kitchen and return to the scene so as to avenge the earlier assaults, ended ultimately in the tragic death of Lipine Fakatane. Knives and other weapons should not be carried by young men for the purpose of fighting and this case is a demonstration of the very tragic consequences that can occur when they are.

Finau v Finau and Minister of Lands

Land Court, Nuku'alofa
President Paulsen
LA 31/2015

21 June 2017

Land — standing to dispute title

The Defendant, occupier of land (uncle) refuses to vacate land and claims that Plaintiffs' lease should be cancelled. The Defendant says there was an impediment to the granting of the lease, namely that the land was occupied and the Minister failed to inspect the allotments before granting the lease. The first problem for the Defendant is whether he has standing to dispute the validity of the Plaintiff's lease.

Held

1. A person who at the time of a grant is in actual occupation of land is entitled to challenge a grant in defence of an action to eject him;
2. A grant of a town allotment in breach of section 50 of the Land Act was not for that reason alone invalid;
3. Whether the presence of a building on an allotment is an impediment to a grant must depend on the individual circumstances of each case.

Cases considered

Skeen v Sovaleni [2005] Tonga LR 298
Tu'akoi v Tu'akoi [2016] (Unreported Land Court, LA 24 of 2008, 6 May 2016, Scott J
Schaumkel v 'Aholelei (Unreported, Court of Appeal, AC 14/2012, 17 April 2013)
Naulu v Tupou and Others [2016] Tonga LR 163
Folau v Taione (Unreported, Land Court, LA 06 of 2015)

Statute considered

Land Act section 50(e)

Counsel for the plaintiffs : Mr. S. Tu'utafaiva
Counsel for the defendant : Mr. L. Niu SC
Counsel for the third party : Mr. 'A Kefu SC and Mrs. E Langi

RULING

The claim and counterclaim

[1] The plaintiffs are brothers. They were born in New Zealand and educated in Tonga. They have town allotments at Fatai and Matafonua respectively. The defendant is the plaintiffs' uncle and is occupying their allotments. The plaintiffs wish to evict him. The defendant says that the plaintiffs' grants of their town allotments are unlawful. He counterclaims for orders that the Minister be directed to cancel the grants.

[2] Broadly the defendant argues that the grants are unlawful because the Minister failed to inspect the allotments before making the grants, that there were impediments to the grants as the allotments were occupied and built upon and in the case of the second plaintiff that he was not entitled to be granted land at Matafonua when he was not a resident there.

[3] There is a preliminary hurdle that the defendant must overcome which is whether he has any standing to challenge the plaintiffs' grants.

The witnesses and credibility

[4] There are disputed questions of fact. I have no reservations about the credibility of the plaintiffs or the Minister's witness Seli Taufa. However, the main protagonists are the defendant and the plaintiffs' father, Kaitu'u Finau (Kaitu'u). This action has its genesis in a disagreement between them and they gave most of the evidence. I found neither to be reliable witnesses. They hold intransigent views, gave some quite implausible evidence and both developed their evidence on their feet in certain respects.

The facts

The Fatai allotment

[5] The plaintiffs' grandfather was Laulotu Finau (Laulotu). He had 11 legitimate children with his first wife. The eldest child and son was Solomone. The second child was a son called 'Elone. The third child was a daughter called Lu'isa. The fourth child and third son was Kaitu'u. The defendant was the fifth child and fourth son. The sixth child and fifth son was Malua. The eighth child and seventh son was Sione.

[6] Laulotu had a town allotment and tax allotment at Fatai. In 1997 he surrendered 2 acres of his tax allotment in favour of Kaitu'u and the remainder was subdivided into town allotments for other sons including Sione. A deed of grant was never issued to Sione but his grant was validly made. The first plaintiff's allotment was formerly Sione's allotment.

[7] Sione lived in New Zealand. In February 1988 he married a Rarotongan woman and they had a son in November 1988 called 'Atonio. It is not clear to me if Sione ever lived on his allotment. Around 2003 a house and a small shop was built on Sione's allotment for Lu'isa's daughter who is Viola. The defendant says Lu'isa paid for the materials but he did the construction work. He does not claim ownership of the house. Viola and her uncle Malua moved into the house and Viola operated the shop.

[8] In 2006 Sione died and his funeral was held at New Zealand. Neither Sione's widow nor 'Antonio made any claim for Sione's land following his death. As a result, the land reverted to the estate holder (in this case the Crown).

[9] The defendant says that after the funeral Laulotu told Lu'isa that Viola should continue to live in Sione's house as if she was renting it from 'Antonio and 'we all agreed'. I find this evidence implausible as Laulotu had no rights over Sione's allotment but nothing turns on this. Viola continued to live on the allotment with Malua until around 2009 but then moved away. In around 2009 also Malua married and his wife lived with him. In 2011 Malua died and his wife returned to her family. No one lived on the allotment for a time.

[10] The defendant and his wife lived and operated a shop from a town allotment at Matafonua (which is the subject of the second plaintiffs' claim). In 2009 they moved to New Zealand. The defendant's evidence was that they went to New Zealand with a container of cassava and because they did not get the money they wanted for the cassava, they remained to pay off the freight and related expenses. He denied that he intended to stay permanently in New Zealand. I find that when the defendant and his wife left Tonga, they had an intention to remain in New Zealand. They had an existing business in Tonga to repay the debt but the defendant said he left his shop and all its contents with Laulotu 'to do with as he wished'. That does not suggest he was concerned about raising money to pay debt. It is consistent with an intention to leave Tonga permanently. Furthermore, they lived in New Zealand for six years until 2015. The defendant gave no evidence about the size of his debt which would require such a lengthy stay in New Zealand. The defendant said at one point that the debt was 'finished' in 2014 but they did not return to Tonga then and remained in New Zealand as overstayers. The reason

the defendant and his wife finally returned to Tonga was because their son, Maile, was seriously ill and later sadly died.

[11] On 16 March 2011 Kaitu'u wrote to the Minister of Lands asking that Sione's land be registered in his name. He noted that five years had passed since Sione's death and said that Sione had a wife and a son and that they were foreign citizens who lived overseas. He also said that the reason for his request was that this was hereditary land and that he was 'the next entitled heir to our father Laulotu Finau'.

[12] The Ministry was aware that there was a house on Sione's land. There is a Ministry note on Kaitu'u's letter of 16 March 2011 which reads:

> NOTE: The death certificate of Sione F Finau is required and there is a dwelling house of Sione according to Kaitu'u Finau

[13] On 23 June 2011 Kaitu'u wrote to the Minister again with 'a new proposition' that the land be registered to his son, the first plaintiff, who he said had turned 16, was a Tongan subject and domiciled in Tonga.

[14] The first plaintiff applied for the land and on 13 August 2012 the Minister granted him the land. In a Savingram of that date to the Secretary of Lands the Minister wrote:

> Kindly prepare the Deed of Grant of the Tax Allotment of the above-mentioned person.
>
> I grant this to Solomone Grahame Finau today and he is currently living in the piece of land....
>
> Once it is ready then return it for registration.

[15] Both Laulotu Jnr and Maile (the defendant's sons) had town allotments but did not live on them. In 2012 Laulotu Jnr and his family moved onto the first plaintiff's allotment. In 2013 they were joined by Maile. It appears this was before the first plaintiff and second plaintiff returned to New Zealand in early 2013 and late 2012 respectively. The evidence did not establish whether Laulotu Jnr moved onto the allotment before or after the allotment was granted to the first plaintiff. The plaintiffs were clearly unsure when exactly Laulotu Jnr moved onto the land. The defendant did not call Laulotu Jnr to give evidence about the matter and in answer to a question from Mr. Kefu the defendant said that he did not know about the land between 2011 and 2015.

[16] The first plaintiff's deed of grant was issued to him on 2 April 2014.

[17] The defendant's wife returned to Tonga in early 2015 and she lived with Laulotu Jnr (and his family) and Maile on the first plaintiff's allotment. She had an argument with Viola and could not operate the shop from Fatai but with the permission of Kaitu'u she re-opened the shop at Matafonua. In October 2015 the defendant returned to Tonga. Since then Laulotu Jnr and his family have moved from the first plaintiff's allotment and he has made no claim to the land.

The Matafonua allotment

[18] The second plaintiff's town allotment is in the estate of Lord Tu'ivakano and was first registered in 1931 to Sitivini 'Esi. Upon his death it was registered to Finau Vala and he died in 1971. Finau Vala's son and heir was Solomone Snr who was Laulotu's father. Solomone Snr had predeceased Finau. Laulotu already had a town allotment and so Laulotu's eldest son Solomone Jnr was registered as the holder of the allotment in 1971. Laulotu and his wife then moved from Fatai to Matafonua. The defendant went with them and married in 1974 and remained at Matafonua until 2009. Solomone Jnr did not live on the allotment. He lived in the United States.

[19] What was described as a hurricane house was built on the allotment. This was replaced in around 1986 with a substantial house which was 36 x 24 feet with four bedrooms and a large lounge. A smaller building was also built which was 36 x 12 feet with a kitchen, dining room, laundry, bathroom and toilet. These are still on the allotment. There is a dispute about who built and paid for the house.

[20] The defendant says that Laulotu's children contributed to the materials whilst he paid the carpenter and his workers and for their daily food. Kaitu'u says that in 1985 he discussed with Laulotu about building a house for him. His siblings were asked to send money but when they did not do so he built the house. Kaitu'u said the house is his and he told everyone in his family.

[21] Mr. Niu submitted that the defendant's evidence should be preferred as it was more detailed than Kaitu'u's evidence. I do not accept that. Kaitu'u gave evidence about why he built the house, how he earned his money (he was selling building materials at the time), he identified the builder and the rates he paid the builder and labourers. Mr. Niu says Kaitu'u never before claimed the house but Kaitu'u denies that and there were no witnesses other than the defendant to contradict him. That is not to say that I accept Kaitu'u's evidence that he went so far as to tell 'everyone in my family' that he owned the house. It is true that there is

no reference to·Kaitu'u owning the house in the statement of claim but rightly so as it is not a matter that is material to the second plaintiff's claim. There is no mention of the matter in Kaitu'u's brief of evidence either but that is a skeletal document that was clearly never intended to cover all of Kaitu'u's evidence. Mr. Niu said that the defendant had no opportunity to call evidence in rebuttal of Kaitu'u's evidence but this is misconceived as the issue was raised by the defendant. Mr. Niu also submitted that Kaitu'u would not build a house on land that was registered to someone else particularly when he had elder brothers before him but the answer to that is he built the house for his father to live in, he did not have a town allotment at the time and his older brothers had no heirs. In the absence of some corroborating evidence, which neither the defendant nor Kaitu'u produced, I am unable to make a finding as to who built and paid for the house. However it is plain and I find that the house was built for Laulotu and it was his house and not the house of the defendant or Kaitu'u.

[22] In1998 the defendant and his wife built a shop on the allotment and operated that shop until 2009 when they moved to New Zealand.

[23] Both Laulotu and Solomone Jnr died in around 2010. Solomone had no children and no one claimed his allotment and it reverted to the estate holder. There is no evidence that anyone claimed Laulotu's house. It appears that the allotment was not occupied between late 2010 and 2015. There was the suggestion that Viola may have lived there from time to time but that she married during this period and moved to Fangaloto.

[24] The second plaintiff applied for the allotment in 2012. He was living on Kaitu'u's town allotment at Fatai. There was an issue whether the estate holder consented to the application in 2010 or 2012 but I am satisfied he signed the application in 2012. I do not understand the defendant to make anything of this.

[25] On 2 April 2012 the Minister approved the grant to the second plaintiff. On 16 April 2012 the Minister directed that a deed of grant be prepared for the second plaintiff.

[26] The Ministry did not conduct an inspection of the allotment. In his written brief Seli Taufa said that Kaitu'u informed him that there were no buildings or improvements or occupants on the allotment. In his oral evidence he said that he was mistaken about that and despite cross examination he remained firm. I find that Kaitu'u did not inform the Ministry that there were no buildings or improvements on the land.

[27] The second plaintiff's deed of grant was issued on 25 May 2012.

The defendant's submissions

The Fatai allotment

[28] The counterclaim as it relates to the first plaintiff's land is concise and alleges only that the first plaintiff's grant is invalid because the land was lawfully occupied by Lu'isa who had permitted the defendant to occupy her house and they both, that is Lu'isa and the defendant, were entitled to be heard before the grant to the first plaintiff was made. This was not pursued and the evidence does not support it.

[29] The defendant argues more broadly that the Minister must inspect land which has been applied for 'to ascertain there is no impediment to the grant like the presence of someone else or his building upon the land' and as he did not do so in this case that invalidates the first plaintiff's grant.

[30] He also argues that Kaitu'u grossly misled the Minister into thinking that there was no impediment to the grant by false representations:

[30.1] That the first plaintiff was residing on the land when he was not;
[30.2] That Kaitu'u was Laulotu's heir when the heir was 'Elone; and

[30.3] That there was no building, improvements or occupants on the land.

[31] Related to this the defendant also submits that Kaitu'u misled the Minister by creating a 'false impression' by not informing the Minister that it had been agreed at Sione's funeral that the house on Sione's land was to be occupied by Viola and by emphasizing that 'Antonio was a foreigner and resident overseas.

The Matafonua allotment

[32] Mr. Niu again argues that the Minister was obliged to make an inspection before granting the Matafonua allotment to the second plaintiff and as he had not done so the grant was invalid.

[33] Mr. Niu also, rather more boldly, contends that the allotment was occupied by the children of Laulotu who owned the house and by the defendant because his shop was on the land. He submitted that the Courts have held that it is an impediment to a grant if there is a building belonging to a person situated on the

allotment when the allotment is granted to another person. He relied upon Tafa v Viau anors [2006] Tonga LR 125 (LC), To'a v Taumoepeau & Minister of Lands [2015] Tonga LR 62 and Manu v 'Aholelei and Minister of Lands [2015] Tonga LR 135.

[34] The defendant's final argument is that the second plaintiff's grant was invalid as under section 50 of the Land Act he could not be granted land from the hereditary estate of Tu'ivakano at Matafonua but only from Crown land.

The law

[35] Before considering the defendant's arguments I wish to say something about the law relative to the issue of the defendant's standing and the other matters upon which he relies.

Standing

[36] A person cannot bring a legal action (including as counterclaimant) unless they have a sufficient and vested interest in the subject matter of the action (Halsbury's Laws of England Vol. 37 Practice and Procedure at para 216).

[37] Whether a person has standing is a mixed question of law and fact. The issue of standing cannot be considered in isolation of the nature of the complaint itself.

[38] A person challenging a grant of land must establish that they have proper standing before the grounds of challenge become a relevant consideration. In Skeen v Sovaleni [2005] Tonga LR 298 the plaintiff sought to cancel the first defendant's registration on similar grounds as are advanced by the defendant in this case. Ford J said at page 300:

> The principles applicable to setting aside registration of a deed of grant are also well established. Until it is established to the contrary, the Court will presume that the register is correct. Registration is final unless it has come about as a result of an error of law (i.e. contrary to the Act) or as a result of fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister.
>
> It is axiomatic, however, that before a plaintiff can challenge the registration of any deed of grant, he must have locus standi. The Land Court was not established as a forum for just any busybody...

> .....Before any challenge can be made to registration of a deed of grant a plaintiff. must be able to establish proper standing before the Court. Where, as in the present case, a plaintiff claims an entitlement to the land in question then the basis for his alleged entitlement must be apparent from the pleadings. Once that threshold is established then and only then do the pleaded grounds for setting aside the deed of grant become a relevant consideration.

[39] Another helpful case is Tu'akoi v Tu'akoi [2016] (Unreported Land Court, LA 24 of 2008, 6 May 2016, Scott J) where the plaintiffs sought an order that the surrender of a widow's estate was null and void. The Land Court held that the plaintiffs had no right to advance any claim to be legal successors to the land in question and they therefore had no right to be notified or to be heard in relation to the surrender. Scott J said at [27]:

> In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperiled by the reversion itself.

[40] Relevantly in the present context it has been held that a person who at the time of a grant is in actual occupation of land is entitled to challenge a grant in defence of an action to eject him (Schaumkel v 'Aholelei (Unreported, Court of Appeal, AC 14/2012, 17 April 2013) and see also Pelesikoti v 'Anau [2016] Tonga LR 477.

The Minister's duties

[41] I do not accept the submission Mr. Niu makes for the defendant that the Minister must always carry out an inspection before granting land. It is now well established that the Minister must make such enquires as are reasonably necessary in view of the information before him to determine if land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable. In some cases that will require an inspection and in other cases it may not.

[42] The purpose of this obligation to make enquires is to avoid unjust and unreasonable consequences which might result from the making of a grant.

[43] In Naulu v Tupou and Others [2016] Tonga LR 163 the Court of Appeal set out important principles which can be summarised as follows:

> [43.1] There is no requirement in law that before making a grant the Minister must always undertake an inspection and the extent of the inquiries he must make will depend on the circumstances of the particular case.
>
> [43.2] Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert.
>
> [43.3] Where there are competing applications or where the position is not clear a detailed investigation is to be carried out.
>
> [43.4] The occupation of the land by someone other than the person applying for it does not necessarily render the land unavailable for grant. That will depend upon the nature and history of the occupation.

[44] I do not accept either Mr. Niu's submission that the mere presence of a building on land is an impediment to a grant. That is not correct. Tonga has many empty houses and shops on what appears to be unoccupied land. It cannot be the case that such land can never be granted. Mr. Niu could not refer me to any case that is authority for this proposition and I have not found any. I note that in each of the three cases Mr. Niu relied upon (Tafa, To'a and Manu) the party challenging the grant was in long term occupation of the land. I am not however attempting to lay down hard and fast rules. Whether the presence of a building on an allotment is an impediment to a grant must depend on the individual circumstances of each case.

Section 50 of the Land Act

[45] The defendant submits that the effect of section 50(e) of the Land Act is that residents on the estates of the Crown must only be granted their allotments out of Crown land. The section provides:

> Land for allotments shall be taken from the hereditary estates in accordance with the following rules-
>
> (e) an applicant for an allotment to be granted out of Crown Land shall have his tax and town allotments from such particular portion of Crown Land as the Minister may decide:
>
> Provided that an applicant already resident on Crown Land shall where possible be granted the allotment from the particular area of Crown Land in which the applicant is resident.

[46] In Folau v Taione [2016] Tonga LR 189 I held that a grant of a town allotment in breach of section 50 of the Land Act was not for that reason alone invalid. My reasons can be found in that ruling and having reviewed it I have found no reason to change my view. Mr. Niu was Counsel for the successful plaintiff in Folau which I mention only because he did not advance any arguments that the decision was incorrect.

Discussion

[47] I now turn to consideration of the defendant's arguments on the facts of this case.

The Fatai allotment

[48] Following Sione's death no one claimed his allotment as widow or heir and it reverted to the Crown. Once it had reverted the defendant did not apply for the allotment. At the time of the grant to the first plaintiff the defendant was living in New Zealand. He had never lived on the allotment and he did not have any right to do so. He did not own the house or any improvements on the allotment either. In those circumstances the defendant had no legitimate interest in the allotment (or the house) that was imperiled or lost by the grant to the first plaintiff. Consequently, he has no standing to challenge the first plaintiff's grant.

[49] In his evidence (at [29]) the defendant says that Laulotu Jnr and his family and Maile had rights to live in Sione's house and that their rights to reside there had not ended at the time of the grant. Even if that were true (and I do not accept it) no one removed them from the land and they have not challenged the first plaintiff's grant. The defendant's evidence only confirms that the interests he purports to advance are not his own. The defendant is truly a busybody in the sense that the term was used by Ford J in Skeen. I dismiss his counterclaim on this basis.

Was the Minister required to inspect

[50] It is unnecessary for me to make any finding as to whether the Minister should have inspected the allotment before making the grant to the first plaintiff. I am satisfied that had he conducted an inspection it would have made no difference. The Minister knew that Sione's widow and son lived overseas and had made no claim to the allotment. The defendant did not satisfy me that at the time of the grant to the first plaintiff Laulotu Jnr was living on the allotment. However, even if he was, he had no right to be there and could not have applied for the allotment himself as he had his own town allotment. His brother Maile was clearly not living

on the allotment until after the allotment was granted. The inspection would have revealed nothing to suggest that there was an impediment to the grant.

Was the Minister misled?

[51] Kaitu'u did not mislead the Minister in any respect that was material to the first plaintiff's application. There is no evidence that Kaitu'u informed the Minister that the first plaintiff was living on the allotment and I cannot draw that inference and there was no requirement that the first plaintiff be living on the allotment for it to be granted to him. As far as Kaitu'u claiming to be Laulotu's heir is concerned the evidence was that 'Elone has been living in the United States for 43 years. The defendant called no evidence that 'Elone is still a Tongan subject and entitled to hold land in Tonga (section 4 Nationality Act Cap 58 repealed by section 5 Nationality (Amendment) Act 2007). I am not satisfied that Kaitu'u was not Laulotu's heir when he wrote to the Minister on 16 March 2011and in any event the first plaintiff's application for the land was not dependent upon Kaitu'u being Laulotu's heir. The land had reverted to the Crown and subject to section 43 of the Land Act it was available for grant to any qualifying applicant. The third allegation is that Kaitu'u informed Seli Taufa from the Ministry that there was no building, improvement or occupant on the land. The Ministry was aware that there was a dwelling house on the land. It is noted on Kaitu'u's letter of 16 March 2011. Seli Taufa's evidence was that Kaitu'u told him that the land was vacant and not occupied or used. I consider that advice was correct at the time. Finally, there is nothing in the allegation that Kaitu'u created a false impression as to the occupation and use of the house. I do not believe there was an agreement made at Sione's funeral that Viola would live in Sione's house, but in any event she chose to vacate the allotment well before it was granted to the first plaintiff. The description of 'Atonio as a foreigner, resident overseas and a New Zealand citizen was not material in the circumstances where the allotment had reverted to the Crown but was not in the least misleading either.

The Matafonua allotment

[52] The defendant did not apply for the Matafonua land when it reverted to the estate holder following Salomone Jnr's death. He had not lived on the allotment or operated his shop from there since 2009. The defendant says he was entitled to be heard because of the 'presence of our dwelling house and our shop' on the allotment (see [29] of his brief). In my view he had no such interest in the house or the shop. As far as the house is concerned it belonged to Laulotu and after his death no one claimed it. The defendant also failed to satisfy me that he built or contributed to the building of the house. As far as the shop is concerned the defendant abandoned his interest in the shop to Laulotu when he moved to New

Zealand. It is relevant that when the defendant's wife returned to Tonga, she opened the shop at Matafonua only after obtaining Kaitu'u's permission. The defendant had no legitimate interest in the allotment or buildings that was imperiled or lost by the second plaintiff's grant and he has no standing to challenge the grant.

Should the Minister have inspected the land?

[53] In his submissions Mr. Niu did not identify any matters which put the Minister on notice of the possibility that there was an impediment to the grant to the second plaintiff. The information that was available to the Minister was that Solomone Jnr, the last lawful holder of the land, had died and no one had made a claim to the allotment. The allotment was unoccupied. The only person who did apply for the allotment was the second plaintiff. He had a close family connection to the allotment. A declaration of no impediment was made by the estate holder Lord Tu'ivakano.

[54] Relevantly in the present context are the Court of Appeal's comments in Naulu at [20] where the Court said:

> In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application by Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.
>
> In this case, there was some further, we think significant information available to the Ministry, namely that it had been told by the applicant, 'Amanaki, that Tevita was farming the land.

[55] The factor that distinguishes this case from Naulu is that here there was no further information available to the Ministry to suggest that there might be an impediment to the grant or that the allotment was not available which he was required to follow up. In the circumstances it was reasonable for the Minister to have relied upon the estate holder's certification.

Section 50 of the Land Act

[56] I accept that at the time he applied for his allotment the second plaintiff was resident in Fatai and not at Matafonua but for the reasons I have given the grant is not invalidated for non-compliance with section 50.

Result

[57] The first and second plaintiffs are successful. The defendant, his invitees, servants or agents are to forthwith vacate the first and second plaintiffs' town allotments.

[58] The defendant's counterclaims are dismissed.

[59] The plaintiffs are entitled to their costs to be fixed by the Registrar if not agreed.

R v Hafoka

Supreme Court, Nuku'alofa
Cato J
CR 123/2015

27 June 2017

Sentence — manslaughter — provocation — absence of murderous intent

The accused plea bargained murder for manslaughter with the prosecution. He had been out drinking with his wife and others, including the deceased. The deceased was drunk and asked the accused's wife for sex while they were all in the town square. The wife became angry and the deceased slapped her whereupon the accused fought with him. The deceased ran away and then called on the accused to fight him. The accused had a knife in his pocket and stabbed the deceased in the abdomen.

There was a time delay between the provocation and the stabbing. The provocation was not a violent attack nor indeed any attack – it was an insulting suggestion to the wife.

Held

1. Starting point of 8 years but with mitigation 5 years 9 months with the last 2 years suspended.

Case considered

R v Tui'tavake [2005] Tonga LR 348

Counsel for the Crown	:	Mr. Lutui
The prisoner	:	unrepresented

S E N T E N C E

[1] The prisoner, Tevita Hafoka, entered a late plea of guilty on the 24th April 2017 to one count of manslaughter contrary to sections 85, 86(1) (a) and (2), 92 and 93 of the Criminal Offences Act. He had originally pleaded not guilty on the 15th July 2015 to a count of murder under section 85, which required the Crown to prove that on the 11th July 2015 at Nuku'alofa, he did intend to cause

injury to the deceased Sioeli Finau when he stabbed him with a knife, he knew that injury was likely to cause his death, and he was reckless whether death ensured or not. The Crown accepted the plea of manslaughter in discharge of the indictment for murder.

[2] The prisoner had elected trial by Jury and had maintained this plea up until the date of his trial. He originally had a fixture for trial when he was represented by counsel for the 14th November, 2016, but trial dates were vacated with a final date to commence on the 24th April 2017. On the 21st April, having been given bail, he failed to appear and a warrant to arrest was issued with the direction his trial was to proceed on the 24th April 2017. He was arrested and came before the Court, unrepresented, his counsel having been given leave to withdraw at the earlier hearing, after he had not appeared and had failed to meet his commitment to counsel.

[3] On the 24th April 2016, he appeared before the Court for a trial by jury, and pleaded guilty to manslaughter. I considered for sentencing purposes that the lateness of this plea should reduce the discount for the guilty plea on the ground that it was entered well over a year after his initial plea and on the point of trial. However, the file records that, on the 13th November 2015 when he first appeared before this Court after committal, the proceedings were adjourned to the 6th November 2015 to enable the defence to discuss with the Crown the issue of plea. I am reluctant therefore to diminish the discount because it would appear that the prisoner had initiated plea discussions at a very early date which for some reason had not resulted in a plea being entered earlier.

[4] The agreed facts record that the prisoner, who is about 27 years old and the deceased who was 23 at the time of his death were involved in an incident on the 11th July 2015. The prisoner had been at a bar in Nuku'alofa with his wife and wife's sister. The bar closed at 11.30 and the accused, his wife and sister left the bar and proceeded to the Nukualofa town square whilst the deceased with friends visited a coffee bar nearby. A short while later, the deceased, who was intoxicated, walked over to the accused's wife and asked her for sex. This angered her and she swore at the deceased. He slapped her on the face. The accused saw the deceased slap his wife and he returned to the area. He attacked the deceased and they commenced to fight. The deceased then ran away and called out to the accused from nearby to fight with him. The accused ran to him and took out a small knife from a pocket in his pants and stabbed the deceased in the left side of the abdomen. The deceased fell to the ground and the accused, having thrown the knife away, went back to his wife. The deceased was rushed to hospital by the police but he was declared dead on arrival. The medical report states that the deceased had died

of cardiorespiratory arrest secondary to hemtherae from the stab wound. The accused was co-operative with police and admitted to the offending.

[5] I asked Mr. Lutui who appeared for the Crown on what basis the manslaughter plea had been accepted. It seemed to me there were two possible bases, and that was provocation or doubt as to murderous intent. Indeed, in R v Tui'tavake [2005] Tonga LR 348, at page 352, the Court of Appeal observed that where a verdict of manslaughter could be the result of provocation or lack of murderous intent, the trial judge should determine which is the more likely explanation for the Jury's verdict and give reasons for his decision.

10 [6] In this case, Mr. Lutui appeared to indicate that the plea had been accepted on the ground of provocation. On provocation, it is important to note that the definition of what can constitute extreme provocation under section 89, includes a violent assault committed in the view or presence of the accused person upon his wife. Although it seems that the retaliation with the knife occurred sometime after the assault by the deceased, and may have at trial given rise to serious questions as to whether there had been a loss of self-control or an excessive reaction, I am content to treat the case as one where acceptance of the plea was based on provocation, although it would not have surprised me if the plea had been based on an absence of murderous intent, in the circumstances.

20 [7] That brings me to a consideration of the prisoner's circumstances for sentencing purposes. The probation report indicates that he is married with one young child and is the sole breadwinner, working in a construction company as a builder. He seems not to have had much education leaving in the fifth form at school and then becoming involved in drugs and alcohol with his peers. He has an unimpressive criminal list of convictions commencing in 2005 with housebreaking and theft; more thefts in 2008 for which he was sentenced to 18 months imprisonment being suspended; unlawful assembly, riot and destroying a building for which he was sentenced to two years imprisonment; grievous bodily harm for which he was sentence to four years and six months imprisonment; escaping from
30 lawful custody; trespass and drunkenness. Significantly, the probation report notes that the prisoner had said he had taken the knife to help with cookery at a family funeral prior to going drinking with his wife and a relative, later. The prosecution did not seek to contradict this assertion and I will sentence him on the basis that he had not carried the knife out with an intention to use it in a fight, a finding which in Tui'tavake the Court considered significant, on sentence.

[8] The Crown in a sentencing submission that Mr. Lutui did not prepare submitted that the case fell into para 4 of the sentencing ranges referred to in Tui'tavake. Relevantly, as to provocation these appear as;

> [3] 7 years for moderate provocation and sudden retaliation
>
> [4] 5 years for a high degree of provocation, sudden retaliation, strong mitigation.
>
> [5] 3 years or less for the highest degree of provocation – violent attack, even terror, evoking extreme passion.

These sentencing ranges were derived from a study of the British Sentencing Advisory Panel's consultation paper on Sentencing of Manslaughter by Reason of Provocation. This had been considered by the New Zealand Court of Appeal in ***R v Edwards*** (NZCA 371/04 13th April 2005), and by the Court of Appeal in Tonga in Tu'itavake. It is to be noted that for the worst cases of violence and provocation where firearms were used the range was said to be 12 years and 10 -12 years where a knife was carried and used with great brutality. These were sentences where provocation had been returned after successful defences.

[9] The ranges referred to are guides only, and an actual sentence is fact specific. The Court of Appeal elsewhere in its judgment emphasised that there was no set tariff. In each case, the task of the sentencing Judge was to determine the true culpability of the offender in the particular circumstances of the case. The Court emphasised the sanctity of human life and that the taking of life should be met with appropriate condemnation. However, the Court observed that the sentence imposed should bear relation to the circumstances of the particular offence and the particular offending.

[10] I indicated to Mr. Lutui that I was rather concerned that there was such a time lapse between the provocations and here the retaliation that is the retaliation could not be said to be immediate or sudden loss of self- control. I also note that the kind of assault referred to under section 89 as extreme provocation was one that was described as a violent assault. There was violence here, but to my mind one that was at the lower level being a slap only to the face of the prisoner's wife. Nor was this, like Tu'itavake, where the prisoner had used a knife in response to a very violent assault. I mooted that for sentencing purposes here the starting point should be around 8 years with which Mr. Lutui did not disagree. Over the weekend, I have reflected on this and also the ranges referred to by the British Sentencing Advisory Panel. I concluded that in the circumstances that an appropriate starting point before mitigation would be 8 years to reflect the fact that the prisoner had used a

knife and caused death in circumstances where the assault on his wife had involved a slap only and the retaliation was not one that involved, in my view, an obvious sudden loss of self-control.

[11] From this will be deducted 18 months for his guilty plea and a further six months for his expression of remorse and apology and some reparation he made I am told to the family in the form of mats. I understand the apology was accepted. The accused expressed contrition in the remarks he made on sentence and asked for mercy pointing out that he was the bread winner for his family that included a baby. Family considerations ordinarily do not play a significant role in sentencing but they may be a factor affecting the length of suspension because family considerations may play an important role in rehabilitation. I consider an appropriate sentence for manslaughter in this case is five years and nine months imprisonment taking into account also his family circumstances. I record that had the plea been based on lack of murderous intent even taking into account the initial provocation, a somewhat higher starting point may have been justified. From this is to be deducted any time spent in custody on remand.

[12] I consider that, although he has a poor record, the prisoner may be maturing with his reasonably recently acquired marital status and child, and appreciates their need for support. Although he has a poor record, with his family support in mind, I consider he should be given a further chance to rehabilitate himself and by cooperating with the police and pleading guilty he has justified some of the criteria of Mo'unga. There was also provocation that motivated his actions. His wife was in Court to give him some support. He stated that he had given up alcohol and deeply regretted what he had done. I propose to suspend the final two years of his sentence on the following conditions;

a. He commits no offences punishable by imprisonment for the period of his suspension;

b. He is placed on probation for the period of his suspension;

c. He is to live where directed by his probation officer;

d. He is to undergo the following courses under the direction of probation;

i. A course on drug and alcohol abuse under the direction also of the Salvation Army;

ii. An anger management course.

e. He is not to consume alcohol or drugs during his suspension.

[13] He is warned that a failure to abide by any of these conditions may see him returned to prison to serve the period of his suspension in custody.

R v Mo'unga

Supreme Court, Nuku'alofa
Cato J
CR 33/2017

13 July 2017

Sentence — carnal knowledge — rape — incest — serious indecent assault — multiple counts

The accused was 46 with no previous convictions. He pleaded guilty to sex with a 10 year old. He repeated this at intervals of 5 months, 9 months, 18 months, and another 18 months. 2 years later the victim reported these events to the police. The accused also raped 2 other victims aged 13 and 23 (a niece so this was incest also). There were 3 other victims who were indecently assaulted.

Held

1. Starting point of 15 years for carnal knowledge of child. Reduced to 11 years for remorse, and early plea. 7 years for rape, down to 5 with mitigation.
2. Totality principle applied so not all sentences were concurrent and a net 15 years in prison, with the final 2 years suspended.

S E N T E N C E

[1] The accused was charged with two counts of carnal knowledge of a child contrary to section 121(1) of the Criminal Offences Act, two counts of rape contrary to section 118(1) (a) of the Criminal Offences Act, incest by male contrary to section 132 of the Criminal Offences Act, indecent assault of a child under the age of 12 contrary to section 125 of the Criminal Offences Act, 2 counts of carnal knowledge of a young person contrary to section 121(2) of the Criminal Offences Act, and 5 counts of serious indecent assault contrary to section 124 of the Criminal Offences Act, and one of indecent assault.

[2] The prisoner pleaded guilty to these counts. The probation report states that he was from a medium size Tongan family living on 'Eua. He is aged 46 and has no previous convictions. He had left school at a young age and helped his family with fishing and on a plantation. He moved to Tongatapu after his parents died and earned a reasonable living as a construction worker. He formed a

relationship in 2009 with a woman who had several children, three being female and married her in August 2016. In October, 2016, he was arrested for this offending and remanded in custody.

[3] The offending is serious. The summary of facts to which the prisoner gave his consent refers to the second victim as being the victim of counts 1, 2, 6, 7, 8 and 14 of the counts in the indictment. She was born on 6th November 1999. At the time of the start of offending, she was 10 years old. Her mother was at this time of the offending the prisoner's de facto wife. Victim 2 had returned home in or about October 2010 from school. She was alone with the prisoner who took off her clothes and then proceeded to lick her vagina. He told her not to tell anyone. The next morning, she was asleep in the living room when he carried her to one of the bedrooms, took off her clothes, licked her vagina, sucked her breasts, digitally penetrated her and had sexual intercourse with her. He told her not to tell or they would both go to prison. In or about March 2011, he had sexual intercourse with her again when she was still under the age of 12. In November 2011, she turned 12 and he continued to have unlawful sexual intercourse with her, in July 2013 and October 2014. In November 2014, the second victim turned 15 years old. She reported the matter to police in October 2016. He was arrested and admitted his offending in a record of interview dated 12th October 2016.

[4] A victim impact report suggests that the victim failed to report the matter because she was afraid to do so. She also doubted her mother would believe her. She told the police after another friend of hers had told her about what the prisoner had done to her. She said she considered the prisoner as a stepfather and trusted him. She stated she was very hurt because he had taken her virginity. She had formerly achieved well at school, but her results dropped to the point where she fell to the bottom of the class and eventually left school, in Form 6. Later, she went to live with her father because she did not want to remain in the same household and this led to a breakdown in the relationship with her mother. She developed high blood pressure and has been hospitalized for this. The prisoner had apologized and she said she had forgiven him but only to please her mother. She has formed a stable relationship which has helped her and she plans to marry.

[5] The prisoner also pleaded guilty to two rapes on different victims. Victim 3 was aged 13 at the time of the offending, in March 2012. She was acquainted with the accused. The prisoner entered the house where she was alone, and forced himself upon her, removing her clothes and raped her (Count 3). Tragically, although the third victim reported the matter to police and the accused admitted to his offending, the complaint was never dealt with until it was referred to the Attorney-Generals' Office in 15th November, 2016. An inquiry made by this Court

of the Police Commissioner revealed that the matter had not been handled properly due it seems to an officer leaving the force and then an incompetent lack of action by another who has since resigned from the force. As a consequence, the prisoner was not charged until another series of sexual offences had been committed. These would have been avoided had action been taken promptly. A victim impact report has not been obtained for this victim but a 2012 report was produced from the Women's Crisis Centre indicating that the incident had seriously affected her mentally, sexually and emotionally. She spent at least 5 months at this safe house. Nothing more is known about her.

[6] Victim 5 (count 4 rape and count 5 incest) was 23 at the time of the offending. She was the prisoner's niece. She resided with the prisoner and his defacto partner in Popua. She had come to Tonga to work and, on a day off, was raped in her bedroom by the prisoner. She did not report this incident although she moved her accommodation eventually due to the emotional effect the offending had upon her. She did not report the incident until the 11th October 2016. The prisoner admitted this offending. This victim in her impact statement indicated the prisoner had not apologized to her, and reading the report it is plain that the offending has understandably had a significant impact upon her.

[7] There were other victims. Victim one was 15 years old and she awoke in the prisoner's home to find that he was holding her hand stroking his penis (Count 13, serious indecent assault). She had been sleeping over with victim 2 who was a friend. She did not make a complaint until October 2016. The prisoner admitted this offending.

[8] Victim 4 (Counts 9 and 10 of serious indecent assault) was 16 years old and a friend of victim 2. She was invited to dinner by the accused's de facto partner. The prisoner during the evening in 2013 did various acts of indecency including touching her vagina outside her pants and used his toes to touch her vagina outside her pants.

[9] Victim six (count 11, serious indecent assault) was 16 and friends with the second victim. She also was sleeping over in March 2016 and when sleeping awoke to find the prisoner was licking her vagina. She did not report this until the 11th October, 2016 but the prisoner admitted the offending in his record of interview.

[10] Victim 7 (count 12, serious indecent assault) was 18 at the time of the offending and a sister of the fourth victim. She also went to the residence to play cards with the second victim and others in July 2016. They were sleeping in the

living room when the prisoner placed her hand on his penis. As a consequence, she told his defacto wife and reported the matter to the police on the 12 October, 2016. He admitted his part in the offending.

[11] Plainly, this is very serious offending. Carnal knowledge of a child under the age of 12 carries a maximum sentence of life imprisonment. Recently, I have had to deal with a number of cases of this kind. Whilst the starting point for rape is five years in Tonga which could be considered a modest starting point judged by overseas experience, although usually there are, I have found, aggravating features present that uplift this starting point, the sentences of this court have involved starting points of 10-11 years for carnal knowledge. Plainly, a significant starting point is required in cases where young children are involved (consistently with Parliament's intention by the provision of a maximum sentence of life imprisonment) to deter and denounce predatory sexual conduct, and to protect children. The starting point I adopt here on count one which I will regard as the head sentence is 10 years imprisonment. I adopt an overall starting point of 15 years, however, to take into account also the carnal knowledge offending on count 2, and also that the prisoner was in a position of trust as the child's de facto parent. This also covers his later intercourse with her after she turned 12, (Counts 7 and 8) being offences of carnal knowledge of a young person contrary to section 121(12) of the Criminal Offences Act, and two counts of indecent assault, one of which occurred when she was a child under the age of 12 (Count 6) and involved licking her vagina.

[12] From this, by way of mitigation I deduct for his timely guilty plea, lack of previous convictions, and his expression of remorse in the witness box in which he said that he had found God, and quoted scripture, a total of four years imprisonment. I convict and sentence him on Count one to 11 years imprisonment, this sentence to be backdated to the date of his remand in custody on this offending.

[13] On Count 2, the second count of carnal knowledge of a child under the age of 12, I convict and sentence him to 9 years imprisonment to be served concurrently with count one.

[14] On Counts 7, and 8, carnal knowledge of a young person where he was the victim's stepfather, I convict and sentence him to three and a half years imprisonment on each Count to be served concurrently with Count one.

[15] On Count 6, serious indecent assault (licking vagina) of a child under the age of 12, I convict and sentence him to 2 years imprisonment to be concurrent with Count one.

[16] On Count 14, indecent assault for which no sensible particular of offending was provided, he is convicted and discharged.

[17] I have also considered his convictions for the counts of rape. In relation to Count 3, victim 3 was only 13 years old at the time of the offending and he entered her bedroom in the house where she was staying by climbing up and in through the windows. I consider a starting point is 7 years imprisonment because of her age and after discount of his guilty plea and lack of previous convictions, I convict and sentence him to 5 years imprisonment on this count. In relation to this Count, after applying the totality principle, I order that four years of this sentence be served cumulatively upon the term of imprisonment on Count one of 11 years imprisonment making an overall term of imprisonment of 15 years backdated to the time of his remand in custody. I consider that this overall period, represents the seriousness of the totality of his offending on more than one victim. On the Count of incest, Count 4, he is convicted and sentenced to three years imprisonment to be served concurrently with the sentence on Count 1.

[18] In relation to Count 5, rape of an older victim aged 23 who was, however, his niece I sentence him to a starting point of 7 years imprisonment, and after mitigation of his guilty plea, previous character and some remorse, he is convicted and his sentence on this Count is also five years imprisonment. This sentence is to be served concurrently with the sentence imposed on Count one.

[19] In relation to the other Counts, on Counts 9 and 10, on the fourth victim which involved serious indecent assault, Count 9 touching her vagina on two occasions outside her pants, he is convicted and sentenced to 12 months imprisonment, and for placing her hand on his penis (Count 10) he is convicted and sentenced to 15 months imprisonment both to be served concurrently with the sentence imposed on Count 1.

[20] In relation to Count 11, serious indecent assault on the sixth victim (licking vagina), he is convicted and sentenced to 18 months imprisonment; Count 12, serious indecent assault on the seventh victim (placing her hand on penis), to 15 months imprisonment; Count 13, serious indecent assault (holding her hand on penis), to 15 months imprisonment. These sentences are to be served concurrently with the sentence on Count 1.

[21] I have considered the issue of suspension and I consider that the prisoner is entitled to a period of suspension because he has pleaded guilty, is a first offender has been co-operative, and has shown some remorse for his actions. I accordingly suspend the final two years of the combined sentence on Counts one and three of 15 years on the following conditions;

> He is not to commit any offences punishable by way of imprisonment for the period of his suspension;
>
> He is on probation to live where directed by his probation officer and is not to reside with girls or women during the period of his suspension;
>
> He is to undergo at the direction of probation appropriate course and counselling for sexual abuse with the appropriate agency.

[22] He has been warned that any failure to perform these conditions may see him returned to prison to serve the balance of his term of imprisonment.

[23] He has been warned also that any repeat of his offending as it relates to carnal knowledge of females under the age of 12 might well mean he is sentenced to life imprisonment.

[24] I summarise the sentences imposed:

Count one – carnal knowledge of a child, 11 years imprisonment;

Count 2 - carnal knowledge of a child, 9 years imprisonment to be served concurrent with the sentence imposed on count one;

Count 3 - rape, 5 years imprisonment, the first 4 years to be served cumulatively upon the sentence imposed on count 1;

The final two years of this combined sentence of 15 years imprisonment is to be suspended on the following terms.

He is not to commit any offences punishable by way of imprisonment for the period of his suspension.

He is on probation to live where directed by his probation officer and is not to reside with girls or women during the period of his suspension.

He is to undergo at the direction of probation appropriate course and counselling for sexual abuse with the appropriate agency.

He has been warned that any failure to perform these conditions may see him returned to prison to serve the balance of his term of imprisonment.

Count 4 – incest, three years imprisonment to be served concurrent with the sentence imposed on Count 1;

Count 5 - rape, five years imprisonment. This sentence is to be served concurrently with the sentence imposed on Count one;

Count 6 - serious indecent assault (licking vagina) of a child under the age of 12, 2 years imprisonment to be concurrent with Count one;

Count 7 - carnal knowledge of a young person three and a half years imprisonment to be served concurrently with Count one;

Count 8 - carnal knowledge of a young person three and a half years imprisonment to be served concurrently with Count one;

Count 9 – serious indecent assault touching vagina outside pants, 12 months imprisonment, to be served concurrently with the sentence imposed on count 1;

Count 10 – serious indecent assault, (placing her hand on his penis), 15 months imprisonment to be served concurrently with sentence imposed on count 1;

Count 11 - serious indecent assault (licking vagina), 18 months imprisonment to be served concurrently with sentence imposed with Count 1;

Count 12 - serious indecent assault (placing her hand on penis), 15 months imprisonment to be served concurrently with sentence imposed with Count 1;

Count 13 - serious indecent assault (holding her hand on penis), 15 months imprisonment to be served concurrently with the sentence imposed on Count 1;

Count 14 - indecent assault, convicted and discharged.

R v Mafi

Supreme Court, Nuku'alofa
Cato J
CR 65/2017

21 July 2017

Rape — abduction —very drunk couple

The accused takes a very drunk woman in his car and they have sex – he says by consent, she says with threats and refusal to let her go. There was some talk of marriage. The case was one of the credibility of the witnesses.

Held

Guilty of rape and abduction

Counsel for the Prosecution	:	Mr. Finau and Ms. Kafa
The Accused	:	unrepresented

V E R D I C T

[1] The accused, Sione Mafi, was charged with three counts of rape contrary to section 118(1)(a) of the Criminal Offences Act and one count of abduction of a woman contrary to section 128 of the Criminal Offences Act arising out of an incident on the 15th February 2017, at Haveluliku.

THE EVIDENCE

[2] The complainant was aged 19 at the time of the incident which occurred on the 15th February 2017 at Haveluliku on the eastern area of Tongatapu. She and two friends had been drinking vodka in the village of Kolonga at about 9 or 10 pm when the accused drove up in his car. By that stage, the complainant and her friends Viliami and Manitisa, whom the complainant said were her cousins, had consumed two bottles of vodka. Manitisa was about to go and buy another. The accused stopped and Manitisa got into his car. The complainant said she had not met the accused before that evening. After that, the complainant and Viliami got into the car also and they drove and purchased another bottle. The complainant said that they then went to a beach area at Kolonga and she then asked to be driven

closer to where her mother lived. It was decided they would go and drink at a cemetery which was closer to where the complainant lived with her parents.

[3] They drank there for a lengthy period in the car. The complainant said Viliami asked that they be driven home about 3am but the accused appeared to have passed out. Viliami asked why had he passed out when they were about to leave? Viliami got out of the vehicle and said that they would walk home. Manitisa, she recalled, was still drinking with the accused in the car. She did not recall anything else until she was later dragged into the car. She said she felt her head bang and she woke up inside the vehicle on her own with the accused. She was in the back seat.

[4] She said she was a bit sober after she had dozed off to sleep. She said when she had woken up the car was being driven by the accused. She said she asked the accused where Manitisa and Viliami were? He said that Manitisa and Viliami had beaten her and left her at the cemetery and he was the one that had helped her. She said this was at about 4-4.30. The accused said that they were at Fua'amotu. He parked in a bush area. He came to the backseat. She said she was crying and said her cousins would not treat her like that. She then asked to be taken home. He said he would not do that until they had intercourse. He threatened her when she said no and said he would shoot her and leave her in the area. He then, she said, took off her clothes, touched her body and forced her to have intercourse. She said she kept moving around and that it was not easy for him to insert his penis into her vagina. She cried afterwards, and was concerned about her mother not knowing where she was. She said she had not consented to intercourse and was concerned about his threats.

[5] There was then discussion about marriage. The accused asked her if she wanted to get married and she said no. He said if she wanted to go home they should get married. She said yes because she was afraid of what he might do to her if she refused namely that he might beat her to death and leave her there.

[6] He then said they would go to his aunt's home and pick her up and then go back to her house and talk marriage. She said they left the bush area about 11am. She said the accused was walking around looking for a can and found one which he used to smoke some leaves. He then forced her to take her clothes off and told her not to shout or yell, because nobody would hear her. He took off her clothes and had intercourse with her. It was she said without her consent.

[7] He then said they would pick his aunt up and go and arrange the wedding. They then came out onto the East coast road at an area between Haveluliku and

Niutoua. They went to his aunt's place she thought at Fatumu but she was not there. He then drove into Nukualofa and went to an ATM machine and said he was going to buy goods to take to her place. He locked the car and told her if she tried to escape he would kill her. He stopped at a Chinese shop and purchased some chicken, in Havelu as they drove out of town. At about 3-4pm, they arrived at an area around Niutoua. He asked to have sexual intercourse again. He had turned into a bush area. He said if she wanted to go home she should have sexual intercourse and arrange their marriage. He said to do what he says if she wanted to stay alive. He took her clothes off the bottom part and sexual intercourse took place. She said she did not consent. After that, he said they would go home to arrange their marriage.

[8] She said he had wanted them to go into her home together but she went in and saw her mother and cried and explained to her that she had met the accused whilst drinking, had not known him, and that he had raped her and she was glad to get home alive.

[9] The mother then saw the accused and told the complainant that was the man who had propositioned her in Fiji. The complainant rang her cousins to find out why she was beaten and explained to them that Sione had raped her and she had just got home. Viliami and Manitisa came around and attacked the accused. Her mother rang the police whilst the complainant had a shower.

[10] She denied she was drunk during any of the sexual intercourse episodes. She said intercourse was painful because she did not consent to it.

[11] Under cross-examination by the accused, she denied trying to get money out of the accused. She denied dancing in front of him. She denied asking him to go into the bushes with her. She denied going to sleep in his car. She said she did not recall vomiting in the car. She denied asking to go to the accused's home. The accused put to her that it was not at Fatumu but Ha'asini they had tried to locate his aunt. She denied asking him for money or chicken. She said she told him she wanted some slippers at Veitongo so that he would travel along the main road, and not go by way of a coastal route back. She admitted that at one point he had asked if she loved him. She said she had told him she did not love him and the only thing they talked about was marriage. She said that he said if they did not get married he would kill her. She denied that the third episode occurred after the car engine was cooling down. She denied saying they could have a quick one or her taking her clothes off. He questioned her about whether her mother had told her they had sex in Fiji and she said only that he had propositioned her. The accused put to her there

was only one incident of sex and that was around Niutoua before he took her home. She said that he had ejaculated during all the episodes.

[12] The accused participated in a record of interview, in which he admitted meeting up with the complainant and her friends who were looking to buy a bottle of liquor. He did not know them. He said they were drunk and they purchased liquor then drove to a beach and a cemetery where they parked and drank. They were drinking about an hour when the complainant passed out drunk. Later Mani (Manitisa) and Pila (Viliami) got angry with him and pulled the complainant out of his car. Mani, he said, then told him to go to Kolonga to buy some marijuana. He gave Mani money who walked to a house to buy marijuana, and he was doubtful that he would return so he left him and went back to the others. Pila and the complainant had passed out drunk. The complainant was woken up by him to have a drink and he said that she got up and vomited into the back of his car. He said he did not drag her into the car. The complainant had passed out drunk when he left the cemetery. He said he was already thinking of her whilst they had been drinking.

[13] He had parked in a bush area when she woke up so no one would know them when they went by. He admitted that he had lied about being at Fua'amotu. He said the complainant said she wanted to go back home. He said to her they should get married and tell her parents and ask to get married. He said it was lies that he had said he would shoot her. He said he passed out drunk at about 9am. Later, they went to Ha'asini to see a woman to come to her parents for them to get married but they could not find her so the plan changed to getting a box of chicken and money to be given to her family. He said he got $500 from an ATM and some chicken in town. He said they drove back to the same area they had come from in the East. They drove to an area and waited for the car to cool down. The accused said that he asked her to have sex with him if she loved him. He claimed that she took off her clothes and consensual sexual intercourse took place. He said after that he went to ask for her parent's consent to marry. He said she got off first and walked to her place and he came with the chicken and was attacked by Mani and Pila. He said he spoke with her father and said he had come to marry the complainant and asked for his forgiveness for going with her. Her mother had shouted at him that is the man who had asked of me in Fiji. He maintained that the complainant had consented to sexual intercourse. The accused elected not to give evidence, nor did he call any evidence. I draw no adverse inference against him because of his election not to give or call evidence.

[14] In his written statement of charges form, he admitted the charge of abduction but denied rape.

[15] In his voluntary statement, he said;

> "We did plan to marry and the plan to go to Ha'asini to bring my aunty so that we can go and speak with her parents. That is why we turned to have sex to show that she loves me and I feel that I really love her. I know that she is hurt because of her mother saying that we had something in Fiji and that is the reason why she didn't do what we had promised, and I am still striving for her and keeping our promise.".

[16] The complainant's mother gave evidence and said that she had encountered the accused by chance on a trip to Fiji. They had ended up in a motel but, although the accused had propositioned her for sexual intercourse and also had got on top of her, intercourse had not taken place. She said that she had only discussed this with her husband and had told the complainant on the 15th February, 2017 that the accused had propositioned her in Fiji only after she had seen him at her home in Kolonga.

[17] Manitisa gave evidence and said they had been drinking from 8-9pm on the 14th February 2017. The accused had joined them at 10.30 to 11. The accused had said he had resided at Kolonga a long time ago and was at Niutoua doing tattoos. They went in his vehicle to get another bottle. They went back to the cemetery and consumed alcohol and marijuana. All of them smoked. The complainant and Viliami passed out on the grass outside the vehicle. After that bottle was finished, he said the accused wanted to get more alcohol and he went with the accused to get a bottle. The store they had been to earlier was closed so he went to another place to purchase, and the accused drove off and left him. After running back to the cemetery, he saw the accused's car leaving Niutoua. Viliami was asleep on the ground. He could not wake him up so he left him and went home. He said the complainant had rung him the next day and asked him why they had left her for the accused to take her. She told him she had been raped. He denied the accused's suggestion in cross-examination that they had gone to get marijuana. He denied that the accused had given him money to buy marijuana. He said the complainant informed him that the accused had told her that he and Viliami had beaten her up and left her at the cemetery.

FINDINGS

[18] This case essentially involves an issue of credibility. The central issues are whether there was beyond a reasonable doubt an abduction, and whether beyond reasonable doubt there were three instances of non-consensual sexual intercourse and not just the one as the accused's claimed in his record of interview and maintained in his cross-examination.

[19] I considered closely the complainant's evidence as she was giving her evidence, and also took into account that conviction relied beyond any reasonable doubt on the integrity of her evidence. Although she admitted having passing out at the cemetery and was plainly serious affected by a combination of alcohol and drugs, before she says being dragged into the car, I consider that she did sober up after finding that she was alone in the car with the accused and was driving in an unknown area. I consider that she was a mature witness in the sense that she gave her evidence carefully and I do not think that she embellished her account. The accused did, in his record of interview, admit that she had asked to go home, and I find that she did on more than one occasion. This would have been a very frightening and indeed harrowing experience for any woman. I accept beyond reasonable doubt that she was telling the truth that the accused had sexual intercourse with her on three occasions that evening, all without her consent. I accept also that he had threatened to harm her that evening if she resisted and would only take her home if they had intercourse.

[20] I do not accept the accused's account as stated in his record of interview that over such a long period between what I find, beyond a reasonable doubt, was the commencement of an abduction at the cemetery to her arrival home there was only one episode of sexual intercourse and that it was consensual. That episode according to the accused took place in the later stages of the abduction that is several hours after they had left the cemetery at Kolonga. Given the accused said in his record of interview that he had developed some feelings towards her as they were drinking together, I consider it most unlikely that the evening developed as he explained with some kind of courtship ending in a sole act of consensual intercourse. I accept beyond any reasonable doubt that all acts of intercourse were non-consensual.

[21] I find also that the complainant told her mother about the rape and her detention prior to the mother stating that was the man who had propositioned her. Her actions in telling her mother what had occurred was entirely consistent with her being raped, and not those of a person contemplating marriage after a consensual but short-lived affair. I reject entirely any suggestion that the mother and complainant conspired together to falsely implicate the accused because of his action with the mother in Fiji. I heard mother give evidence and formed the view that, although she had rather foolishly allowed herself to be involved in a compromising situation in the motel room with the accused, that she was an honest woman who had rung the police out of concern for her daughter and not for any collateral, personal or vindictive reason. Indeed, the account she gave of the accused's behaviour in Fiji was reminiscent I consider of the way the accused opportunistically and in a predatory way had pursued her daughter. The accused's

conduct in Fiji was no more than a very unusual coincidence in this case. I am satisfied it was no more than that, and whatever did happen in Fiji between the accused and the mother, it was not causative of any false complaint.

[22] I consider that the accused was probably adversely affected by alcohol and by the consumption, during the evening, of marijuana. I have no doubt he had designs on the complainant at an early stage of their meeting and that is why he left Manitisa and went back to the cemetery, on his own hoping to take up with the complainant. Aware that she and Viliami had passed out he dragged her into the car and made off leaving Viliami behind, asleep. In his record of interview, the accused said when he came back to the cemetery the complainant and Viliami had passed out drunk. The complainant said she felt she was being dragged into the car and woke up when she felt a bump. I think it most unlikely the complainant would have got up and voluntarily got into the car, alone. I think it likely that the accused was able to do this only because Viliami had passed out on the ground because, if he had been awake, I doubt that he would have allowed the accused to put the complainant in his car, and drive off. I accept the evidence of Manitisa also that he had been left behind by the accused, having attempted to buy more alcohol and not drugs as the accused claimed. I accept that when he arrived back at the cemetery, he had seen the accused departing Niutoua with the complainant and he had left Viliami asleep to go to his home. I consider that the only reason the accused left Manitisa behind was, as I have said, to have access to the complainant.

[23] I consider the accused's assertions in his record of interview that he had designs of marrying the complainant from the outset to be no more than a fantasy at best. He had barely known her before dragging her into the car and driving away and she was plainly at that time in a rather intoxicated state, and vulnerable. I am satisfied that this was no genuine courtship ending in a sole act of consensual intercourse as some seal of approval prior to seeking the parent's approval to marriage. I consider that it is likely that the accused in an attempt to minimize the criminality of his actions and in a somewhat deluded state, befuddled by alcohol and marijuana, wanted to present to her parents a picture of the two falling in love and wishing to marry as a justification for her being away for so long with him, and as a cover for his actions. The fact he chose to deliver chicken to the family and possibly money to appease them, also is consistent with this motive. I consider his actions brazen. I find the complainant understandably went along with his talk of marriage and really had no other choice if she was to get home, safe. It is to her credit that throughout this ordeal she appears not to have panicked but to have acquiesced in the accused's suggestion of marriage so as to ensure that she arrived home without harm.

[24] I find beyond reasonable doubt that during the evening of the 15th February 2017, the complainant had non-consensual sexual intercourse and was raped by the accused on three occasions. I also find that there was no basis for the accused to have an honest but mistaken belief that she was consenting to intercourse, on any occasion.

[25] On the count of abduction, I consider that beyond any reasonable doubt, she was taken by force that is she was dragged into the car by the accused, and also beyond reasonable doubt that was with the intent of carnally knowing her. In this regard, I accept that, on more than one occasion, she asked to be taken home after coming to her senses and that the accused had threatened her at times, taken her to remote areas, all with the intent from the time of taking her away to have carnal knowledge of her. I note and accept Mr. Finau's submission that when in his record of interview after the complainant had got into his vehicle, the accused stated "I said to myself I have food as she was already in the van", as evidence of his contemporaneous state of mind and of his desire to have carnal knowledge of her. Indeed, he seems to admit abduction when the charges were read to him, but I do not rely on this in coming to this verdict. The passage of events speaks emphatically of his intention to take her away from the cemetery at Kolonga and have carnal knowledge of her.

VERDICT

[26] I find the accused guilty on all counts beyond reasonable doubt, convict him accordingly and remand him in custody for sentence.

'Ulu'ave v R

Supreme Court, Nuku'alofa
Cato J
AM 7/2017

24 July 2017

Sentencing — Magistrate fails to give any reasons for his sentence — re-sentence on appeal

The accused is convicted of the theft of a cow and sentenced by the Magistrate to 18 months. The Magistrate gave no reasons for the sentence and the Judge says without reasons the court on appeal can better sentence the accused.

Held

Sentence manifestly excessive – reduced to 12 months fully suspended.

J U D G M E N T

[1] The appellant, Paula 'Ulu'ave, appealed against his conviction for the theft of a cow and his sentence of 18 months imprisonment commencing 20th March 2017, with the last 6 months suspended for two years. I gave an oral judgment today (the 21st July, 2017) dismissing the appeal against conviction and upholding the appeal against sentence. I said that I would record the material part of my judgement in writing.

[2] In so far as the conviction is concerned, there was in my view, no basis for interfering with the judgment of the Magistrate convicting the appellant of theft. An eyewitness saw the slaughter of the animal which was tethered adjacent to the appellant's father's property and on the complainant's property, and assisted the appellant to take it away. The animal had been sold for a funeral at a price well below the complainant's market value for the animal. The accused had told various witnesses that his father owned the cow which was in conflict with what his father had said in evidence, namely that he was not missing such a cow.

[3] As to the sentence, however, the Magistrate gave no reasons for his sentence despite the accused making some effort to mitigate. I have said on several occasions that reasons for sentencing judgements must be given so that the recipient is made fully aware as to the basis or foundation for his or her sentence.

That is fundamental for the good and fair administration of criminal justice, and means that, if the sentence is appealed, the Court is in a position to better evaluate the propriety of the sentence. Not only do reasons assure transparency, but they also cause the sentencer to pause, reflect and justify his or her sentence in a principled way, rather than rush to judgment and arrive at an ill-considered and possibly incorrect sentence.

[4] I accordingly decided to resentence the appellant. The Crown had conceded that the sentence was manifestly excessive suggesting a period of imprisonment of three months. I consider that short terms of imprisonment although fashionable in bygone days should be avoided if at all possible. The value of the cow was said to be $3,000.00. As such under section 145 the maximum sentence is 7 years imprisonment. Although the accused had some theft convictions, they were many years ago. He said his wife was pregnant and asked for mercy. I consider that the theft and rather brutal killing of the animal was a serious criminal matter because cows are very valuable for many Tongan families and they are often tethered insecurely at road sides or in insecure properties making them easy targets for theft. I consider that the sentence I impose should act as a deterrent but also, I do not forget that the appellant has not been involved in theft for many years and deserves, in my view, substantial credit for this. I also take the view that, although he defended the charge, he is a good prospect for rehabilitation considering his absence of offending for many years, and bearing in mind also that he has a wife who is supportive of him. That will assist his rehabilitation. Accordingly, I sentence the accused to 12 months imprisonment for the theft of the cow but I fully suspend this on the following terms;

> He is not to commit any offences punishable by imprisonment for the period of imprisonment;
>
> He is to perform 75 hours community work on the Vuna road under the direction of probation;
>
> He is to report to probation by no later than 4pm on the 24th July 2017.

[5] A copy of this judgment is to be sent to Probation.

Fifita v Tonga Broadcasting Commission and Ors

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 22/2017

24 July 2017

Judicial review — reappointment — was there a decision to review — renewal or extension?

The Plaintiff's position as General Manager of the Tonga Broadcasting Commission expired under a contract that included a clause that – "The term is renewable unless otherwise terminated by Agreement between the parties or under this contract".

The Minister had advised all Public Enterprises that all CEO positions were to be advertised when they came to be reviewed. Under section 26(1) of the Public Enterprises Act the approval of the Minister was required.

At a meeting of interested parties the Minister, according to one account, approved the re-appointment on condition that the new contract does not contain a clause like the one above. The Minister says he did not finally approve the re-appointment pending further consideration of legal aspects as he wanted all CEO positions to be advertised. By a mix up with communications, the Board of TBC did sign a new contract that included the same clause as above that the Minister objected to.

The Minister, referring to section 30 of the Public Enterprises Act told the Chairman of TBC that he had not approved the appointment and under section 30(3) she is deemed to have resigned. The Minister claimed also to have never made a decision because the Board of TBC had never sought his approval to the appointment.

Held

1. The Minister neither approved nor withheld approval to the contract for re-appointment and accordingly there is no decision capable of judicial review;
2. Section 30 of the Act is self-executing; it provides that an appointment of CEO without the approval of the Minister is void – there was no decision thereon by the Minister.

Statute considered

Public Enterprises Act section 30

Counsel for the plaintiff	:	Mr. W Edwards
Counsel for the first defendant	:	Mrs. P Tupou
Counsel for the second defendant	:	Mr. 'A Kefu SC

RULING

The issue

[1] This is an application for judicial review. Mrs. Fifita asks the Court to quash what she says was a decision of the Minister of Public Enterprises made on 1 May 2017 declaring void her reappointment as the General Manger of Tonga Broadcasting Commission (TBC) and a notice of TBC of 10 May 2017 communicating that decision to her. The Minister and TBC argue that the Minister made no decision and that Mrs. Fifita's reappointment was void by operation of law because the Minister's approval was not obtained to it as is required by section 26(1) of the Public Enterprises Act (the Act).

The hearing

[2] To explain much of what follows I should describe the course of this action which has been unusual. Mrs. Fifita had initially sought an injunction to restrain TBC and the Minister from appointing any other person as the General Manager of TBC. At a hearing on 12 June 2017, I was told that there were no factual disputes and no discovery of documents required and that it would be preferable for the substantive matter to be heard on an urgent basis rather than determine the application for injunction. I set the action down for hearing on 20 June 2017. It was to proceed on the affidavit evidence that was already filed but I reserved leave for any party to give notice to cross-examine. Mrs. Fifita subsequently gave notice requiring the Minister to attend for cross-examination but that notice was withdrawn on 19 June 2017.

[3] At the hearing on 20 June 2017 counsel presented their legal submissions. Upon reflecting on the submissions overnight I felt that I needed further assistance on some aspects of the evidence. There was a further hearing when counsel addressed me on those matters on 21 June 2017 and I then reserved my decision. Counsel were then advised by my assistant that my decision would be released on 26 June 2017. Before it was released the Court received a letter from Mrs. Fifita's lawyer, Mr. Edwards, asking that the decision be delayed because Mrs. Fifita wished to submit an affidavit from the former Company Secretary of TBC, Ane Mailangi, which it was said had a 'critical' bearing on the case. That affidavit was filed. I saw counsel in chambers on 27 June 2017. The defendants did not oppose

the admission of the further affidavit and I granted leave for it to be admitted. The action was adjourned to 30 June 2017 so that Mr. Kefu could take instructions from the Minister as to whether he wished to respond to the affidavit of Ms. Mailangi. At the conference on 30 June 2017 Mr. Kefu advised that the Minister would file an affidavit in reply to Ms. Mailangi's affidavit. That affidavit was duly filed the same day. There was then a further hearing on 12 July 2017 where counsel addressed me on the significance of the further evidence. There were no requests to cross-examine Ms. Mailangi or the Minister on their affidavits. At the conclusion of that hearing I reserved my decision again.

[4] What will not be apparent from this narrative is that the admission of the affidavit of Ms. Mailangi marked a fundamental shift in the basis of Mrs. Fifita's case. The heft of her case at the hearing of 20 June 2017 was that she had a right of renewal under her contract of employment which had already been approved by the then Minister or that in withholding his approval to her reappointment the Minister had breached an implied obligation of mutual trust and confidence, did not act in good faith or failed to observe natural justice. Following the admission of Ms. Mailangi's affidavit Mr. Edwards disavowed these arguments and presented the case on what I understand to be a two-pronged basis. First, he argued that the Minister had in fact given his approval to the reappointment of Mrs. Fifita. Secondly, he argued that the Minister could not withhold his approval because he did not accept the terms of employment agreed between Mrs. Fifita and TBC. On either basis the Minister's letter of 1 May 2017 and TBC's letter of 10 May 2017 were said to be unlawful.

The facts

[5] TBC is a public enterprise. Mrs. Fifita has been a long term, loyal and able servant of TBC. Since October 2008 Mrs. Fifita has been TBC's General Manager. It is common ground that she was the Chief Executive Officer of TBC for the purpose of the Act.

[6] Mrs. Fifita had a written contract of employment with TBC for the period of 1 November 2013 to 30 October 2016.

[7] Clause 1.1 of the contract is set out below. The last sentence of this clause which refers to renewal of the contract, is particularly relevant to the present case. The clause states:

> The term of appointment of this Contract is for a period of three (3) years, commencing from 1st November, 2013 to 30th of October, 2016. The term

is renewable unless otherwise terminated by Agreement between the parties or under this contract.

[8] Clause 1.2 contained an acknowledgment that Mrs. Fifita's appointment was made under section 26 of the Act.

[9] Clause 2 provided that the contract could be varied but the variation had to be in writing and approved by the Board.

[10] Clause 3 set out Mrs. Fifita's responsibilities which included her entering into a 'written Performance Agreement with the Responsible Minister' as set out in Schedule B to the contract.

[11] Clause 18 provided that TBC was to notify Mrs. Fifita in writing not later than three months before the expiry of the contract if the contract 'will be renewed or extended or the post will be advertised'.

[12] Under clause 22 the contract could be terminated by Mrs. Fifita giving three months' notice or payment in lieu of notice and by TBC for reasons other than misconduct by giving three months' notice or payment in lieu after consultation with the Board.

[13] Schedule A to the contract contained a detailed job description and Schedule B a long list of performance indicators relevant to Mrs. Fifita's role.

[14] Mrs. Fifita says that prior to the expiry of the contract she made the then Chairman of the Board, Mr. Tapu Panuve, aware that her contract was up for renewal and she understood from him that it would be renewed. Despite a sub-committee of the Board conducting a review of her performance and finding it satisfactory Mrs. Fifita's contract was not renewed.

[15] Mrs. Fifita became aware that there was concern about the wording of her contract and that she might not be granted a renewal. The affidavit of Ms. Mailangi explains this. In a letter of 5 October 2016 the Minister wrote to the Chairpersons of the Boards of Public Enterprises setting out his expectations for the operation of Public Enterprises. These included that all CEO positions would be advertised when they came up for renewal. Ms. Mailangi said that the members of the sub-committee that were reviewing Mrs. Fifita's performance were concerned that the renewal provision in her contract appeared to be in conflict with the Minister's letter and legal advice was sought.

[16] I understand Mrs. Fifita also sought legal advice from Mrs. Petunia Tupou in which she expressed the view that the Minister could not require the General Manager's position to be advertised. Mrs. Fifita also took advice from another lawyer, Mr. Clive Edwards. On 28 October 2016 Mr. Edwards wrote to the Chairman of TBC asserting that Mrs. Fifita was entitled to a renewal.

[17] In his first affidavit the Minister says that he became aware that Mrs. Fifita's contract was up for renewal on 1 November 2016 when advised of that by the Chairman. On 8 November 2016 the Minister met with the Chairman, the Chief Executive Officer for Public Enterprises, the Solicitor General and legal counsel for TBC, Mr. Ralph Stephenson. Ms. Mailangi was also at the meeting. Ms. Mailangi's evidence is that the Minister was given advice concerning the renewal of Ms. Fifita's contract and gave his approval to the renewal but, importantly, his approval was not unconditional. Ms. Mailangi says that the Minister required Mrs. Fifita's contract to be amended 'so that the renewal clause and any other clause of concern would not appear again in her future contract'. She goes on to say that the subsequent renewal of Mrs. Fifita's contract was in 'conformity' with the understanding reached at the meeting 'but certain terms and conditions had to be amended.' She states that 'I do accept that the Minister had very serious concerns with the renewal clause….'.

[18] In his second affidavit the Minister acknowledges that the advice he received at that meeting was that TBC had to renew Mrs. Fifita's contract because of the renewal provision in clause 1.1. He said he was disappointed with the advice. Consistent with his letter of 5 October 2016 he wanted the position advertised. He said that he did not give his final approval to the renewal of Mrs. Fifita's contract and wanted the Chairman to work with the legal advisers to review the possibilities as to whether the position could be advertised and if not to negotiate with Mrs. Fifita to remove the final sentence of clause 1.1 of her contract before submitting the contract to him for his approval. The Minister said that he did not give his approval to Mrs. Fifita's reappointment subject to the change to clause 1.1 as Ms. Mailangi believed.

[19] Ms. Mailangi recognises that the Minister required that the renewal provision be removed from Mrs. Fifita's contract and the possibility that the Minister might require amendment of 'any other clause of concern'. This is all consistent with the Minister's evidence that the matter was left on the basis that the Chairman would look into the issues discussed and go back to the Minister 'before [TBC] would make the appointment under the new employment contract'. I therefore accept the Minister's evidence that he did not give any final approval for the renewal of Mrs. Fifita's contract.

[20] On 15 November 2016 Ms. Mailangi sent an email to Mr. Pita Moala, a member of the sub-committee considering the renewal of Mrs. Fifita's contract. In that email Ms. Mailangi appears to say that at the meeting of 8 November 2016 it was agreed that Mrs. Fifita's contract would be renewed subject only to the removal of the right of renewal from clause 1.1. The email ends '...if [*Mrs. Fifita*] agrees to that slight variation, then the paper could be tabled in the next board [*sic*] by the Sub-committee or even via circulation for Board endorsement'. On the basis of her own evidence that advice was incorrect.

[21] On 21 March 2017 Mrs. Fifita signed a new employment contract with TBC for the period 31 October 2016 to 1 November 2019. The contract appears to be on the same terms as her previous contract with one change to clause 14 relating to the payment of a pension upon termination. There was no change to remove the right of renewal. It is an unsatisfactory feature of the case that there was no evidence of any negotiation between TBC and Mrs. Fifita over the inclusion or removal of the renewal provision in her contract. There was no evidence that Mrs. Fifita had agreed to the removal of the renewal provision from her contract.

[22] The Minister says that it was brought to his attention on 22 March 2017 that Mrs. Fifita's contract had been renewed without his consent. He met with the Chairman and was told of the renewal. He was both surprised and gravely disappointed that Mrs. Fifita had been reappointed 'without my final approval'. The Minister then travelled overseas for a time.

[23] The Chairman of TBC, Mr. Panuve, then resigned. He was replaced on 1 May 2017 by Mr. 'Ahongalu Fusimalohi. On the same day the Minister wrote to Mr. Fusimalohi about Mrs. Fifita's contract and said that he had not received a copy of her contract or been informed of her reappointment which required his approval. He said he considered that any agreement 'purportedly' made with Mrs. Fifita was void under section 30(1) of the Act. He also referred to section 30(3) of the Act. It provides that a Chief Executive Officer appointed in good faith in contravention of the Act is deemed to have resigned his office from the date he is advised of that fact by the Chairman of the Board. The Minister directed Mr. Fusimalohi to inform Mrs. Fifita of that fact as soon as possible and noted that the appointment of a Chief Executive Officer for TBC was an urgent task.

[24] On 10 May 2017 Mr. Fusimalohi wrote to Mrs. Fifita advising her that due to the fact that 'the shareholder through the Minister of Public Enterprises have decline [*sic*] to consent to your appointment, your contract is not legally effective' and '…your existing contract of employment is not legally effective because the shareholders have declined to approve it/consent to it.'

[25] The Minister felt that Mr. Fusimalohi's letter did not accurately state his position. In a further letter of 17 May 2017 to Mr. Fusimalohi the Minister expressed concern with the use of the phrases 'decline to consent to your appointment' and 'decline to approve it/consent to it' because they were erroneous and misleading. The Minister said he wanted to make it clear that he had not declined his approval to Mrs. Fifita's contract because the Board of TBC had never sought his written approval of it. These proceedings followed and were filed on 17 May 2017.

The Public Enterprises Act

[26] Upon reading the Act it is immediately apparent that the Minister has what Mr. Kefu described as an important supervisory role over the operations of Public Enterprises. It is not necessary for me to set out the provisions in detail but I note the following. The powers, duties and functions of the Minister are as set out in the Act. He can with the consent of Cabinet exercise all the rights and powers of the shareholder and owner of the Government's interests in Public Enterprises (section 9). Under section 11 the Minister has powers to omit or include provisions in a Public Enterprise's statement of corporate intent. Under sections 12 and 14 the Minister with the consent of Cabinet appoints Directors and fixes the remuneration of Directors. He can remove Directors also. Under section 18 the business plan of a Public Enterprise must be submitted to the Minister for review before it is adopted. The Board is obliged to consider any comments of the Minister. The Board has obligations to report to the Minister in half yearly and annual reports under sections 19 and 20. Under section 21 the Board must meet with the Minister and agree on principles upon which a dividend will be paid in each financial year. The Minister has wide powers under section 23 to require the Board to supply such information relating the affairs of the Public Enterprise as the Minister shall direct.

[27] Of direct relevance to the present action are sections 26 and 30 of the Act, the relevant parts of which I set out below.

> Section 26
>
> The board shall with the approval of the Minister, appoint a Chief Executive Officer who shall be responsible for managing the public enterprise and implementing the decisions of the board.
>
> The Chief Executive Officer shall be employed under a written performance-based contract of employment with the public enterprise which shall contain the following minimum provisions-
>
> the objectives to be achieved by the public enterprise;

the performance expected of the public enterprise;

a review of the performance of the Chief Executive Officer;

adherence by the Chief Executive Officer to the public enterprise statement of corporate intent produced by this Act.

Sections 30 (1) and (3)

The appointment of a person as director or Chief Executive Officer in contravention of the provisions of this Act shall be void.

…..

A Chief Executive Officer appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of that fact by the Chairman of the board.

Discussion

[28] Mr. Edwards emphasised that this action is a challenge to the Minister's letter to the Chairman of TBC of 1 May 2017 and the Chairman's letter to Mrs. Fifita of 10 May 2017 which he said were unlawful notices declining the Ministers approval to the reappointment of Mrs. Fifita.

A right of renewal or extension

[29] I had understood from Mr. Edwards' oral presentation that it was accepted that clause 1.1 was a right of renewal of Mrs. Fifita's employment contract rather than a right to an extension of the contract. However in Mr. Edwards' written submissions he argues at [6.5] that Mrs. Fifita 'always had a right to extend her contract of employment with [TBC], where the renewal is an extension of the contract …not a completely new contract…'. This is a very confusing analysis. Clause 1.1 was a right to renew Mrs. Fifita's employment contract. That construction is consistent with the terms of the contract as a whole, which distinguishes between a renewal and an extension, and the relevant statutory scheme, particularly sections 26 and 30 of the Act. In law the distinction is an important one. A right to an extension once exercised simply extends the term of an existing contract. A renewal creates a new contract.

[30] In this case however the distinction is somewhat academic. TBC clearly purported to renew not extend Mrs. Fifita's contract. She entered into a new contract with TBC on 21 March 2017 and it expressly provided that it was subject to section 26 of the Public Enterprises Act. Her reappointment therefore

undoubtedly required the Minister's approval but that approval was never obtained for the reasons I have already given.

[31] I therefore reject Mr. Edwards' first argument on behalf of Mrs. Fifita that the Minister gave his approval to her reappointment.

Limits on the Minister's power to withhold approval

[32] Mr. Edwards then argued that the Minister has no power to withhold his approval to the reappointment of Mrs. Fifita. He said it is the Board's responsibility to appoint the Chief Executive under section 26(1). The Board had reviewed Mrs. Fifita's performance and found it satisfactory. Mr. Edwards said that the Minister could not be concerned with the terms upon which a Chief Executive Officer is appointed except to the extent that they did not comply with the law. In support of his submission, he referred me to section 26(2) of the Act which he submitted set out the only lawful requirements of a Chief Executive Officer's contract of employment. I do not accept Mr. Edwards' submission.

[33] As a matter of common sense and of law no person can be said to be appointed to a position of employment unless and until the terms of such appointment have been agreed. The Minister's consent must necessarily relate both to the identity of the proposed appointee and the terms of the appointment.

[34] This is consistent with the scheme of the Act and specifically to the plain intention that to the extent set out in the Act the Minister has a wide supervisory role over the affairs of Public Enterprises including the appointment of Directors and Chief Executive Officers. The interpretation of section 26(1) which Mr. Edwards urges upon me cannot be correct as it would undermine the very integrity of the scheme of the Act. It would reduce the Minister to a mere functionary in the matter of the appointment of a Chief Executive Officer. There is nothing in the Act to suggest an intention to impose such limits on the Minister's powers.

[35] I find no support for Mr. Edwards' submission in section 26(2). That section is concerned only with the minimum provisions of a Chief Executive Officer's employment contract. In relation to Mrs. Fifita's contract the Minister had legitimate reason to be concerned that it contained a right of renewal. That provision was inconsistent with Government policy which required that posts be advertised and thereby subject to open competition. I have found that the Minister never gave his approval to the reappointment of Mrs. Fifita but even had his approval been given subject to the removal of the renewal provision that was a condition the Minister was entitled to impose.

Section 30 is self-executing

[36] The next issue concerns the operation of section 30. Under section 30(1) no Chief Executive Officer of a Public Enterprise can be appointed in a manner that contravenes the Act. It is a requirement of the Act that the appointment of a Chief Executive Officer be with the Minister's approval. Any appointment in contravention of the provisions of the Act 'shall be void'. It does not acknowledge of the possibility that non-compliance with the Act might be overlooked or waived in the exercise of the Minister's discretion.

[37] The operation of section 30(1) is self-executing. That means that the consequence that Mrs. Fifita's appointment was void for non-compliance with the Act is independent of any act or decision of the Minister. There is no discretion exercised by the Minister or any decision made by him in the application of section 30(1) which can be subject to review or require the observance of natural justice or an implied obligation of mutual trust and confidence (*Minister of Revenue and Customs v Prasad* (Unreported, Court of Appeal, AC 7 of 2015, 14 September 2016) at [14]). Likewise, I do not consider that the Board of TBC made any decision that can be reviewed when it wrote to Mrs. Fifita on 10 May 2017 advising her that her contract of employment was not legally effective. That was conduct giving effect to a consequence determined by the Act itself.

The application must fail

[38] It follows that Mrs. Fifita's application for judicial review must be dismissed. I have considerable sympathy for her. She has by all accounts been an excellent employee. I make no comment as to whether she may still have remedies available to her in respect of any failings of the Board of TBC to obtain the Minister's approval to her reappointment.

[39] I should note that there was some evidence put before the Court by Mrs. Fifita that she was not reappointed because the Prime Minister is angry with journalists at TBC. This issue hardly featured at all in counsel's arguments and was not relevant to the issues I had to decide.

Result

[40] The plaintiff's application is dismissed.

[41] I will hear from the parties on costs if they cannot agree by the filing of memoranda within 14 days.

'Eukaliti v Puloka Construction Limited

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 58/2016

25 July 2017

Negligence — construction worker loses 2 fingers in work accident — claim the employer was negligent in failing to train employees and provide safe place of work — claim for damages

Damages — construction worker loses 2 fingers in work accident, claims loss of earnings etc

A construction worker loses 2 fingers in a work accident. He claims the employer was negligent in failing to train employees and provide a safe place of work. The employee claims for damages – pain and suffering, permanent disfigurement and loss of earnings.

The Plaintiff was wearing flip flops at work but changed into sneakers when he climbed a mast to assist a team in its erection. He attached a safety belt but says he was not issued with gloves or other safety gear. His fingers were caught between a steel cable and pulley and his fingers were severed near the top joints.

The employee after recovery came back to work for a few months but then gave the work away. The judge was not convinced that the Plaintiff discontinued this work due to inability to perform tasks or ridicule from workmates. The Plaintiff's attendance at work previously was patchy. He did some other construction work before the trial but had not otherwise sought employment in that industry or as a cook (his first job).

The employer held regular safety meetings but employees were not required to attend. Employees were not required to wear gloves and were not given specific instructions on performing the task that caused this accident.

Held

1. The employer owes a duty of care but is not required to guarantee the safety of employees.
2. The employer was negligent and this was a cause of the injuries.
3. Damages were awarded – pain and suffering $5,000; disfigurement $10,000; loss of earnings $4,000.

Cases considered

Kaufusi v Lasa & others [1990] Tonga LR 139
Coleman v Kolo [1991] Tonga LR 35
Falakiko v Tukala [1992] Tonga LR 4
Manu Kilisimasi v Malanai & Tonga Telecom [1996] Tonga LR 189
Kingdom of Tonga v Muller [1997] Tonga LR 192
Miletic v Capital Territory Commission (1995) 69 ALJR 675

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

R U L I N G

The claim

[1] The plaintiff (Mr. 'Eukaliti) was employed by the defendant (Puloka) as a construction labourer. In the course of his work the middle and index fingers of his right hand were caught between a steel cable and a pulley. They were severed above the second joints. Mr. 'Eukaliti alleges that Puloka was negligent in failing to provide proper instruction, safety equipment and a safe work environment causing him to be injured. He claims damages for pain and suffering, permanent disfigurement and loss of earnings.

The facts

[2] At the time of the accident Mr. 'Eukaliti was 20 years old. He left school in Form 4 and worked as a dishwasher. He then got work with a construction company called Group Construction. That company was owned by Tevita Puloka (who now owns Puloka) and one Valingi Niutei. Group Construction was building disaster relief housing at Niuatoputapu. Mr. 'Eukaliti cooked for the workers and later he did labouring. In 2013 he returned to Tongatapu and worked for Puloka.

[3] Puloka was engaged to erect eight Digicel masts at sites around Tongatapu. With one exception the masts are all free standing, triangular in shape, wide at the base and narrow at the top and between 30 and 45 metres in height. They were built in sections which were bolted on top of one another.

[4] The accident occurred at Ha'ateiho on 18 August 2014. A mast was being erected there and Mr. 'Eukaliti was one of the workers. His duties included climbing the mast to bolt sections in place. All that was to be done to complete the

mast was to hoist and bolt in a steel ladder that technicians would use to install transmission equipment. The ladder was heavy. It had brackets at its top and bottom. The ladder was hoisted by a steel cable. There was one pulley secured to the top of the mast. The steel cable ran through the pulley. One end of the cable was connected to the ladder. The other end ran through another pulley that was attached to a leg of the mast and then to an electrical winch about 20 metres away. The winch in-turn was secured to a mango tree and powered by a generator.

[5] A number of workers were involved in hoisting the ladder. There was a worker who operated the winch. There was a rope connected to the ladder controlled by another worker on the ground (who I understand is called the pilot). There were also three workers on crossbars at different levels of the mast whose role it was to clear the ladder from the mast by pushing or pulling the steel cable. Calls could be made by them to the pilot and from him to the winch operator to stop and start the winch.

[6] Puloka's supervisor on the job was Teivisi Peini (Teivisi). Mr. 'Eukaliti said that Teivisi instructed him to climb to the top of the mast and to push or pull the steel cable so as to ensure that the brackets on the ladder did not get caught on the mast. Mr. 'Eukaliti's evidence was that he had gone to work in *flip flops* because he was tired and did not want to climb the mast and that he only did so because he was instructed by Teivisi and one Taita Mafi. Teivisi's evidence was that he did not instruct Mr. 'Eukaliti to climb the mast. He said that he intended to climb the mast himself and it was only after he put on his safety belt that he saw that Mr. 'Eukaliti had already climbed the mast. I preferred the evidence of Mr. 'Eukaliti that he was told to climb the mast.

[7] Mr. 'Eukaliti changed into sneakers before he climbed the mast. He put on his safety belt which he secured only when he reached the top of the mast. He said that he had not been issued with any safety gloves and did not wear any safety equipment other than the safety belt. Teivisi said that he was aware that Mr. 'Eukaliti was not wearing safety gloves. He said that he did not insist that workers wear gloves and he does not wear them himself.

[8] Mr. 'Eukaliti was on the top crossbar of the mast. He was within reach of the top pulley. As the ladder was nearing the top of the mast, but about 2 or 3 metres below Mr. 'Eukaliti, it got caught on the mast. Mr. 'Eukaliti grabbed and pushed the cable to free the ladder. He had a full grip of the cable in his right hand and was concentrating on freeing the ladder. Unexpectedly (or as he said 'before I knew it') his right index and middle fingers got caught between the steel cable and the pulley and were severed near the second (top) joints.

[9] Mr. 'Eukaliti called to alert those below him that he was injured. He was not initially heard. The evidence was that the winch was very noisy. When he was heard the winch was stopped. Teivisi climbed up to him and he was lowered by the cable to the ground. He was taken to Vaiola Hospital where he remained for treatment for a week and a half. Mr. 'Eukaliti remained off work for a time to heal and was paid a half of his wages in some weeks.

[10] Much was made by Puloka of the fact that it had an insurance policy providing cover in the event of the death or injury of its workers. I regard this as irrelevant to any issue I have to decide. Puloka made a claim on the policy and on around 24 September 2014 the claim was settled by payment of $2,450. This was not paid to Mr. 'Eukaliti.

[11] The wages record of Puloka shows that Mr. 'Eukaliti returned to work at the end of October 2014 and worked until around 10 March 2015.

[12] It appears Mr. 'Eukaliti's attendance at work was always irregular. Mr. 'Eukaliti said that he stayed away from work 'a lot' and five or six days a month due to illness. The wage records suggest that he took more time off work than that. There was no explanation as to why he was so sickly. There was a lengthy period between 2 December 2014 and 26 January 2015 when he was absent from work. He said that this was the Christmas break and that his mother was ill. He was clearly uncertain about that. He acknowledged that on the day of the accident he felt lazy and tired and so chose to turn up for work in *flip flops* rather than in his usual safety footwear. It appears to me that this could only have been to avoid his duties.

[13] Mr. 'Eukaliti said that upon returning to work he found that he could not perform tasks or handle tools properly and that he took longer to do his work. He also said that his co-workers talked about him and they ridiculed and teased him calling him names such as 'butt hands' and 'butt fingers'. After closing Mr. 'Eukaliti's case (and following a break for a public holiday) Mr. Niu sought and obtained leave to recall Mr. 'Eukaliti to give further evidence about the difficulty he had performing his work following the accident. I was reluctant to grant leave as Mr. Niu had already asked Mr. 'Eukaliti about this. The further evidence did not impress me and to my mind was contrived. Mr. 'Eukaliti gave precise times for the performance of various work tasks before and after his accident yet he had never timed his work. His evidence was implausible and unconvincing when one considers the absence of complaint about his work from Puloka or his later employer for whom he also did construction work (to which I shall later refer).

[14] Mr. 'Eukaliti decided he would not return to work with Puloka. He did not advise Puloka of his intentions. On 10 March 2015 he received his pay and took a loan from Puloka and then did not return to work or repay the loan. He initially denied any knowledge of the loan.

[15] Mr. 'Eukaliti's evidence was that he decided not to return to work because he could no longer perform his work properly and other workers were talking about him and teasing him. He said he 'felt bad' and did not want to work like that anymore so 'I just did not go back to work'. Mr. 'Eukaliti failed by a large margin to satisfy me, even to the civil standard, that he left his employment for any of these reasons. I do not accept that Mr. 'Eukaliti's decision to abandon his employment with Puloka was due to the accident or his injuries. After the accident Puloka continued to employ Mr. 'Eukaliti on the same terms as before. It never complained about his work. No other witness gave evidence that his work was unsatisfactory or that there was any talk about him or teasing by his co-workers. If Mr. 'Eukaliti had genuine concerns about his work or his co-workers (and I am not satisfied that he did) he never raised those concerns with Puloka. He said he did not do so because no one would pay attention to him but there was nothing to suggest to me that was the case.

[16] Mr. 'Eukaliti acknowledged only under cross-examination that after leaving Puloka he had taken a construction job with Valingi Niutei building a large residence for a Minister at Kolovai. He was offered this work because he is a friend of Valingi Niutei's son. He said that the work included partitioning, hammering, painting, hand sawing and bricklaying. He was not entirely sure when he worked (it was probably late 2016 and early 2017) and gave no evidence of the total amount that he earned. He said that he finished when the work ran out. There was no evidence that anyone ever complained about his work.

[17] Mr. 'Eukaliti says that he is now only working in the plantation and cannot do some tasks such as carrying heavy buckets or scraping coconuts and that he has difficulty doing household duties. He said that if he was still working at Puloka he would be earning $280 per week and that if he had not been injured he would have continued as a construction worker until age 60 and would have received a pension or retirement sum. I do not accept this evidence. Mr. 'Eukaliti has lost one segment on two fingers. The greater part of those fingers remain. He demonstrated that they function and can bend. I cannot see why he cannot perform tasks such as carrying a heavy bucket or scraping coconuts. There was no medical evidence called by Mr. 'Eukaliti about the expected loss of function resulting from his injuries to support his evidence. What is clear is that after the accident Mr.

'Eukaliti was able to work in construction for both Puloka and Valingi Niutei performing tasks requiring both strength and dexterity.

[18] Since abandoning his employment with Puloka Mr. 'Eukaliti has not applied for any employment in construction or as a cook or a dishwasher (the work he has done before) or indeed in any other field.

Duty of care and negligence

[19] There is no dispute that Puloka owed Mr. 'Eukaliti a duty to take reasonable care to avoid foreseeable risks of injury in the performance of his work (*Smith v Charles Barker & Sons* [1891] A.C. 362). The obligation encompasses various aspects including the provision to an employee of adequate materials, proper systems and effective supervision but can perhaps be summarised as a duty to avoid injury by providing 'a safe system of work'. The duty does not mean that an employer is required to guarantee the safety of an employee. There is a balance to be drawn between the degree of risk against the measures that can be taken to eliminate it (*Miletic v Capital Territory Commission* (1995) 69 ALJR 675).

[20] Mr. Niu submitted that Puloka was negligent and thereby caused Mr. 'Eukaliti's injuries in three respects. First, he said that the winch should have been positioned at the bottom of the mast and not 20 metres away so that the winch operator could have seen for himself that the ladder was caught and stop and start the winch instantly. Secondly, he said that Puloka failed to provide safety gloves to Mr. 'Eukaliti. Thirdly, he submitted that the pulley should have had a cover or a cut out switch to prevent a hand or finger getting caught in the pulley.

[21] Mrs. Tupou submitted that where the negligence alleged is a failure to take some action to avoid harm then the proof of that is one of two kinds:

> '…either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it' (*Morton v William Dixon Ltd*., 1909 S.C. 807 at 808 per Lord Dunedin).

[22] Mrs. Tupou argued that Puloka was not negligent because it provided a safe system of work for its employees and taught and instructed them on safe work practices and provided safety gear including safety gloves for their use.

[23] It is an important feature of this case that the risk of Mr. 'Eukaliti getting his fingers caught in the pulley was well known to Puloka's supervisor Teivisi. Sometime earlier in his career while working at Vava'u Teivisi's fingers had got caught in a pulley in almost identical circumstances. He was fortunate as his fingers were not severed. This was because a rope was being used rather than a steel cable. Nevertheless, his injuries were serious and he was taken by plane to Tongatapu for treatment. Mr. 'Eukaliti said he only learned of Teivisi's accident after he had left Puloka and while drinking with Teivisi and I accept that evidence.

[24] Evidence was given by Teivisi and Raymond Langi that Puloka regularly (at least monthly) conducted meetings with its workers at which it emphasised the need for safe work practices and the use of safety equipment. There was also evidence that Puloka provides safety equipment to its workers if they do not have their own and that there were safety gloves kept in a drum on site along with other safety equipment for use by the workers at the mast. I am unable to accept this evidence.

[25] As far as the monthly meetings are concerned, Mr. 'Eukaliti said he did not attend such meetings and I believe him. There were no records of the meetings, who attended them and what was discussed. Mr. Langi said he recalled seeing Mr. 'Eukaliti at only one of the meetings but he could not recall the date. Furthermore, the evidence went no further than that workers were told in general terms that safety is important and that they should wear safety gear. There was no training of staff to identify and avoid known risks of injury. There was no evidence that Puloka has any safety polices or procedures in place that are known to the staff. Importantly, there was no evidence either that Mr. 'Eukaliti was trained or given any instructions on how to safely perform the dangerous work that led to his injuries.

[26] As far as the safety equipment is concerned the evidence was that Puloka provides safety gear to its staff *if they do not have their own* (apart from shoes). Mr. Langi acknowledged in cross-examination that employees who were provided with safety equipment were required to pay back the cost of it to Puloka. He agreed that this meant that the workers might not ask for it. The only inference that can be drawn from that evidence is that such workers would then work without the safety gear.

[27] I was not satisfied that there were in fact safety gloves in a drum on site that were available to Mr. 'Eukaliti on the day he was injured. There was no evidence from Teivisi or Mr. Langi that they had checked that the gloves were available that day. In any event I found the evidence about the availability of safety

gloves to be of limited relevance. Contrary to Puloka's assertion that it emphasises safe work practices Teivisi has an entirely lax attitude to the wearing of safety gear. He said that workers do not wear hats or gloves and he does not force them to do so because that is what they prefer. He does not wear safety gloves either. He said he had never seen Mr. 'Eukaliti wear gloves while climbing and clearly he never required him to wear them. Mr. 'Eukaliti gave evidence that he climbs masts without attaching his safety belt to the mast. I do not accept that a supervisor with an awareness and concern for the safety of his workers would allow such practices on a construction site. In any event the evidence of Teivisi was that even if Mr. 'Eukaliti had been wearing gloves he still would have been injured by the pulley but perhaps not to the same extent.

[28] Mrs. Tupou also submitted that Puloka followed 'best practice' in Tonga in hoisting the ladder. I do not accept that submission. There was no evidence called by Puloka as to what is best practice in Tonga.

[29] It was folly to have put Mr. 'Eukaliti in the position where he was required to handle the steel cable in such close proximity to the unguarded pulley. The pulley was shown to the Court. It is a dangerous piece of equipment simply because it is made of metal and has exposed moving parts (the pulley's rollers) into which fingers or clothing could be easily caught. It is plain that a guard could be installed to prevent fingers or clothing coming near the pulley's rollers. I can see nothing at all to support Teivisi's evidence that installing a guard might cause the cable to fail.

[30] I accept also Mr. Niu's submission that the winch should have been positioned at the bottom of the mast and not 20 metres away so that the person operating the winch could see if the ladder got tangled and stop the winch immediately. In that way the ladder could have been untangled with no risk of injury. In this case the system used relied upon the workers on the mast untangling the ladder by pushing and pulling the cable. If they could not untangle it they had to give instructions to stop the winch. Those instructions had to be relayed from the workers on the mast to the workers below and then relayed again to the winch operator. It is hard to see how such a system could ever allow for the winch to be stopped in a timely manner.

[31] In addition Mr. 'Eukaliti should not have been asked to do the work without proper and specific training making him aware of the risk of injury and the steps that he must take to avoid it. He was not given training.

[32] For those reasons there is no doubt in my mind that Puloka was negligent in the manner in which the ladder was hoisted putting Mr. 'Eukaliti at unnecessary risk and that its negligence caused his injuries.

Contributory negligence

[33] Mrs. Tupou submitted that Mr. 'Eukaliti caused his own injuries. I do not accept that Mr. 'Eukaliti caused or contributed in any respect to his own injuries.

[34] Mrs. Tupou said that Mr. 'Eukaliti said he had not done the work before and took it upon himself to climb the mast thereby putting himself in a vulnerable position. Mr. 'Eukaliti was instructed to climb the mast and Teivisi's evidence was that he was capable of the work.

[35] It was then argued that despite knowing that the pulley might injure him Mr. 'Eukaliti was focused on the ladder and not the pulley. Mr. 'Eukaliti said, and I accept, that the ladder posed the greatest danger to him. The ladder was a short distance below him. It was very heavy. It had become tangled but the winch was running. In such circumstances the cable would be coming under tension and upon being released might move quickly striking Mr. 'Eukaliti. He had every reason to be focused on the ladder.

[36] It is then submitted that Mr. 'Eukaliti could have avoided injury if he had signaled to stop the winch and released the cable. I have already mentioned the difficulty of stopping the winch in a timely manner. This was confirmed by Mr. 'Eukaliti's evidence that when he was injured he called down to stop the winch but he was not heard. I cannot see how Mr. 'Eukaliti can have been expected to untangle the ladder without gripping the cable. Puloka cannot absolve itself when Mr. 'Eukaliti was simply doing what he had been required to do.

Damages

[37] Mr. 'Eukaliti has sought:

$10,000 damages for pain and suffering;

$20,000 for his permanent disfigurement;

$582,400 for loss of earnings.

[38] Mr. Niu has helpfully referred me to reported decisions of this Court and the Court of Appeal. Unfortunately they are not recent. They do however provide me with some guidance on relevant principles and the appropriate level of awards.

[39] *Kaufusi v Lasa & others* [1990] Tonga LR 139 was an appeal from a Supreme Court decision awarding the appellant $15,000 general damages and $1,000 exemplary damages following an assault by a Police Officer causing him the loss of an eye. The awards were increased to $20,000 for general damages and $5,000 for exemplary damages. The appellant had returned to work but could no longer do a 'first class job', could no longer play rugby and his marriage prospects might have been affected due to his fixed unwavering eye. The Court of Appeal noted that although the appellant had returned to work his prospective loss of earning capacity was a factor to be taken into account and said:

> The loss of earning capacity generally forms the principal head of damages in a personal injury action and both loss of earnings by the time of the trial and prospective loss must be taken into account. In this case the loss by the time of trial was minimal, but no allowance appears to have been made for prospective loss. The amount which the Appellant is presently earning may not be the amount which he will continue to earn in the future, for while a partial disability may not have immediate effect it may well put him at a disadvantage in the labour market should he have to look for fresh employment. A fully sighted employee has obvious advantages over a one-eyed man. It is not easy to assess the loss of earning capacity represented by the Appellant's physical handicap, but it is certainly much more than a negligible risk and in our opinion justified serious consideration in arriving at an appropriate award of damages.

[40] In *Coleman v Kolo* [1991] Tonga LR 35 the Court of Appeal upheld an award of $8,000 damages for what were described as severe injuries. The appellant suffered multiple fractures to his leg, was in hospital or receiving treatment for about six months but made a good recovery. The Court found the award high by local standards but not so high as to warrant interfering with it.

[41] In *Falakiko v Tukala* [1992] Tonga LR 4 the plaintiff was injured in a traffic accident and suffered a compound fracture of her left ankle and a simple fracture and substantial tissue loss of her right tibia and fibula. The injuries left substantial scarring and permanent deformity. She was confined to bed for six weeks in hospital and spent a further six and a half weeks in hospital learning to walk again. The Court accepted that her scars caused embarrassment and prevented her from dancing and she was hindered doing household chores. She was able to do the same job as before the accident but with a reduced amount of lifting and carrying. The Court awarded a global sum of $34,000 for general damages.

[42] In *Manu and Kingdom of Tonga v Muller* [1997] Tonga LR 192 an assessment of $10,000 for 5% permanent loss of function to the appellant's left knee was upheld by the Court of Appeal following an assault. The Court noted at 194:

> It is important that the Supreme Court, in assessing damages, takes into account levels of ordinary income in Tonga and the value of money and general conditions in the Kingdom.

[43] Finally in *Kilisimasi v Malanai & Tonga Telecom* [1996] Tonga LR 189 the Court awarded a 79 year old who had been knocked out by the defendant driver and could no longer work as a watchman $4,000 for pain and suffering and loss of future earnings for 4 years of $3,800 along with other sums in respect of the costs of his nursing assistance.

[44] It is not easy to reconcile these awards. Clearly each case must be determined on its own particular facts. As the Court of Appeal noted in *Manu* (supra) at page 194 it is a 'difficult and invidious task to draw comparisons because physical injuries and the range of consequential sequelae do vary so much.' The awards made in the cases appear to me to be modest which no doubt reflect the economic circumstances and levels of income in Tonga. However these cases were decided 20 or more years ago and I must have regard to changes in the value of money over time (of which neither party called any evidence) and to the fact that workers earnings in Tonga have increased.

[45] In respect of pain and suffering Mr. Niu argues that the $10,000 claimed is reasonable. He relied upon the *Manu* case where the award was $4,000 but noted that it was decided 20 years ago. Whilst I accept that Mr. 'Eukaliti would have suffered considerable pain at the time of the accident and until he received treatment I note that he healed and returned to work quickly and there was no evidence that he presently suffers ongoing pain or will do so in the future. In contrast the claimant in *Manu* required surgery, prolonged physiotherapy and experienced continuing discomfort that was likely to increase with age. In the circumstances I think a fair award in this case for pain and suffering is $5,000.

[46] In respect of permanent disfigurement, loss of amenity and enjoyment of life Mr. 'Eukaliti claims $20,000. Mr. Niu relies upon the *Falakiko* case where $34,000 was awarded but that case involved far more serious injuries and the award was a global sum covering all heads of loss. It is the case that Mr. 'Eukaliti has suffered permanent disfigurement although I did not accept his evidence that this resulted in him being teased nor do I accept the submission that he will in the

future be subject to embarrassment and ridicule. The evidence of loss of amenity and enjoyment to life was scant. I accept that there are some tasks he may not be able to perform as proficiently as before the accident but I do not accept that there are activities that he previously enjoyed that are now closed to him. In all the circumstances I consider an award of $10,000 under this head is appropriate.

[47] The final head of claim is for loss of earnings. The amount claimed is $582,400. This is unrealistic representing the total loss of all future earning capacity. Mr. 'Eukaliti was not deprived of his employment with Puloka; he chose to leave it. He then worked for Valingi Niutei with no complaints about his work. He is capable of working in the construction industry. I can see no reason that he cannot obtain employment in other fields. I therefore do not allow this head of claim as he has framed it. But that is not an end of the matter. In view of the comments of the Court of Appeal in *Kaufusi* (supra) I must have regard to prospective loss of earnings because Mr. 'Eukaliti's partial disability may in the future put him at a disadvantage in the job market. I cannot exclude this risk as negligible. That said I do not accept Mr. Niu's submission that it is common sense that no building employer will employ Mr. 'Eukaliti. A company did employ him following the accident with no evidence of complaints. Weighing these factors as best that I can an award of $4,000 is justified.

[48] In addition to that, Mr. 'Eukaliti received reduced wages during the period that he was healing. He is entitled to the balance of his wages. Between 18 August 2015 and 24 October 2015 he was paid $612.50 when at his usual rate of pay (I adopt Mr. Langi's evidence of $175 per week for 9 weeks) he was entitled to be paid $1,575. I therefore award him the difference of $962.50.

Result

[49] The plaintiff's claim is successful. There will be judgment in favour of Mr. 'Eukaliti against Puloka for the following sums:

In respect of pain and suffering the sum of $5,000.

In respect of permanent disfigurement, loss of amenity and enjoyment of life the sum of $10,000.

In respect of prospective loss of earnings $4,000.

In respect of the loss of past earnings the sum of $962.50.

[50] These sums will attract interest at 10 per cent from the date of judgment until paid.

[51] Mr. 'Eukaliti is entitled to his costs which are to be fixed by the Registrar if not agreed.

Police v Tau

Supreme Court, Nuku'alofa
Cato J
AM 21/2016

27 July 2017

Sentencing — housebreaking and theft

The defendant broke into a family home at night and stole $3,400 worth of goods of which $1,944 worth was recovered. The offender pleaded guilty before the Magistrate and said he was getting married. The Magistrate saw the offender's previous conviction record which included 6 offences of dishonesty (including 3 housebreakings) that resulted in 5 prison sentences.
The Magistrate sentenced the offender to 6 months probation. During the probation he offended again and did not marry as he stated was his intention.
The Police appealed claiming the sentence was manifestly inadequate.

Held

1. The starting point for simple housebreaking and theft of valuable property is 2 years, including the importance of deterrence and protection of the public.
2. Personal circumstances such as intention to marry and domestic circumstances should not allow significant mitigation.
3. Because of delay in prosecution and this being the first offence in 5 years (apart from a theft on probation that resulted in 6 months prison) the sentence is 9 months prison concurrent with extant imprisonment.

Counsel for the Appellant : Mr. 'Aho

No appearance of the Respondent

J U D G M E N T

[1] When this matter was called on the 29th June, 2017, the respondent who was a sentenced prisoner at the time appeared before me and requested an adjournment to brief counsel which I granted to today's date. I was informed by Mr. 'Aho who appeared for the appellant that he had been released from custody

on a theft charge for which he had received six months imprisonment. That involved bag snatching and arose subsequent to this offending and Mr. Aho, also confirmed, whilst he had been on probation for this offending. The respondent did not appear. I decided that since he was well aware of the date of hearing the appeal should proceed today.

[2] The respondent had pleaded guilty to one count of simple housebreaking and simple theft which carry maximum sentences of 3 years imprisonment. The facts reveal that at about 8pm on the 30th March 2016, he broke into a family home and stole about $3400.00 worth of goods, $1944.00 of which was recovered. He pleaded guilty and before the Magistrate said that he was a changed man and was getting married. Mr. 'Aho informed me that he did not get married, and it seems as I have said committed another offence of dishonesty whilst on probation

[3] The Magistrate had before him a list of his previous convictions. Since 2008, when he would have been about 16, he had committed 6 offences of dishonesty with the last being in 2012. He had received sentences of imprisonment for five of those offences, three of which were housebreakings, one an unlawfully getting on premises, and two of theft for which periods of imprisonment varying between 3 months and a year, with two sentences of imprisonment being suspended.

[4] The Magistrate sentenced him on the 8th September 2016 on both counts to one year probation to be served concurrently. The Magistrate said in his short sentencing judgment;

> "As I have seen your record there has been a deterrent sentence given to you also various numbers of imprisonments but still there is no change. As of today, you have stated that you area marrying next week and due to rehabilitation of changing your life.".

[5] The appellant, on the 4th October, 2016, filed an appeal on the grounds that the sentence was manifestly inappropriate taking into account the previous history of offending. There seems to have been a delay in transcription of the record in this Court with the file being received here on the 6th October 2016, but not forwarded to me for action until May 2017.

[6] I agree with Mr. 'Aho that the sentence is manifestly inadequate or inappropriate bearing in mind that the respondent has several previous convictions for housebreaking and theft. The only factor which mitigates this is that his record

reveals he has not offended since 2012. I will take this into account in relation to the sentence I impose today.

[7] I consider that a starting point for simple house breaking which involves a dwelling house and theft of quite a large amount of domestic property, some of this not being recovered, would be about two years imprisonment. The sentence imposed here of probation might be appropriate for a young, first offender but not for this offending. In not imposing a sentence of imprisonment, the Magistrate completely failed to take into account the importance of deterring housebreaking and indeed the need to protect the public for housebreakers and thieves.

[8] His only reasons given for imposing sentence of probation was that prison had been imposed before with no change occurring and that the respondent was shortly to be married. I do not consider that the fact that prison sentences had been imposed before and had not dissuaded the respondent from offending justifies probationary sentences being imposed. Rather, it would suggest that longer sentences of imprisonment should be imposed for recidivism. Personal circumstances such as intention to marry and domestic commitments do not ordinarily result in significant mitigation, either. In this case, taking into account the guilty pleas, I consider a sentence of 15 months imprisonment would have been appropriate to reflect the seriousness of the offending which was significant, and the respondent's circumstances. After reflection since the hearing this morning, I take into account also that this is a Crown appeal where a lower sentence is usually appropriate to reflect the element of double jeopardy, that there has been, in my view, an inordinate delay in processing of the appeal in this Court (delay in the transcription of a brief record), and the fact his last conviction was about five years ago. These factors mean that I should reduce the sentence to one of 9 months imprisonment, slightly shorter than the 12 months I had mooted with Mr. 'Aho.

[9] Although there has been a gap in offending, the nature of his present offending which is serious does not inspire me with any confidence that the respondent is a good candidate for rehabilitation. I note also the advice given to me by Mr. 'Aho that, since the sentences of probation were imposed, he had committed another offence involving theft of a handbag for which he was sentenced to 6 months imprisonment.

[10] Accordingly, the appeal is allowed and the sentence varied on the housebreaking and the theft to 9 months imprisonment on each to be served concurrently. These sentences are to be backdated to take into account any remand in custody that has been served in relation to this offending.

[11] I issue a warrant of arrest so that he is brought before this Court to commence his period of imprisonment, as soon as possible.

R v Kitekei'aho

Supreme Court, Nuku'alofa
Cato J
CR 36/2015

27 July 2017

Criminal law — drugs — bribery of police officer — uncertainty in which house accused lived — marijuana found in just one of three houses searched

Evidence — scope of search warrant exceeded but evidence admitted — drugs lost by police but this not vital to case

The Police had a search warrant for premises where the defendant lived. They found the defendant at the house where he had been previously living and the Police were allowed to search also the house adjacent, where it was said the grandmother resided. It appeared that the defendant now lives in another house. All 3 properties were searched and the bag of marijuana (in size about half an onion bag) was found under a bed in the house of the grandmother. The defendant had free access to this house and there was men's clothing there.

Before the room with the drugs was searched, the lead police officer was taken aside by the Defendant. The police officer (Tu'utafaiva) says the defendant offered him $2,000 to not search that room.

The marijuana and photos of it were lost by the police, probably during refurbishments at the police station. There was 3.8 kg of marijuana.

Held

1. Police did not deliberately act beyond the scope of their search warrant;
2. Even though the scope of the warrant was exceeded because the accused probably lived elsewhere, this was not sufficient reason to reject the admission of cogent and vital evidence;
3. The loss of the drug and the failure to formally identify it did not affect the Crown case;
4. The accused was convicted of possession of an illegal drug, and bribing a police officer.

Cases considered

R v Bowe [2003] Tonga LR 24

Bunning v Cross (1978)141 CLR 54
R v Ratima (1999) 17 CRNZ 227(CA)

Statutes considered

Evidence Act, 2006 section 30
Illicit Drugs Control Act 2003 section 4 (a) (b) (ii)
Tonga Police Act 2010. section 165(1)

Counsel for the Prosecution	:	Mr. 'Aho and Mr. Finau
Counsel for the Accused	:	Mr. Corbett

10 **V E R D I C T**

[1] The accused, Nausaimone Kitekei'aho, was indicted on one count of possession of illicit drugs contrary to section 4 (a)(b)(ii) of the Illicit Drugs Control Act 2003, and the second, bribery of a member of the Tongan police contrary to section 165(1) of the Tonga Police Act 2010.

THE EVIDENCE

[2] The first witness was Sergeant Etuate Siale. He obtained a search warrant from Magistrate Mafi on the 24th November, 2014. The warrant commanded police to enter the "dwelling house, property, town allotment, vehicle at Popua where Nausaimone Kitekei'aho lives" and search for illicit drugs. The affidavit
20 accompanying the warrant had been sworn out by the witness and in it he deposed that;

> "The Police have found reliable information relating to illegal illicit drugs marijuana plants of the cannabis type which is kept at the town allotment property of Nausaimone Kitekei'aho (m) Popua on which Nausaimone Kitekei'aho and others are living."

[3] The Officer in charge of the search was Sateki Tu'utafaiva who conducted the search on the 25th November, 2014, at Popua. The property was, in size, a quarter of an acre and had two small dwelling houses on it that were close together. The witness said he found the accused at the property when police entered the
30 allotment in the early morning. The warrant was read to him and he had said it was fine for police to continue with their work. The witness asked to whom the house belonged and the accused had said that his son and family lived there. A search of it followed. No drugs or items of interest were located. Tu'utafaiva then advised

the accused that the next search would involve the second house. He asked the accused who the second house belonged to? The accused said that it belonged to his mother. Tu'utafaiva told the accused to bring his mother out of the house so that the police could continue the search. He said that, as other officers commenced to search, the accused had asked him if they could have a moment to talk. At this point, the witness said that he and the accused had walked into the living room and the accused had asked him what if he gave the witness $2000.00 so as not to conduct the search? Tu'utafaiva asked the accused what he meant and he said the thing is in the room. Tu'utafaiva said that a door to the room was open and there was a black plastic bag under the bed. The accused told Tu'utafaiva that there was marijuana under the bed. He was then told that he would be charged with possession of illicit drugs.

[4] Tu'utafaiva told officers Fihaki and Vi to bring out the bag and it was photographed. Tu'utafaiva said that the photographs and the drug which occupied about half an onion sack had been lost and the prosecutor, Mr. 'Aho, informed the Court that this had occurred during the refurbishment of the Police station when exhibits were removed to the Longo longo Police station. He said that Officers Fihaki, Vi and Fahina were in the room when the drug was located. He said that the bag was opened and he saw the material in it was cannabis. He said that he had been in many operations involving marijuana. He said the plastic bag had been taken to the police station as an exhibit.

[5] Under cross-examination, he admitted that he did not ask the accused whether he lived in the first house searched. He said that was the third time he had conducted a search warrant on the accused and this was the third time that he had found him in that residence. He said he had read the accused the search warrant before the first residence was searched. He said the accused had looked at the search warrant and read it. Then he had said the house was free for them to search.

[6] He said that the accused had told him that he resided at his de-facto partner's residence about two minutes from the location where the search was to take place. He said that this conversation took place when they were searching the first house. Tu'utafaiva thought that he still lived at the first house even though the accused had said that he did not because he had found him there on previous occasions. He said that, after the search was over, they had effected a search on the premises, where the accused said he lived with his partner and no drugs had been obtained.

[7] Tu'utafaiva was asked also about the second house and he said that there were male clothes in the room where the drugs were located. He said that his

thoughts were that the accused's son and wife resided in the first house and the accused and his mother lived in the other house. The mother occupied one room. He said that women's clothes were in that room. He said that he believed that the accused lived in the second room because the drug was found there and the accused had said it was his. Tu'utafaiva admitted that he had been told by the accused that he lived elsewhere with his partner when they were about to search the second house.

[8] No drugs were found at the premises where the accused said he lived with his partner. Mr. Corbett asked about the record of interview and why bribery was not mentioned in that. Tu'utafaiva did not appear to respond to this question and Mr. Corbett did not take this further.

[9] Officer Feki gave evidence of the accused entering into a record of interview on the 25th November, 2014. He said the drugs were present at the record of interview and were weighed and found to be 5 kilograms. He was present when the bag was weighed. He said it was one of the largest seizures he had been involved with during a period of 7 years working in drugs. He said that drying out would account for the difference in weight as recorded initially on seizure and the 3.8 kilograms that was stated in the indictment.

[10] In his record of interview, taken on the 25th November 2014, the accused admitted that marijuana had been located in his mother's house. He admitted the drug was his. He said he just had it to smoke. He said he recognized the drug in the office during interview as his. He denied living with his mother. He said he was not inside his mother's house when police came but outside. He completed his record of interview by saying he would finish it in Court. When the charge of possession of illicit drugs was put to him he said that everything was true. In his voluntary statement, he said simply that he was content with the work carried out by the police.

[11] Officer Fihaki said that no drugs were found in the first house and as they commenced to search the second house he heard the accused say that house belonged to his mother. He confirmed that before they commenced to search that residence Tu'utafaiva told them to hold while he talked to the accused. He said that the accused and Tu'utafaiva went into the house and talked. He said that he did not know what they were talking about. He said that Tu'utafaiva had called them in and had said that the accused would direct them to something. The accused had said the thing was under the bed. The accused admitted that the drug was his. Officer Tu'itavuki had photographed the open bag in situ. Some of the material was green and some of it was dry. He produced a seizure list which showed that

the drug had been seized by the police and taken from the house. It showed the recorded weight and a sample being taken for analysis. The drug was taken to Officer Pale who took a sample and tested it. He said that Tu'utafaiva had only told him, after the search, that the accused had called him and told him where the drug was.

[12] Officer Pale gave evidence that inter alia he worked in photography and conducted preliminary tests for drugs. He identified the plant material as cannabis from a botanical examination and a presumptive chemical test. He had taken a sample from the whole exhibit which had been brought to him.

[13] The accused gave evidence and also called evidence. The accused said that he was aged 52 and resided at Popua. He said that he was separated, had a partner and had children with her. He said that he had walked to his mother's residence at about 8am to get some fish. That was a distance about 200 metres from where he lived with his partner. He asked his son for fish and the police arrived. Officer Tu'utafaiva got out and read the warrant to him. He said he would search his mother's house. There were two houses about 10 metres apart; one his son was living in and the other belonged to his mother. After they concluded the search of the son's house they continued to his mother's house. He said that he told police that was his mother's house and not his. He said that he had informed Tu'utafaiva of this when he had read the search warrant to him. He said they went to conduct the search and Tu'utafaiva had asked him to request his mother to come out of the house, and she did.

[14] The police had then continued with their work. He denied that he had ever approached Tu'utafaiva to talk. He denied offering Tu'utafaiva a bribe. He said the police told him they had found marijuana. He said he looked inside and saw the marijuana. He said the police told him it was marijuana and that he did not know what it was. The police then searched his house where he lived with his partner and found nothing.

[15] He said that his mother owned the house as a result of his father dying. He was the heir but did not own the house. He said he did not live in either of those two houses, but elsewhere with his partner. He said that he went to the police station and accepted the work done because he was sorry for his mother. He resiled from any admission of owning or knowing what the plants were, saying he only told the police this because his mother was ill. He said a younger brother was living with his mother at the time of the search.

[16] Under cross-examination, he admitted that he had been living at his son's residence with his partner before moving to live nearby in a residence owned by his cousin, a year before the search. He repeatedly denied any admission that the marijuana, was his or that he had offered Tu'utafaiva a bribe. He said that he was shocked and surprised at what had happened. He said the clothes found in the bedroom where the drug was located were probably his younger brother's. He agreed that he visited his mother from time to time.

[17] The accused's son gave evidence. He said that after the first search they had called his father to come into the mother's house. He was in the house for 2 to 3 minutes. The police came out of the house. He did not hear any conversation. He said that no one lived with his grandmother. His father and other relatives brought her food. His father only came over if he wanted to eat fish.

[18] The accused's partner confirmed that she and the accused had lived together for 8 years and had two children. They had lived with the accused's son and family for a couple of years after 2010 and had moved to their present residence about two years before the search. The police had searched their residence and found nothing. She said the accused did not live with his mother.

FINDINGS

[19] I carefully considered the evidence of the accused and I do not accept that he was telling the truth when he resiled from the admissions he made in his signed record of interview. I accept the evidence of Officer Tu'utafaiva, in preference to the accused or his son, that the accused had approached him for a discussion in private and that they had entered the mother's residence together. Consequently, Tu'utafaiva had halted the search whilst he and the accused had a short conversation in which I accept the accused offered him a bribe prior to the accused pointing out the drug. I accept also that the accused subsequently admitted that the drug located under the bed belonged to him, and was cannabis. I do not accept his explanation given at trial, for the first time, that he only made the admissions he did because he wanted to assist his mother. I reject any suggestion that he told the police lies concerning his involvement out of a concern for his mother. I consider that, although he probably did not live at his mother's residence, he had access to the house and that is the reason he was able to place the drug under the bed in the spare room.

[20] On the issue of the bribe, I also accept Tu'utafaiva's evidence that the accused, before the search of the mother's residence took place, had asked Tu'utafaiva to talk in private and that they had entered the house before the drug

was located. The fact that the search was temporarily halted was supported by officer Fihaki who said that Tu'utafaiva had told him to hold the search while he talked with the accused and they went inside the residence. I think it unlikely Tu'utafaiva would have interrupted the search without reason to do so. I accept the reason he gave that the accused attempted to bribe him not to continue with it. I consider that this was a desperate attempt by the accused to dissuade police from conducting the search because he knew what they would find. When this did not work and knowing that the drug would be inevitably located, I accept that he referred Tu'utafaiva to it.

[21] Much of the challenge by Mr. Corbett was directed at the search itself. He submitted that the police went beyond the scope of the warrant when they searched the two houses and that the drug was obtained pursuant to an illegal search and was inadmissible. The central aspect of his challenge was that the accused, at the time of the search, was not living at either of the premises but with his partner, elsewhere. He emphasised that the police were told this before the search commenced of the mother's residence.

[22] Tu'utafaiva had said that on three previous occasions they had effected a search of the first residence and the accused had been living there. The accused and his partner admitted living at the son's residence one to two years before the search. I consider that Tu'utafaiva, honestly believed, despite the accused saying otherwise, that the accused was living at a residence on the allotment when he found him there at or around 8am prior to the 2014 search. Mr. Corbett suggested that he should have halted the search at that point, and procured another warrant when the Court opened for business at about 8.30. He submitted that there was present enough police to have controlled the scene until this was done and prevent any incriminating material being removed. I do not think, however, that the police would have had any power to control the scene whilst another warrant was obtained.

[23] I do not consider that this was a case where the police egregiously abused the power of search, or took deliberate short cuts to obtain and execute a search warrant. The warrant had been obtained to satisfy clause 16 of the Constitution which provides that it is unlawful to enter forcibly the houses or premises of another or to search for anything or take anything that is the property of another except according to law. I am satisfied that the accused was on the premises at the time the police came to execute the warrant, although not inside either of the houses probably, as he said, eating some fish provided by his son, and the police had good reason based on their experience of his living at that residence on earlier occasions when police had searched that he was still living there at the time the

police conducted their search on the 25th November, 2014, and that he was living in the second residence. By the time police came to enter the second house, following a request by the accused to speak in private, Tu'utafaiva, I find, had been offered a bribe not to search further and then had been alerted to where the drug was. At that point, he would have been in dereliction of duty had he not called police in to secure the drug.

[24] Mr. Finau for the Crown referred me to the judgement of Ford CJ in *R v Bowe* [2003] Tonga LR 24 In that case, also involving drugs, Ford CJ considered that even if a search was illegal, the evidence in England would be admissible at common law under *Kuruma v The Queen* [1955] AC 97 which allowed evidence to be given and the death sentence consequently upheld, even though the evidence had been obtained under an illegal search. Certainly, as Ford CJ remarked, that was the high water mark illustrating the inclusionary approach which had been adopted by English courts at common law for many years. However, it is doubtful in the modern world where an individual's right to privacy is given greater emphasis and the legitimacy of police action relating to search and seizure is more closely scrutinised, that the inclusionary approach should be slavishly followed in Tonga today. I raised with counsel the approach of the High Court of Australia in *Bunning v Cross* (1978)141 CLR 54 where the Court sanctioned a balanced approach to such issues. The Court in considering whether illegally obtained evidence should be admitted had to balance the public interest in maintaining the integrity of search and seizure procedures and ensuring that those whose task it is to enforce the law act lawfully, against the public interest that those who commit criminal offences should be brought to justice. (See further Ireland's Case (1970) 126 CLR 321) The factors adverted to by Stephen and Aickin JJ in Bunning were;

> no deliberate disregard of the law should be involved;
>
> whether the evidence could have just as easily been lawfully obtained;
>
> the cogency of the evidence and whether the illegality could be said to affect its cogency;
>
> the importance of the evidence in the context of the case;
>
> If vital evidence, was it of perishable or evanescent nature so that if there were any delay in securing it, it would have ceased to exist.
>
> the seriousness of the offending.

[25] This approach has gained favour in New Zealand and similar considerations are to be found under section 30 of the Evidence Act, 2006.

[26] Whatever approach is adopted here, I do not find that the police deliberately acted beyond the scope of the warrant. They acted in the belief that the accused lived at one of the houses on the allotment and the accused's behaviour prior to the search of his mother's residence would have given Tu'utafaiva additional reason to believe that he did live there. In these circumstances, I consider that, even though the scope of the warrant was exceeded because the accused probably lived elsewhere, this was not sufficient reason to reject the admission of cogent and vital evidence, in this case.

[27] In any event, I consider that when the accused asked to speak to Tu'utafaiva in private and then allowed him to enter and carry on a conversation in the house, whilst the search was halted, Tu'utafaiva was not a trespasser but present pursuant to an implied licence to enter the residence, by invitation of the accused, who plainly would have access to and authority to enter upon the premises it being, according to his evidence his family home which his mother had inherited after his father's death. See on implied licence, R v Ratima (1999) 17 CRNZ 227(CA) On this view, there is no illegality in what the police did in entering the mother's premises pursuant to the accused's invitation to do so, before a search was undertaken and in securing the drug after the accused had pointed it out to Tu'utafaiva.

[28] Mr. Corbett made submissions on the bribe. He pointed out that this was not the subject of any discussion in the record of interview, and so could not have been communicated to officer Feki. This may well be the case and is consistent also with the accused not being charged or committed on a charge of bribery to this Court. Neither Tu'utafaiva or Feki were pressed on this issue, by Mr. Corbett. It seems likely, however, that Tu'utafaiva did not mention this to Feki or Feki would have been expected to have taken it up with the accused in the interview. Tu'utafaiva, however, must have made mention of it in his brief of evidence tendered at the committal on the possession charge, leading the Crown to include it as an additional count in the indictment. The prosecution was entitled to pursue this very serious allegation and include a count of bribery if the Crown considered it appropriate to do so in the indictment after there had been a lawful committal on the possession charge to this Court, and the evidence tendered on the committal revealed another uncharged offence. Cf R v Lamb [1969]1 All ER 45 on section 2(2)(c)(i) of the Administration of Justice (Miscellaneous Provisions Act) 1933. Mr. Corbett did not object to the count of bribery being included in the indictment so I proceed on the basis that it must have been included in the brief of Tu'utafaiva leading to committal on the possession count. Indeed, prior to delivering this judgment, Mr. 'Aho confirmed that this was so. I have considered Mr. Corbett's complaint but for the reasons I have given I accept Tu'utafaiva's evidence that a

bribe was offered and I convict the accused of bribery, also. I also add that I have taken into account that there is no supporting evidence of the bribe which was made in private and for that reason I should exercise care before convicting. For reasons which I have given, I am satisfied, however, beyond reasonable doubt that Tu'utafaiva was telling the truth about this.

[29] Mr. Corbett also complained that, although the evidence indicated that photographs had been taken of the cannabis including being in situ and the cannabis had been seized and weighed, neither photographs nor drugs had been produced in evidence. Nothing, however, was made of this during the evidence. Had it been, the Crown could have adduced evidence to formally explain why they could not be produced. Mr. 'Aho explained why this was so from the bar table in answer to a question posed by the Court as to whether photographs said to have been taken of the marijuana were going to be produced, namely that the evidence had been lost during the refurbishment of the police station, and Mr. Corbett did not suggest he was dissatisfied with this explanation or required further proof during the trial. In the absence of this being raised as an issue, I see no reason now why this should preclude me from convicting the accused of possession of an illicit drug. I am satisfied beyond reasonable doubt that the Crown has proven the essential elements of the offending involving the accused being in possession of cannabis, the weight of which in the indictment I accept was 3,800 grams or 134 ounces, which is a large amount of cannabis in Tonga. I am satisfied also beyond any reasonable doubt that the material was taken into custody weighed and sampled and identified by expert evidence as cannabis or marijuana, an illicit drug. I am satisfied that at all material times beyond a reasonable doubt that the accused had custody and control of the drug, that is possession of it, and that he identified it as cannabis and as his after it had been taken back to the police station and was present when he was being interviewed.

VERDICT

[30] Accordingly, I convict the accused on one count of possession of illicit drugs contrary to section 4 (a) (b) (ii) of the Illicit Drugs Control Act 2003, and the second, bribery of a member of the Tongan police contrary to section 165(1) of the Tonga Police Act 2010.

Pacific International Commercial Bank v National Reserve Bank of Tonga

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 65/2016

28 July 2017

Banking — revocation of banking licence — no notice or chance to make representations was given — did the Reserve Bank owe a duty of care to the commercial bank? — security for costs principles

The Reserve Bank revoked the banking licence of the plaintiff bank. There was no notice given or opportunity given to make representations about the proposed revocation.

There have been many actions between the parties This application is for the claim of negligence to be struck out and for security for costs to be given by the plaintiff commercial bank.

Held

1. The existence of a duty of care that would if breached allow a claim of negligence is not consistent with the Act. In determining whether it is fair, just or reasonable to impose a duty of care the Court ought to look at the statutory purpose of the statutory duty that the defendant is said to have negligently performed. In revoking a banking licence the Reserve Bank is concerned with the prudential supervision and public confidence in the operation and stability of the financial system 'and to protect the interests of clients, investors and general public depositors'.
2. To impose on the Reserve Bank a common law duty of care as alleged in this case would be inconsistent with the performance by the Reserve Bank of its supervisory functions.
3. The sixth cause of action (relating to negligence) is struck out.
4. The plaintiff commercial bank is to provide security for costs to be assessed.

Cases considered

Northern Territory of Australia and Ors v Mengel and Ors (1995) 185 CLR 307
X (Minors) v Bedfordshire City Council [1995] 2 AC 633
Caparo Industries plc v Dickman [1990] 2 AC 605 (HL)
Fleming v Securities Commission [1995] 2 NZLR 514 (CA)
Public Service Association Incorporated v Kingdom of Tonga [2015] Tonga LR 439
Highgate on Broadway Ltd v Devine [2012] NZAR 1017

Counsel for the plaintiff : : Mr. J McBride
Counsel for the defendant : Mr. H Waalkens QC KC

R U L I N G

The application

[1] The plaintiff (PICB) has brought this action to challenge the decision of the defendant (the Reserve Bank) of 26 July 2016 revoking its banking license under the Financial Institutions Act 2004 (as amended by the Financial Institutions Amendment Act 2014) (the Act).

[2] The statement of claim contains six causes of action. Five of the causes of action are for judicial review. The sixth cause of action is in tort. It alleges that the Reserve Bank was negligent in revoking PICB's licence when it was not entitled to. In respect of this sixth cause of action unquantified damages are sought.

[3] There are two applications before the Court (other than for costs). First, the Reserve Bank applies to strike out the sixth cause of action on the grounds that it does not disclose a reasonable cause of action or is an abuse of process (O.8 Rule 8 (1)(a) and (d) Supreme Court Rules). Secondly, the Reserve Bank seeks security for costs. Both applications are opposed by PICB.

Background matters

[4] This is not the first action between these parties over the same matter. On 2 August 2016 PICB commenced an action under CV 40/2016 against the Reserve Bank and also against its Governor, Dr. Sione Kioa, challenging the decision of 26 July 2016. At the time of filing, it sought interim declaratory relief quashing the decision and directing the Reserve Bank to give PICB an opportunity to submit reasons why the licence should not be revoked. In addition to the interim orders it

sought TOP$10 million general damages and TOP$5 million punitive or aggravated damages.

[5] In summary, the allegations in the statement of claim in CV 40/2016 were:

> That the Reserve Bank was a statutory body established under the National Reserve Bank of Tonga Act 1988.
>
> That it had on 26 July 2016 without notice unlawfully revoked PICB's bank licence.
>
> That this was invalid as the Reserve Bank had failed to give written notice of its intention to revoke the licence under section 10(2) of the Act and relied on grounds which had been the subject of an earlier notice of intention to revoke that had been withdrawn on 2 April 2015.
>
> That between 28 July 2016 and 1 August 2016 the Reserve Bank had acted maliciously when giving the public false information concerning PICB's solvency, the need to revoke its licence and whether it had breached the conditions of its licence.
>
> That on 1 August 2016 Dr. Kioa made a public statement to the media that the Reserve Bank should appoint a receiver to recover loan monies owed by customers who had borrowed from PICB.
>
> As a result of the Reserve Bank's actions and Dr. Kioa's public statement there was a run of deposit account holders.
>
> That PICB had suffered and would continue to suffer substantial damage.

[6] The Reserve Bank opposed the application for interim orders. The application was withdrawn by PICB on 11 August 2016 without being heard. The Reserve Bank then applied to strike out the statement of claim (along with other orders). That application complained that the claim was subject to O.39 Rule 1 of the Supreme Court Rules and leave of the Court was required before the action was commenced. On 3 November 2016 Mr. Tu'utafaiva, then Counsel for PICB, sought an adjournment of the strike out application. When that was opposed an order was made by consent striking out the statement of claim in its entirety. I reserved leave to PICB to apply for judicial review of the Reserve Bank's decision of 26 July 2016 within 21 days.

[7] This proceeding was filed on 23 November 2016. On 27 January 2017 I granted PICB leave to apply for judicial review. Leave was conditional upon payment of the costs awarded in CV 40/2016 and without prejudice to any application by the Reserve Bank to apply to strike out the proposed sixth cause of action in tort. The application to strike out (and for security for costs) was duly filed and is the subject of this ruling.

The statement of claim

[8] It is essential to an understanding of what follows that I describe the basis for PICB's application for judicial review and the sixth cause of action. This was set out in a helpful manner at paragraphs 56 to 58 of Mr. McBride's written submissions.

[9] PICB's case is that the Reserve Bank has the power under the Act to grant and revoke a licence to operate a banking business. The business of a bank necessarily depends on public trust and confidence which flow from the fact that the Reserve Bank has authorised its operations. PICB argues that once a licence is issued the Act recognises (in section 10) that a bank should ordinarily be given 10 working days notice of an intention to revoke its licence 'as the consequence of revocation …will be self-evidently dire'. It is said that the Reserve Bank unlawfully (and carelessly and recklessly) revoked PICB's licence without giving it prior written warning as required by the Act. Whilst acknowledging that there is provision in section 37 of the Act for a licence to be revoked without notice PICB submits that the provision (and the related section 36) are poorly drafted and do not apply and that in any event the Reserve Bank did not invoke those sections when revoking PICB's licence and cannot now provide 'retro reasons'. There are additional arguments that if the Act did not require that PICB be given notice under section 10 then it had a legitimate expectation of further dialogue with the Reserve Bank and the revocation was unreasonable.

[10] As is plain, the kernel of PICB's case is that it was entitled to be given notice to respond to the Reserve Bank's intention to revoke its licence and that the Reserve Bank's notice was unlawful and of no effect because it did not afford to PICB the prescribed 10 working days for a response.

[11] As far as the sixth cause of action is concerned the pleading is curt but clearly follows the same line described above. I set it out as follows:

> 48 PICB repeats paragraphs 1 to 31 above and says that:

a) the Reserve Bank owed a duty of care to PICB to supervise its operations carefully and reasonably, and only revoke its licence in the circumstances prescribed in the FIA, once PICB had been given a reasonable opportunity to submit reasons why its license should not be revoked;

b) the Reserve Bank negligently breached its duty of care to PICB by:

i) failing to give PICB a reasonable opportunity to submit reasons why its license should not be revoked; and

ii) purporting to revoke the Licence when it was not entitled to; and

c) The Reserve Bank's negligence caused PICB loss.

Relevant principles on a strike out application

[12] Mr. McBride reminded the Court of the principles upon which it must proceeding when dealing with a strike out application. These can be summarised as follows:

a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even though they are not or may not be admitted.

b) Before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.

c) The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material to safely make a decision.

d) The fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction.

[13] I do not take issue with any of this. I would add that O.8 Rule 8(2) provides that when an application to strike out is based on the ground that the claim discloses no reasonable cause of action no evidence shall be heard on the application. It is all too common for parties to apply to strike out a claim or

defence with affidavits containing what turns out to be contested evidence. That is not permitted under the Rules. However Mr. Waalkens made the interesting point (with reference to the White Book) that in a case such as this the Court may have regard to the evidence already put before the Court in supporting affidavits comprising the original application for leave to seek judicial review. When applying for leave PICB relied upon the lengthy affidavits filed in CV 40/2016. Both Counsel referred to a limited extent to the affidavit evidence and no objection was taken.

The strike out application

[14] In their submissions Counsel first dealt with the Reserve Bank's ground that the sixth cause of action was an abuse of process (because it should have been raised in the first action) and then with the ground that the sixth cause of action does not disclose a reasonable cause of action. In my view the second of ground is unanswerable and is sufficient to determine this application. It is not necessary for me to deal with the abuse of process ground or indeed the Reserve Bank's further argument advanced by Mr. Waalkens that if a duty of care was owed it had not been breached.

[15] The Reserve Bank says that it is not reasonably arguable that it owed PICB a common law duty to take reasonable care in performing its supervisory functions under the Act. The issue then is whether the claim by PICB that such a duty was owed to it by the Reserve Bank is clearly untenable, assuming the facts pleaded in the statement of claim are true.

[16] Mr. McBride emphasised, and I accept, that this Court is not required to decide with any finality whether such a duty is actually owed. In the case of an application to strike out on the basis that a particular duty of care does not exist, the question for the Court is whether the circumstances relied on by the plaintiff are capable of giving rise to a duty of care and if the duty of care cannot confidently be excluded (the onus being upon the Reserve Bank in this case) the claim must be allowed to proceed.

The approach to determining the existence of a duty of care

[17] The Reserve Bank is a public body and PICB's sixth cause of action alleges that it acted negligently in the exercise of a statutory power to revoke PICB's banking licence. It is well established that the careless performance of a statutory duty or power does not of itself create liability for loss that may result (*X*

(Minors) v Bedfordshire City Council [1995] 2 AC 633 (HL) per Lord Browne-Wilkinson at 734-744).

[18] Relying on *X (Minors)* (supra) Mr. Waalkens submitted that in considering whether to impose a duty of care upon a public body arising from the careless exercise of a statutory power or duty the Court needs to consider two broad issues. First, whether the claim is justiciable and, if so, secondly whether it is appropriate to impose a common law duty of care upon the body in question.

[19] In relation to the first issue Mr. Waalkens argued that negligence actions should not be used to impugn a discretionary decision of a public body. In relation to the second issue, Mr. Waalkens argued that the considerations that are relevant concern whether there is a sufficient relationship of proximity between the parties to justify the imposition of a duty of care and whether upon consideration of any relevant policy factors it is fair, just and reasonable that the law impose such a duty on one party for the benefit of the other (*Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL)).

[20] In *X (Minors)* (supra) Lord Browne-Wilkinson was of the view that if a decision falls within the ambit of a statutory discretion a common law duty to take care in relation to it cannot exist and it is not necessary to go on and consider the second limb of the inquiry as to whether a duty of care might arise on common law principles. However in some decisions the question whether the decision was within power has not been treated as determinative. Todd at 6.6.01 notes:

> Questions as to whether a public body has acted rationally or within the ambit of a discretion is better seen as relevant in determining whether the authority is in *breach* of a duty independently held to exist.

[21] For PIBC Mr. McBride noted that the Courts in England and Wales, Australia, Canada and New Zealand have struggled to formulate methodology for determining whether a duty of care exists in novel situations and advocated for the Australian approach under which it is of the utmost importance to identify and consider all of the salient features of the case. The salient features fall broadly under the headings of the nature of the claim, foreseeability, proximity and policy.

[22] In this case I do not think it matters which approach I adopt as Counsel agreed that the Court must consider the same relevant range of factors.

Discussion

[23] There was no difference between Counsel that negligence actions should not be used to impugn a discretionary decision of a statutory body because for a Court to substitute its own discretion is to usurp the function of the public body (Stephen Todd, *The Law of Torts in New Zealand* 7th Ed, Thomson Reuters, Wellington, 2016 at 6.06.02 and page 349).

[24] In *X (Minors)* Lord Browne Wilkinson at page 737 said:

> Since what are under consideration are discretionary powers conferred on public bodies for public purposes the relevant factors will often include policy matters, for example social policy, the allocation of finite financial resources between the different calls made upon them or … the balance between pursuing desirable social aims as against the risk to the public in so doing. It is established that the courts cannot enter upon the assessment of such "policy" matters.

[25] Mr. McBride argues that PICB is not pursing a complaint about the exercise of a statutory discretion, or indeed that the Reserve Bank implemented a flawed policy or even a 'political decision'. He submits PICB's complaint is that the Reserve Bank failed to appreciate that it needed to give a prior notice of its decision to revoke. I do not accept that submission.

[26] The decision of the Reserve Bank to revoke PICB's licence was undoubtedly the exercise of a statutory discretion in a context where the Reserve Bank was required to consider and balance a range of policy considerations including but not limited to (as Mr. Waalkens correctly submitted) the prudential supervision of banks, the public confidence in the banking industry but also the interests of depositors with PICB.

[27] It has been held that in so far as a plaintiff's complaint is that a decision maker has made a mistake as to the extent of the power causing the plaintiff to suffer loss his only cause of action is in misfeasance not negligence. Rationales for this principle include that a duty to take care to act within power 'might act as a disincentive to efficient decision making and tend to lead to intractable difficulties in determining how such a duty might be discharged' (Todd at 6.6.02 (4) page 367) and that such a duty would undercut the requirements for the cause of action in misfeasance. In *Northern Territory of Australia and Ors v Mengel and Ors* (1995) 185 CLR 307, 359 Brennan J said:

> Where a public officer takes action that causes loss to a plaintiff …and the sole irregularity consists of an error as to the extent of the power to

> support the action, liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in a public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability – namely, liability in negligence – where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss.

[28] As Mr. McBride acknowledges (see paragraph 47 of his submissions) PICB's complaint is the failure of the Reserve Bank to give notice of its intention to revoke its licence. The Reserve Bank failed, PICB says, to appreciate the true extent of its power causing PICB purely economic loss. In such a case PICB' only cause of action in tort is for misfeasance not negligence and no duty of care exists.

[29] I note also in this context the words of Lord Keith of Kinkel in the Privy Council case of *Takaro Properties v Rowling* [1987] 2 NZLR 700 where it was said:

> As is well known anybody, even a Judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs can be severely criticised without attracting the epithet "negligent". Obviously, this simple fact points rather to the extreme unlikelihood of a breach of duty being established in these cases, a point to which their Lordships will return; but it is nevertheless a relevant factor to be taken into account when considering whether liability in negligence should properly be imposed.

[30] Mr. McBride argues that this claim is a novel one because there are no authorities addressing a claim against a bank for negligently revoking a licence, publicly without the benefit of a statutory period of notice. Whilst that may be so, there are a number of authorities where the Courts have refused to impose a duty of care on a public body undertaking a financial regulatory role (*Minories Finance Limited v Arthur Young* [1989] 2 ALL ER 105 (CA), *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 (PC), *Davis v Radcliffe* [1990] 1 WLR 821 (PC), Fleming v Securities Commission [1995] 2 NZLR 514 (CA) and see also

Stovin v Wise [1996] AC 923). This also tells against the imposition of a duty of care.

[31] It is trite that whether a common law duty of care will be imposed in a case such as this is strongly influenced by the statutory framework under which an impugned decision is made. The relevant legislation is the Act. It is impossible to see how the imposition of the duty of care for which PICB contends can ever be considered consistent with the Act. In determining whether it is fair, just or reasonable to impose a duty of care the Court ought to look at the statutory purpose of the statutory duty that the defendant is said to have negligently performed. In revoking a banking licence the Reserve Bank is concerned with the prudential supervision and public confidence in the operation and stability of the financial system 'and to protect the interests of client's, investors and general public depositors' (section 15 and see also section 36 and 37).

[32] To impose on the Reserve Bank a common law duty of care as alleged in this case would be inconsistent with the performance by the Reserve Bank's of its supervisory functions and its duty to protect 'clients, investors and general public depositors'. It might well also have a chilling effect and discourage the performance of the Reserve Bank's duties for fear of civil liability. I agree with Mr. Waalkens that this is a powerful factor pointing against the imposition of a common law duty of care.

[33] Mr. McBride argued that PICB was vulnerable and dependant in that it had no way of protecting itself from the negligent decision of the Reserve Bank to revoke its licence and that this supports the imposition of a duty of care. He also submits that there was a special relationship between the Reserve Bank and PICB. I do not accept that PICB was vulnerable, at least not in the way that concept is understood in the present context (*Minories Finance* (supra) at 110).

[34] PICB was a substantial commercial enterprise concerned with making profits from providing banking services. It was well able to protect itself by conducting its operations prudently and carefully in accordance with the requirements of the Act and its licence. In so far as it contends it was vulnerable to a negligent decision to revoke its licence it was able and had the means to seek judicial review and obtain urgent interim relief. It is notable that PICB did indeed seek interim relief in CV 40/2016 but abandoned the application.

[35] The argument that there existed a special relationship between PICB and the Reserve Bank is most curious. First, no such special relationship is pleaded. It

is for PICB to assert in its pleading all the facts that it relies upon to support the imposition of a duty of care. More importantly, I cannot see how a 'protracted dialogue' (see Mr. McBride's submissions at [55]) between the Reserve Bank and PICB can possibly give rise to the imposition of duty to protect PICB when the subject matter of the dialogue was PICB's alleged failure to comply with the Act, the terms of its licence and directives of the Reserve Bank.

[36] It follows that despite all that Mr. McBride impressed upon me in his able submissions I can see no tenable argument that the Reserve Bank owed PICB a duty of care as alleged. The sixth cause of action is therefore struck out.

Security for costs

[37] In seeking security for costs the Reserve Bank relies upon O.17 Rule 1(b) that PICB may be unable to pay its costs if ordered to do so. Mr. McBride accepts that the Reserve Bank has satisfied the onus upon it to persuade the Court that PICB may not be able to pay costs but says other factors point against making the order sought.

[38] I drew to Counsels' attention the principles in *Public Service Association Incorporated v Kingdom of Tonga* [2015] Tonga LR 439 (CA) at paragraphs [22] to [27]. The Court of Appeal set out a four step enquiry in assessing applications of this sort. The Court must assess:

> The approximate level of costs likely to be awarded to the defendant if successful.
>
> Whether the plaintiff will be good for such an award.
>
> Whether, in the light of the circumstances of the case, justice requires that the plaintiff should be required to give some security for those costs.
>
> In those circumstances, the amount of the security that should be ordered and the means by which it should be satisfied.

[39] At each step of its consideration of the application the onus of persuading the Court to make an order for security is borne by the applicant (in this case the Reserve Bank). I deal with each of the four matters I must consider below.

[40] The Reserve Bank seeks security for costs in a sum of $100,000. There is no evidence to support that figure and PICB argues that it is manifestly excessive.

It argues that an amount of $20,000 is a more appropriate amount if security is to be required. I will return to this.

[41] Mr. McBride concedes that PICB may not be good for an award of costs and I do not need to consider the evidence in relation to this.

[42] Mr. McBride refers to a number of factors which he says point against ordering security. He argues that the plaintiff is not nominal and has suffered a real loss as a consequence of the revocation of its licence. This is strongly disputed by the Reserve Bank who says that PICB was losing large sums of money from the day it commenced business. It appears to me that the Reserve Bank is correct about that. I also therefore do not accept the submission that PICB's impecuniosity has been caused by the Reserve Bank's decision to revoke its licence without prior notice.

[43] It is said that PICB has not disposed of assets to avoid paying costs and has difficulty accessing third party funding. It appears to me that the disposal of assets is a reason to grant security but not a compelling factor to refuse an application where there is clear evidence of a plaintiff's impecuniosity. There is insufficient evidence that PICB is not able to draw on third party funds (such as shareholders or others interested in the proceeding) to raise a sum which in the context of a commercial banking dispute will be relatively modest.

[44] A further matter relied upon is that PICB's claim is meritorious. As Kós J noted in *Highgate on Broadway Ltd v Devine* [2012] NZAR 1017, 1024 the Court is not to predetermine the merits or form more than an impression. Similarly the Court of Appeal in *Public Service Commission* (supra) noted that any assessment of the merits can only be broad brushstroke. My assessment of the merits is that PICB's claim is arguable but not strong.

[45] Finally it is argued that ordering security would be oppressive and 'likely to lead to a denial of justice'. There is certainly insufficient evidence before me to suggest that is the case.

[46] Neither party contends that security should be provided other than by payment into court.

[47] Balancing the relevant factors I am of the clear view that the interests of justice require that an order be made that PICB provide security for costs. However, as I have noted the Reserve Bank has failed to put before me any

evidence of the likely costs of the action. I expect any assessment it has made will have to be reviewed now that the sixth cause of action has been struck out.

[48] Counsel agree that if I find security should be provided the best course is to adjourn this application so that they may confer about the amount of security to be provided by PICB. If they cannot do so, the matter can be adjudicated. I will deal with this in the orders below.

Result

[49] The sixth cause of action in the statement of claim is struck out.

[50] I am satisfied that PICB should provide security for costs but adjourn the application to allow Counsel to confer in the hope that some agreement can be reached as to quantum.

[51] This action shall be called for mention at 9am on 29 September 2017 at which time I shall if necessary hear further from Counsel on the quantum of security and make timetabling orders.

[52] The Reserve Bank is entitled to costs to be fixed by the Registrar if not agreed.

Lenati v Palelei and Minister of Lands

Land Court, Nuku'alofa
President Paulsen
LA 16/2017

7 August 2017

Land Law — lease granted despite long time occupation by another — Minister's duty to enquire about occupation — occupant's right to be heard

The Minister granted the first defendant a town allotment at Ma'ufanga and it was registered on 26 July 2016. The plaintiff had been living on that land all her life but was not consulted by the Minister before the grant was made and registration completed. The plaintiff's mother had a 50 year lease but this was surrendered just before the grant to the first defendant.

The plaintiff sought an order cancelling the first defendant's registration. The issue was whether the Minister fulfilled his duty to make reasonable enquiries to determine whether there was an impediment to the making of the grant, which was part of an exchange of allotments by the lessee, the plaintiff's father.

The Land Ministry made no enquiries about occupation of the land and the applicant for the grant did not inform them of the lease.

Held

1. The Minister did not make proper enquiry as to whether the land was occupied, whether there was a registered lease and if there was therefore an impediment to the grant;
2. The plaintiff's occupation was lawful and she had a right to be heard arising from the fact of her long term occupation of the land, not the lease that had by then expired;
3. The First Defendant's Deed of Grant is cancelled and the Minister is directed to make a fresh decision, in his own discretion, after all parties have been heard.

Cases considered

Finau v Finau (Unreported Land Court, 21 June 2017, LA 31/2015,
Tafa v Viau anors [2006] Tonga LR 287 (CA),
Naulu v Tupou and Others [2016] Tonga LR 163
Manu v 'Aholelei [2015] Tonga LR 135

Tafo'o v Vete [1998] Tonga LR 164,
Vai v 'Uliafu & anor [1989] Tonga LR 56
Vainikolo v Kaihea anor [2009] Tonga LR 201.
Pelisikoti v Anau and anor [2016] Tonga LR 477

Counsel for the plaintiff: Mrs. P. Tupou
Counsel for the first defendant: Mr. S. H. Taione (on 19 and 20 July) and Mr. S. Tu'utafaiva (on 28 July)
Counsel for the second defendant: Mrs. 'E. Langi

10 **R U L I N G**

The claim

[1] The Minister granted the first defendant a town allotment at Ma'ufanga and it was registered on 26 July 2016. The plaintiff had been living on that land all her life but was not consulted by the Minister before the grant was made and registration completed. The plaintiff seeks an order cancelling the first defendant's registration.

[2] At issue is whether the Minister fulfilled his duty to make reasonable enquiries to determine whether there was an impediment to the making of the grant of the town allotment to the first defendant.

20 **The facts**

[3] Siaosi Palelei (Siaosi) had two daughters by his first wife and four daughters by his second wife, 'Uheina Palelei. The plaintiff (Lata) is the second daughter of Siaosi's marriage to 'Uheina. Siaosi also had an illegitimate son named Paula Palelei (Paula). Paula has three sons. The first defendant (Siosifa) is Paula's youngest son. It follows that Lata and Paula are half siblings and Lata is Siosifa's aunt.

[4] In 1948, Siaosi was granted a town allotment known as Matakivaha'i. It was registered in 1956. Siaosi and his family lived in a substantial house which was gifted to him and relocated onto the allotment.

30 [5] Lata was born in 1965. She has lived on Matakivaha'i her entire life; that is 52 years. She is married and her husband has a town allotment.

[6] Paula moved to live on Matakivaha'i in around 1979 when he was chased off his uncle's land. Siaosi consulted 'Uheina and they agreed Paula could live with them. He was treated as any other member of the family.

[7] Siaosi retired in around 1985. He decided to stand for the Legislative Assembly as a candidate in 'Eua. To advance this intention he arranged to exchange Matakivaha'i for Paula's town allotment at 'Eua. The exchange of the town allotments was approved by Cabinet. Paula was registered as the holder of Matakivaha'i on 31 July 1990. However Siaosi became ill and never stood for election.

[8] When 'Uheina found out about the exchange of the allotments she was not happy. She was concerned that one day the family would be chased from the land. She told Siaosi to reverse the exchange but he said it could not be done. 'Uheina then said that the allotment should be halved between Paula and their daughters. Siaosi assured his family that he would see to it that no one would chase them from their land. Lata understood from her father's assurance that she would be able to live on the land for as long as she wished. Siaosi and 'Uheina continued to live on the land until they died in 2000 and 2006 respectively and Lata has lived there to the present day.

[9] Paula (who did not give evidence) must have been aware of the concerns within the family about the exchange of the allotments and discussed that with Siaosi. On 19 October 1990 Cabinet approval was obtained to the grant of a lease over one half of the allotment for 20 years in favour of Siaosi's eldest daughter Talahiva. The lease was registered on 22 February 1996 for the term 22 February 1996 to 21 February 2016. This was broadly congruous with 'Uheina's suggestion that the town allotment be divided between Paula and the daughters. I have no doubt that the lease was intended to provide security of occupation for Siaosi's daughters. It is not clear why the lease was registered in only Talahiva's name but there was no suggestion that it was to benefit her alone. It is also not dear why the lease was granted for 20 years. The circumstances lead me to conclude it was thought likely that within 20 years the daughters would have moved away.

[10] On 10 April 2012 Paula wrote to the Minister of Lands to surrender that part of Matakivaha'i that was subject to the lease in favour of Siosifa. However Paula's letter made no mention of the lease or of Lata's occupation. The application was not processed immediately because the allotment was subject to a mortgage. Following the discharge of the mortgage Cabinet approval to the surrender was given on 17 October 2014. On 11 November 2014 a public notice

was published notifying of the surrender and calling for any claims to be made to the land. No claims were made.

[11] On 26 January 2016 Siosifa lodged an application for a grant of the land. The lease had not then expired. It had expired by 7 March 2016 when the Minister gave his consent to the grant. On 26 July 2016 Deed of Grant Vol 435 Folio 29 was issued to Siosifa.

[12] Lata was not informed of Paula's intention to surrender the land or of Siosifa's application. It was not until September 2016 that Paula's wife told her that the land had been registered by Siosifa. In December 2016 Siosifa told Lata's husband that he was going to build on the land and that they would need to move away.

[13] Lata was concerned about these events. She wrote a letter to the Minister asking him to cancel Siosifa's grant on 30 January 2016. She also wrote to Paula on 9 February 2017 asking him to return the land. Paula responded expressing the hope that Lata would vacate the land. On 28 March 2017 Siosifa's lawyers wrote to Lata giving her 14 days to vacate or they would proceed to Court and lock up the house to prevent her and her family from entering it.

The role of the Ministry

[14] Warrick Vea, an experienced Land Registration Officer, gave evidence for the Minister. He said that he personally processed the applications in relation to the allotment in dispute.

[15] Mr. Vea confirmed that no inspection of the land was carried out before the grant was made to Siosifa. This was, he said, because Paula's surrender letter made no reference to a lease or to the fact that the allotment was occupied. I note also that the lease was not recorded on Paula's Deed of Grant.

[16] There was no evidence that Mr. Vea or anyone at the Ministry asked either Paula or Siosifa if the land was occupied. Mr. Vea said that he spoke to Paula on several occasions but I do not recall him informing me that the allotment was occupied. The inference I draw from the evidence is that Paula and Siosifa did not wish the Ministry to know of Lata's occupation or for Lata to be alerted to their intentions with regard to the land.

[17] Mr. Vea said that he did not learn of the lease until 2017 when Crown Law requested instructions for this case. He did not consider the possibility of a

lease because Paula's allotment had been mortgaged since 1993 and was not available to be leased. This was not an assumption that Mr. Vea could safely make as notwithstanding the mortgage the lease was registered in favour of Talahiva and a further mortgage was then registered on 24 August 2001.

[18] Mr. Vea was mistaken in my view that he only became aware of the lease in 2017. It can be assumed that he was familiar with the Ministry's file. On 4 May 2016 the Minister issued a Savingram which directed that Siosifa's Deed of Grant should be prepared to complete registration. On that Savingram there is a note written by a Ministry Officer recording that the lease had expired in 2016. That Savingram refers to a map of the allotment which Mr. Vea acknowledged was the map prepared for the lease. The existence of the lease was therefore certainly known to the Ministry by 4 May 2016.

[19] If Mr. Vea was not aware of the lease, he should have been aware. The lease was registered and could have been found in the register of leases. Mr. Vea also acknowledged under cross-examination that the lease would have been shown on a head map (by which I take it he meant the registered plan of allotments). Rather than search those records he relied upon the Deed of Grant and incorrectly assumed that there could not be a lease.

The submissions

[20] Mrs. Tupou submitted that Paula had breached Tongan cultural values in taking steps to remove Lata from the land and failing to extend to her the same consideration as had been shown to him when he had been forced from his uncle's allotment.

[21] She also noted a history of non-compliance by the Ministry with the Land Act in respect to the registration of the mortgages and the lease. She also submitted that the Ministry had failed to show that the consent of Cabinet to the surrender of the land had been advertised in the Tonga Government Gazette and in three issues of a Tongan Weekly newspaper as required by section 54(2) of the Land Act. Mr. Vea's evidence was only that a public notice was published on 11 November 2014 in a newspaper. The omission to publish in accordance with section 54 meant, Mrs. Tupou submitted, that the grant to Siosifa should be declared invalid.

[22] In relation to the Minister's duty to make reasonable enquiries Mrs. Tupou referred me to Finau v Finau [2017] Tonga LR 211 where I discussed the principles enunciated in Naulu v Tupou and Others [2016] Tonga LR 163. She submitted that the history of dealings with the town allotment, involving the

exchange between Paula and Siaosi and the registration of the lease in favour of Talahiva, meant that the Minister was put on notice that an inspection should be conducted before granting the town allotment to Siosifa. She also argued that the Minister must be taken to have known of the lease and the fact that it had at the time of the grant only very recently expired. These matters were sufficient to alert the Minister to make further enquires.

[23] Mr. Tu'utafaiva submitted that Siosifa was entitled to apply for the land once it had reverted to the Crown following Paula's surrender. He argued that Lata's right to occupy the land did not survive the term of the lease and that at the time the grant was made she had no right to be heard. He also submitted that Lata had no right to remain on the land when her husband had his own town allotment.

[24] For the Minister Mrs. Langi submitted that with the information that was before the Minister there was no obligation to inspect the land before making the grant to Siosifa. The relevant information was, she said, Paula's letter requesting a surrender in favour of Siosifa, that there was a mortgage on the land which meant there was no reason to look for any lease, the fact that no claims had been made within the 12 months prescribed by section 54 of the Land Act and that at the time of the grant the lease had expired (although according to Mr. Vea the existence of the lease was not known).

[25] Mrs. Langi also argued that Lata's right to occupy the land could not survive the lease. She submitted that the term of the lease for 20 years was an indication that it was not the intention that Lata and her sisters would live on the land indefinitely as Lata now contends.

[26] I asked Mrs. Langi about cases where it had been held that a person in long term occupation of land was entitled to be heard by the Minister before a grant was made to another. I had in mind Tafa v Viau anors [2006] Tonga LR 287 (CA), Manu v 'Aholelei [2015] Tonga LR 135 (LC) and Naulu. She submitted that these cases can be distinguished because they involved a prior holder giving permission to the person challenging a grant to occupy and live permanently on land whereas in this case Lata's right to be on the land did not survive the lease. She referred me to Tafolo v Vete [1998] Tonga LR 164, Vai v 'Uliafu & anor [1989] Tonga LR 56 and Vainikolo v Kaihea anor [2009] Tonga LR 201.

The law

[27] The extent of the Minister's duty to make enquiries before making a grant was considered by the Court of Appeal in Naulu. This Court has applied Naulu in Finau and Pelisikoti v Anau and anor [2016] Tonga LR 477.

[28] In Naulu the Court of Appeal cancelled a grant of a tax allotment because the Minister had failed to discharge his duty to make reasonable enquiries as to the availability of the land. Specifically the Minister had not investigated the fact that the land was under cultivation. The Court of Appeal noted that the Minister had been told by the applicant for the land that it was being cultivated: which surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. This might not have been a short-term project. In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in light of what it found, should the Minister have decided whether the land was available.

[29] Referring to Tafa the Court of Appeal noted:

> [15] The Court drew attention to two aspects of the Minister's functions and duties which, it said, combined to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. The first was the need for him to sign a declaration that there was no impediment. He could not do so if he simply did not know because he had made no sufficient inquiry.
>
> [17] The second aspect to which the Tafa v Viau Court drew attention was that, as it said:
>
> "...the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved" (at [12])
>
> [18] The Court stressed that the Minister does not have to make the inquiries personally and may rely on his officers "but, if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minster (at [12]).

[30] The Court of Appeal in Naulu recognised that there is not always a requirement that the Minister undertake an inspection of land before making a grant. It stated that where there is a declaration of no impediment from the estate holder, no competing application and nothing else to put the Ministry on alert it

might be reasonable for the Minister to rely upon the estate holder's certification 'though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up.

[31] In this regard the Court, at [10], referred with apparent approval to the comment of Scott J in the Court below where he said: ..

> where there are competing applications or when the position is not at all clear then a detailed investigation has to be carried out.

[32] In putting this particular case in context it is helpful to refer to two further extracts from Tafa. At paragraph [13] the Court of Appeal found that a decision maker can be held to account if he fails to have regard to circumstances that he would have known had he acted reasonably and fairly. The Court went on to say:

> The duty to take reasonable steps to ascertain the facts to which we have referred has been held to apply by very high authorities. In Secretary of State v Tameside MBC at 1065, Lord Diplock said:
>
> > "[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"
>
> On that basis his Honour considered an administrator could be held to account for a failure to have regard to "circumstances which, had he acted reasonably and fairly he would then have known". Where that knowledge would have imposed a duty to accord natural justice to some person ... "the Court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.".

[33] The other extract comes from the ruling of the Land Court in Tafa ([2006] Tonga LR 125, 141-142) which was upheld on appeal. Ford Acting CJ said:

> To have a situation, therefore, where the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term lawful occupant of the same piece of land, is quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature.

Discussion

[34] The land in question is Government land. Whilst there were no competing applications for the land the Minister did not have and could not rely upon a declaration from the estate holder that there was no impediment to the grant. It was for the Minister to sign a declaration that there was no impediment to the grant and he could not do that in the absence of sufficient enquiry.

[35] The Minister, and the officers acting on his behalf, did not make sufficient enquiry. There was no evidence that they asked Paula or Siosifa whether the land was occupied and if so by whom. More emphatically, Mr. Vea should have searched the register of leases or the registered plan of allotments and discovered the lease. It was neither prudent nor proper for Mr. Vea to assume that there could be no lease because the land was mortgaged. The lease would have put the Ministry on alert that the land for which Siosifa had applied was almost certainly occupied by another and had been so since at least 1996.

[36] The Ministry should then have investigated what was happening on the land and undertaken an inspection and spoken to Lata. That would have revealed her occupation of the land for over 50 years and that she wishes to continue to occupy the land and claims a right to do so. Only once the Ministry had done so, and in light of what it would have found, could the Minister have reached an informed decision that the allotment was in fact available for grant.

[37] I do not accept the arguments advanced by Mrs. Langi and Mr. Tu'utafaiva that Lata had no right to be heard as the lease had expired when the grant was made. When the lease expired Lata remained in occupation of the land and there had been no demand that she vacate the land. Her occupation was not unlawful (Manu v 'Aholelei (supra) at [38]-[48]). Her right to be heard arose from the fact of her long term occupation of the land not from the lease.

[38] I reject also Mrs. Langi's submission that Lata had no right to be heard because there was no promise from the former holder that she could live permanently on the land. The cases Mrs. Langi referred me to were primarily concerned with the defence of estoppel to an action for eviction. This case is not concerned with estoppel but with the Minister's duties to make reasonable enquiries before making a grant of land.

[39] I am mindful of Mr. Tu'utafaiva's submission that Lata and her husband should live on his town allotment. That may be one factor for the Minister to consider in due course but does not deprive Lata of a right to be heard.

[40] For the reasons I have given I find that the Minister did not discharge his duty to make reasonable enquiries as to the availability of the land to be granted to Siosifa. It follows that Siosifa's registration must be cancelled and the Minister is directed to do so and to make a fresh decision on Siosifa's application (and any competing application that Lata may make) once he has given both Siosifa and Lata an opportunity to be heard.

[41] Nothing in this ruling should be taken as expressing a view on how the Minister may resolve the competing claims of Siosifa and Lata. That is a matter entirely for the Minister to decide.

10 [42] Because of the conclusion I have reached it has not been necessary for me to consider Mrs. Tupou's argument that the grant to Siosifa was invalid in breach of section 54.

[43] For completeness I should add that this action was heard urgently as Siosifa claimed hardship because he has spent a large sum on building materials to build on the land. Storing those materials is apparently both difficult and expensive. This situation is of his own making. He concealed his intentions for the land from Lata. Had he not done so this dispute could have been resolved before he purchased any materials.

Result

20 [44] Lata's claim is successful and the Minister of Land is directed to cancel Siosifa's Deed of Grant in accordance with paragraph [40].

[45] Lata is entitled to costs to be fixed by the Registrar if not agreed.

R v Kupu

Supreme Court, Nuku'alofa
Cato J
CR 29 and 50/2017

9 August 2017

Sentencing — armed robbery — separate grievous bodily harm

The accused uses a machete to threaten and rob storekeepers and then drives away. Separately the accused robbed a warehouse and bashed a Chinese woman on the head with a piece of wood.

Held

1. The starting point for the machete attack is 8 and a half years; discount 18 months for guilty plea plus additional discount for reasons kept confidential on the court file;
2. On the robbery with violent attack the starting point is 8 years, but reduced here to 6 and a half years of which 2 and a half years to be cumulative; but overall the final 18 months is to be suspended.

S E N T E N C E

[1] The accused Viliami Kupu pleaded guilty to one count of armed robbery contrary to section 154(1) and (3) of the Criminal Offences Act. Subsection (3) aggravates the offence of robbery simpliciter, which carries a maximum sentence of 10 years, to 20 years if a weapon is used in the commission of the offence.

[2] In this case, Mr. Kupu together with another man, who has yet to be tried on the 31st January 2017, was armed with a machete and stole property valued at $7671.50 by using violence on the proprietors who were Chinese.

[3] The facts indicate that the accused had filled up baskets in the store and upon reaching the counter reached into their respective backpacks and pulled out machetes. One man moved around the counter and pointed the machete at one of the owners of the store and demanded that he fill the backpack with cash. The other man presented a machete and told the other owner not to move. The men then ran to a van with tinted windows that was waiting nearby and they sped away.

[4] It was brought to my attention prior to sentencing that Mr. Kupu was awaiting sentence on a charge of causing grievous bodily harm contrary to section 106(1) and (2) of the Criminal Offences Act which he committed on the 17th November 2016. He pleaded guilty to that offending on the 5th July 2017 after initially entering a not guilty plea on the 27th April, 2017. The maximum sentence for this offending is 10 years imprisonment. I sentence him also for this offending.

[5] In this case, Mr. Kupu broke into a warehouse also owned by a Chinese businesswoman. Having helped himself to some food, he found a piece of wood and made his way to the woman's bedroom and hit her on the head and face with the weapon after she had asked what he wanted. She suffered open wound injuries to her skull and also mandible fractures. He then made off taking no property of significance.

[6] In both instances, the offending was serious. The probation report records that Mr. Kupu grew up in Vava'u in a large family of five and complained of receiving harsh discipline at home. He left school in the third form and had been truant often. He was not employed. He eventually made his way in 2015 to Nuku'alofa where he married and has one child. He lived with his wife's parents. He helped around home but was described as being very easily influenced by his peers. He had only one previous conviction for housebreaking and another for theft. He was sentenced to two years imprisonment for the housebreaking and three months for the theft concurrently which arose in 2013 in Neiafu, Vava'u. His wife is supportive of him. He is said to enjoy associating with peers smoking and consuming alcohol.

[7] In relation to the armed robbery, I note that although both men carried machetes and threatened the owners there were no actual physical injuries caused to them but their fear must have been considerable when the machetes were presented. A number of authorities were cited by the Crown to me on armed robbery. One, R v Vaka_CR 75, 76, 81, 82, 99/2012, involved a number of young men who robbed a Chinese store, one carrying a knife. I emphasised the importance of deterrence in sentencing in cases like these and the need to protect store owners in Tonga who often opened late in night. I sentenced Vaka on the basis of a starting point of five years and allowed him 18 months for his guilty plea. On reflection, the starting point I imposed in that case was too low and did not adequately reflect the aggravated circumstance reflected in section 154 (3). Closer to the mark in my view was an eight to ten year starting point I commenced with in R v Maikolo_Fifita and others. (CR 109-11/15 (Vava'u)). That case involved the robbery of a Chinese store in Vava'u by three men where a .22 rifle was carried as a weapon. The more serious of the two offenders had a starting point

of ten years reduced by two years for his guilty plea. The final year of his sentence was suspended on conditions.

[8] In this case, I consider the fact that both offenders carried machetes, knives capable of doing great harm and consequently being very frightening, means that a starting point of eight and a half years is in order. That is higher that the starting point I had mooted of about 7 and a half years imprisonment at the hearing but it reflects my concern that both men carried machetes and the combined effect of this must have been terrifying for the owners of the shop. Had those been used on the owners to inflict harm, a greater starting point would have been justified. The message must be taken seriously by those who use weapons to carry out robberies in Tonga that this Court will impose condign sentences on those who offend in this way, and that this is consistent with Parliament's intent in legislating for a twenty year maximum in cases of armed robbery. The Courts will not shirk in protecting the public and shop owners from this kind of dangerous predatory criminal activity. After several years in Tonga, I observe that it is not uncommon for small businesses, commonly Chinese owned and operated, to stay open well into the night, performing a service for the general Tongan community, when they can be easy victims of robbery. This Court emphasises that criminals who rob persons operating their businesses or persons in their homes, also not uncommon, can expect severe punishment.

[9] I allow the accused 18 months discount for his guilty plea. Although he professed remorse at sentence I very much doubt that he is concerned for anybody but himself. The sentence I would have imposed but for the circumstances mentioned below would have been seven years imprisonment for armed robbery. However, as a consequence of receiving certain additional information which is to be kept confidential in a sealed copy on the court file, I reduce this sentence by three years to 4 years imprisonment for armed robbery.

[10] In relation to the second offence that of grievous bodily harm where the maximum sentence is ten years imprisonment, I consider that a high starting point is merited also to reflect the very cowardly and very dangerous action of hitting a woman around the head and the face with a piece of wood causing her serious injuries including losing consciousness for some time and hospitalisation for a few days. I consider a starting point of 8 years is appropriate and for his guilty plea I also grant him an 18 months discount. The sentence I impose for grievous bodily harm is six and a half years imprisonment.

[11] Considering the totality of his offending, and the fact he is only 22 years old with some but only a limited history of prior offending, I direct that the first

two and a half years of his sentence on grievous bodily harm be imposed cumulative upon his sentence of four years on the armed robbery making an overall sentence or combined sentence of 6 and a half years.

[12] I have considered the issue of whether any part of this overall sentence should be suspended. He has not been the subject of a suspended sentence before, he has pleaded guilty and been co-operative, he is only 22 and will require some supervision on release after a lengthy sentence. I accordingly, order that the final 18 months of his combined sentence of six and a half years be suspended on the following conditions;

He is not to commit any offences punishable by imprisonment during the period of his suspension;

He is released on probation for the period of his suspension;

He is to live where directed by his probation officer;

He is not to consume alcohol or take drugs during the period of suspension;

He is to attend the following courses during the period of his suspension under the direction of probation;

A course on alcohol and drug abuse;

A Life skills course;

An anger management course.

[13] He is warned that a failure to abide by any of the conditions of his suspension may mean that application is made to return him to prison to serve the balance of his combined term of imprisonment of six and a half years.

[14] His sentence of imprisonment is backdated to take into account any period served on remand in prison for this offending.

Hafoka v Police

Supreme Court, Nuku'alofa
Cato J
CR 68/2017

10 August 2017

Criminal Law — Seizure of cash — Money Laundering and Proceeds of Crime

The applicant (drug suspect) appeals to challenge the seizure of money by Police. Under section 18(G) of the Money Laundering and Proceeds of Crime Act if an appeal is not filed within 30 days of seizure notice then the money is automatically forfeit to the Government. Police can hold cash for 72 hours but to extend that period the police must get a court order under section 19.

Held

1. There is no formal requirement under the Act for a notice to be served to support an initial 72 hours seizure;
2. Section 19G is intended to run from the time formal notice of an order extending time beyond the 72 hours period by operation of section 19D is given;
3. In this case the police applied to extend in time, and the Applicant appealed in time.

Statute considered

Money Laundering and Proceeds of Crime Act, ss 18, 19

Counsel for the Applicant	:	Mr. Tu'utafaiva
Counsel for the Respondent	:	Mr. 'Aho

J U D G M E N T

[1] The Applicant seeks a ruling that his notice of appeal (received by the Court) on 12th July 2017 which was the 30th day from the 12th June 2017 is in time to satisfy the provisions of section 18G (5) of the Money Laundering and Proceeds of Crime Act and consequently the money seized by police from the

Applicant's premises on the 27th May 2017 should not be automatically forfeit to the Crown.

[2] Mr. 'Aho for the Respondent contends that the notice of appeal was received out of time and the money was forfeit under section 18G (5) of the Act namely that it fell outside the period of thirty days from he submitted the seizure notice dated the 8th June 2017 that was given by police to the applicant pursuant to Section 19C of the Act and allow police to retain the proceeds of the seizure for 72 hours.

[3] Under section 19 an authorized officer may seize cash if he has reasonable grounds to believe it is recoverable cash, or intended by any person for use in unlawful conduct or it is undeclared cash intended for use in unlawful conduct. An authorized officer may also seize the cash if satisfied of any of the above or for purposes of the investigation, and if so, that seizure for a period lasts for 72 hours. Here the amount of the cash was in excess of $11,000 and the deponent police officer swore in his application under section 19D for an extension of the seizure beyond 72 hours that the Applicant had told him that the money was the proceeds of crime namely drug dealing. A small amount of cannabis had been located in the same room as the money and was the subject of a charge of possession of illicit drugs which·has yet to be resolved in the Magistrate's Court. The deponent stated that he had not served any notice of seizure until the 8th June 2017 because he had been unaware of the provisions of the Act. In fact, there is no formal requirement under the Act for a notice to be served to support an initial 72 hours seizure so long as the requirements justifying seizure have been met. It is only when police wish to extend the seizure for a three month period that is beyond the initial 72 hours given under section 19D (1) that a formal order of court is required under section 19D (2). There is no challenge here to the basis for the police seizing the money.

[3.1] Police as they were required to do to extend the seizure beyond 72 hours made application to this Court on the 9th June 2017 for an extension of the period for a further three months under section 19D (2)(a) and (3) as I have said and this was granted by the Court on the 12th June 2017. There is a power under section 19D(2)(b) to further extend an order of three months to one of a year from the date of the first order.

[4] I consider that Mr. Tu'utafaiva is correct when he says that time runs from the date upon which the applicant obtained the extension of three months from the Court which was on the 12th June 2017, and not from the time the police served the 72 hour informal seizure notice on the applicant on the 8th June 2014. That would seem to be the natural meaning section 19BG (5) which refers to cash seized under

sections 19C and 19D and not cash seized by a disjunctive operation of the sections. I consider that section 19G is intended to run from the time formal notice of an order extending time beyond the 72 hours period by operation of section 19D is given to an affected person. The police's initial power to seize, as I have said, is no more than an interim power that is given to them to decide whether they want to invoke formal court process to extend the seizure initially for three months and then a year. It does not require the police as I have said to issue any formal notice on seizure although it is no doubt, as a matter of record, a good thing that they do so as to avoid any later arguments concerning the value of any cash taken. My view is strengthened by section 19G (5) expressly states that an order under subsection 19D (2) shall provide for notice to be given to any persons affected by it. In my view the statutory scheme of notice and objection envisages that when the Court makes an order that lengthens the seizure period and also places a person affected under threat of automatic forfeiture if an appeal is not commenced within a thirty days period, the person or persons affected are required to be given notice and the time limit for an appeal to be filed under section 19G (5) operates from that point. In this case, that period commenced on the 12th June, 2017 when this Court issued an order under section 19D (2) and not the 8th June 2017 when police issued an informal seizure notice; the money it being taken into police custody after the search on the 27th May 2017. The Notice of Appeal filed on the 12th July 2017 meets the 30 day requirement for filing taken from the 12th June, 2017.

[5] Accordingly my ruling is that the Applicant is correct and the notice of appeal is not out of time.

Prasad v Prasad and Ors

Supreme Court, Nuku'alofa
Paulsen LJC
CV 42/2015

10 August 2017

Contract —separate agreement for management of business by vendor till major debt paid — principals continue to manage through shell companies — quantum valebant — availability of specific performance where applicant effectively tries to circumvent the law — novation

Companies — role of principals in company contracts

Equity — availability of specific performance where applicant tries effectively to circumvent the law

The Prasads owned Moapa (large grocery business) and Rampra, supplier to Moapa who were owed $3.5 million. To stave off the worst effects of a forthcoming liquidation of Moapa (guilt in unlawful activity, debt of $11 million in tax) and the cancellation of Moapa's business licence, the Prasads signed agreements with the defendant for (a) the sale of the grocery business, (b) the assumption by the defendants of the large debt to Rampra and (c) the continued management of the business by the Prasads until the debt was paid.

Rampra could have brought the action to recover the debt but would thereby have been exposed to a breach of the law. Moapa was in liquidation with very large debts. The Prasads brought the action but the court found that they were not a party to the agreements and could not enforce them. There was found to be a novation whereby the debt was no longer due to Moapa but under the new implied agreement it was owed to Rampra.

Held

1. Contractual burdens or obligations are not transferable or assignable.
2. The contract provided for a novation - namely a new contract substituting for an existing one.
3. The Prasads were not a party to the primary agreement between the companies, and cannot enforce it.

4. The court will not grant specific performance to reward an action instigated to defeat a valid defence at law.

Cases considered

Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660
Crane Ice Cream Co v Terminal Freezing & Heating Co (1925) 128 A 280
Scarf v Jardine (1882) 7 App Cas 345
Beswick v Beswick [1968] AC 58

Statute considered

Foreign Investment Act 2002

Counsel for the plaintiffs	:	Mr. W. Edwards
Counsel for the first defendant	:	Mr. L. Niu SC
Counsel for the second defendant	:	Mr. W. C. Edwards SC

R U L I N G

The nature of the case.

[1] The second defendant (Moapa) sold its grocery business and assets to the first defendant (Luna'eva). The plaintiffs (the Prasads) were the beneficial owners of all the shares in Moapa and signatories to the sale agreement. The Prasads are seeking orders for specific performance requiring Luna'eva to pay:

a. An outstanding balance of the purchase price to Moapa; and

b. A debt owed to a major trade supplier of Moapa called Rampra Investments Limited (Rampra).

The facts

[2] The evidence was given by the plaintiff Rudra Prasad, Sanjeet Nand (a former General Manager of Luna'eva), Sunil Verma (the General Manager of Rampra) and 'Aisake Tu'iono (the liquidator of Moapa). Luna'eva elected not to call any evidence.

[3] The Prasads are husband and wife. Mrs. Prasad is a major shareholder in Rampra.

[4] Moapa was registered on 28 October 2002. The Prasads were the only shareholders and at all relevant times Mr. Prasad was a director. Moapa purchased the assets of JM Store and continued its supermarket business at Nuku'alofa. It also acquired properties at Puke (a warehouse), and at Vava'u and Ha'ateiho (retail operations). Moapa became one of the major importers of grocery goods for retail and wholesale in Tonga.

[5] Mr. Prasad received advice that shares in Moapa should be transferred to Tongan nationals. The reasons for this were not explained. In around 2010 some shares were transferred to local businessmen Sione Palu and 'Etiluna Mafi. They did not make any investment in Moapa and held their shares on trust for the Prasads.

[6] Moapa was under the control of Mr. Prasad until April 2015. He lives in Australia but has business interests in Fiji and Tonga and travelled to both countries from time to time.

[7] Moapa became involved in Court proceedings with a shipping company, Pacific Forum Line, and in one of the actions the Supreme Court found that Moapa was acting in breach of the Foreign Investment Act 2002 (Rudra Prasad and Moapa Enterprises Limited v Derek Leonard; Pacific Forum Line (NZ) Ltd and Eckington Limited, CV 75 of 2012). As a result on 17 March 2015 the Ministry of Commerce, Tourism and Labour gave notice of its intention to cancel Moapa's business license. Mr. Prasad referred to the relevant correspondence and actions that followed but it will suffice to say that Moapa's business was closed down. Moapa could not trade but was holding a significant quantity of goods for which it had not paid its suppliers. One such supplier was Rampra.

[8] Faced with the loss of its business, the risk that its assets could only be sold at a substantial discount and that its perishable goods would go to waste Moapa sold its business and assets to Luna'eva. Mr. Prasad said that he discussed the matter in detail with Mr. Mafi who, as well as having shares in Moapa, was a shareholder and director of Luna'eva.

[9] Whilst Mr. Prasad said that the sale was to protect the interests of Moapa's creditors it appears to me that his real concern was to see that Rampra was paid. Mr. Prasad said that Rampra had reserved ownership in the stock that it had supplied to Moapa. Luna'eva was to acquire Moapa's business, assume the

obligation for the debt owed to Rampra (Rampra's debt) and pay the debt in full over time from the sale of its stock.

[10] On 14 August 2015 two agreements were entered into. These were a sale agreement and a management agreement. Mr. Prasad said that he prepared both agreements himself. They are poorly drafted agreements and given what was at stake it was regrettable that he did not seek legal advice.

The sale agreement

[11] The sale agreement is between Moapa and Luna'eva. However, it records that the Prasads 'own 100% of the outstanding equity of [Moapa]' and 'join in this agreement for the purpose of making certain representations and agreements'.

[12] The recitals record that Moapa is selling to Luna'eva the stock, fixtures, fittings, motor vehicles and goodwill of its business. Importantly also it says:

> Further [Luna'eva] has assumed the "Debt" owed by [Moapa] to Rampra Investments Limited, a company incorporated in Fiji. All above transactions are as set forth in Schedule 1, annexed to this agreement.

[13] By clause 1 Moapa 'sells, conveys, assigns, and transfers to [Luna'eva] the "Assets" and Rampra's Debt as set forth on Schedule 1...".

[14] Clause 2 states that Luna'eva does not assume any obligation or liability of Moapa except for 'the assumed/transferred "Debt" of Rampra'.

[15] By clause 3 the purchase price of the business is $750,000. The amount of $100,000 is credited as paid and the balance of $650,000 payable by four instalments of $162,500 on the 15th day of the months of May, June, July and August 2015.

[16] Clause 4 provides that Moapa and the Prasads jointly and severally represent and warrant that the representations and warranties set forth in Schedule 1 were true and correct.

[17] Clause 12 is an entire agreement clause which also provides that all of the signatories 'has caused this sale and purchase agreement together with assumption/transfer of "Debt" owed to Rampra by Moapa…'.

[18] Schedule 1 provides the list and value of the assets being purchased. The purchase price of $750,000 was the sum of the value of all the assets and consumption tax of $4,103,050 less Rampra's debt of $3,353,050.

The management agreement

[19] The parties to the management agreement are Luna'eva and Mr. Mafi on the one part and Rampra and the Prasads' son, Rulesh Prasad, on the other. Mr. Prasad said this was signed in the offices of a lawyer, Mrs. Petunia Tupou, and that Mr. Mafi was given advice on the management agreement before it was signed.

[20] The principal purpose of the management agreement was to put in place arrangements for payment of Rampra's debt. The recital states:

> Luna'eva has purchased, the [business] of Moapa…..as at date 20th March 2015. Further this new "Business" has also acquired the debt, owed by Moapa to Rampra, amount of $TOP 3.5 million. Rampra has agreed that the said debt to be transferred to the "Business", on condition that Rulesh and or his nominees will have management control of "The Business". The parties have agreed to put whatever they have discussed and agreed in writing as follows:..

[21] By clause 1 the term of the management agreement is five years or until Rampra's debt was paid in full.

[22] Clause 2 sets out the purposes of the management agreement which were to ensure payment of Rampra's debt, to train Mr. Mafi in the management of the business and to maintain Rampra as a major supplier to the business. These purposes reflect the Prasads' primary concern to protect and further the interests of Rampra both in respect of payment of its debt and by maintaining a substantial customer for its goods in Tonga.

[23] Clause 3 sets out certain rights and responsibilities which included that Mr. Mafi was not to be involved in the day-to-day operations of the business but in strategic decision making and Rulesh Prasad, either personally or by his nominee, was to be responsible for the smooth and profitable operation of the business. Restrictions were placed upon Luna'eva in respect to the payment of dividends and upon Mr. Mafi not to encumber assets of the business until payment of Rampra's debt was made.

[24] By clause 4 a management fee was payable to Rulesh Prasad or his nominee of a minimum of 3.5% of the gross sales of the business payable monthly.

[25] Clause 5 provides that all expenses of the business would be paid by the business when due. Clause 6 deals with the maintenance of the books and records of the business. Clause 9 provides that the management agreement 'constitutes the entire agreement between both parties concerning this transaction' and by clause 10 any waiver, amendment or modification was not effective unless in writing and signed by the party against whom such waiver, modification or amendment was sought to be enforced.

[26] Mr. Prasad said that the Ministry of Commerce Tourism and Labour sought assurances that he was to have no part to play in the new business of Luna'eva. On 20 April 2015 Mr. Prasad confirmed by written undertaking, inter alia, that he held no interest in Luna'eva and would not take part in the business and that it would be independently operated by Luna'eva. One might query how it could be said that the business would truly operate independently when under the management agreement it was controlled by Mr. Prasad's son and there were significant restrictions placed on both Mr. Mafi and Luna'eva. Mr. Mafi and his wife as shareholders of Luna'eva also gave undertakings that the Prasads would not be involved in the business. Mr. Prasad maintained that he was not involved at all in the management of the business following 15 April 2015.

[27] Luna'eva commenced trading its new business selling stock acquired from Moapa. A stocktake was undertaken as at 15 April 2015. As at that date the value of stock supplied by Rampra was $1,807,431.50.

[28] Mr. Prasad said that in reliance upon clause 3 of the management agreement, Rampra appointed Sanjeet Nand and Justin Prasad to manage the business of Luna'eva. Sanjeet Nand gave evidence that whilst Mr. Mafi had some involvement in the business, he took instructions from Rulesh Prasad.

[29] On 21 April 2015 Mr. Mafi wrote to the Ministry of Foreign Affairs noting Luna'eva's recent purchase of Moapa and asking for the transfer of the visas of Moapa's employees to Luna'eva. The letter contained a list of the employees and their dependants. By 10 June 2015 Mr. Mafi had had a major change of heart. He wrote to the Ministry stating that Luna'eva had not acquired the services of Moapa's expatriate staff and that it did not have work contracts in place with Sanjeet Nand or Justin Prasad.

[30] On 16 June 2015 Sione Fakahua, a law practitioner acting for Luna'eva, wrote to Sanjeet Nand alleging that he was working illegally and terminating his employment. He was forbidden to enter Luna'eva's premises and was required to hand over all the keys to the office as well as monies held at the store.

[31] Mr. Prasad said that the letter of 16 June 2015 was the first time he had notice that Luna'eva was not prepared to comply with the sale agreement and the management agreement.

[32] On 1 July 2015 Mr. Prasad received a letter from legal counsel for Luna'eva informing him that he was not entitled to visit or attend Luna'eva's premises except if he was visiting as landlord. Luna'eva also demanded that he give a full account of all goods and property of Luna'eva which had been sold and money received since 14 April 2015.

[33] On 3 July 2015 the Prasads' and Rampra's lawyer, Mr. Edwards, gave notice to Luna'eva's lawyer, Mr. Niu, of the breach of the sale agreement and management agreement by Luna'eva and demanded full payment of Rampra's debt.

[34] On 9 July 2015 Mr. Prasad received an email from Luna'eva's accountant, which attached a Board resolution of Moapa dismissing him as a director of Moapa.

[35] The reasons behind the steps taken by Luna'eva at this time were not explored in the evidence and as Luna'eva elected not to call any evidence it is not clear what caused the breakdown in the relationship.

[36] It is not in dispute that Luna'eva took possession of the assets of Moapa under the sale agreement and commenced business but did not pay any part of Rampra's debt.

[37] Moapa was put into liquidation by the Supreme Court on 6 May 2016 and 'Aisake Tu'iono was appointed liquidator. He gave evidence that the amounts paid by Luna'eva towards the purchase price of Moapa's business totalled $355,000. These were payments made by Luna'eva to the Ministry of Revenue and Customs towards Moapa's tax liabilities between 29 June 2015 and 29 July 2015. There is a balance of $295,000 of the purchase price that remains unpaid by Luna'eva.

[38] Mr. Prasad said that after this action was commenced against Luna'eva he received an email from Mr. Mafi on 27 August 2015 proposing the payment of Rampra's debt at a discount. He rejected that as a possibility.

The pleadings

[39] In their second amended statement of claim of 11 August 2016 the Prasad's plead that Luna'eva breached the sale agreement in that it failed to pay the balance of the purchase price of the business and failed to pay Rampra's debt. The Prasads seek orders for specific performance that Luna'eva pay both the balance of the purchase price and pay '[Rampra] for the goods in its possession…'.

[40] Luna'eva denies that the Prasads were parties to the sale agreement, that they provided any consideration for the sale agreement or that they have any standing to sue on the sale agreement.

[41] Moapa was joined as a second defendant at a late stage. Mr. Edwards Snr suggested prior to trial that Moapa would apply to be joined as a plaintiff to seek its own relief against Luna'eva but it did not do so.

The submissions

[42] Mr. Edwards described this action as 'essentially' one for the recovery of a debt owed by Luna'eva to Rampra. It is founded on the premise that Luna'eva made a promise to the Prasads that it would pay Rampra for the goods that Rampra had supplied to Moapa (paras 5.1, 5.6 and 5.20 of Mr. Edwards' submissions).

[43] Mr. Edwards argues that there is no dispute that Luna'eva received goods under the sale agreement which had been supplied by Rampra to Moapa, that the goods had not been paid for and as to the value of those goods.

[44] He further submitted (in answer to submissions for Luna'eva) that the Prasads were named in the sale agreement as parties and had provided valuable consideration in various respects (which for reasons that will follow, it is not necessary for me to consider).

[45] Mr. Edwards submits that the Prasads are entitled to enforce the promise made to them by Luna'eva even though the promise was for the benefit of Rampra.

[46] Mr. Edwards also argues that if the Prasads are not able to enforce the sale agreement, Luna'eva would have received the business assets and stock of Moapa without payment. That would be an inequitable result justifying a remedy in

restitution. Mr. Edwards said that the Prasads should be entitled to recover on a quantum meruit basis (I think he meant quantum valebant) and relied on British Steel Corporation v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504. There was no pleading to support this submission.

[47] For Luna'eva, Mr. Niu submitted that the sale agreement was between Moapa and Luna'eva and that the Prasads were not parties. In addition he submitted that the Prasads had not provided any consideration under the sale agreement. The sale agreement was concerned, he said, with the sale of the assets of Moapa. It was not concerned with the sale of the Prasads' shares in Moapa or 10 'of any equity of the shareholders or operator' nor had the Prasads promised anything under the sale agreement in return for the promises made by Luna'eva. In Mr. Niu's submission the sale agreement was therefore not enforceable by the Prasads.

[48] Mr. Niu also argued that as Moapa had been put into liquidation payment of Rampra's debt was subject to the provisions of the Companies Act 1995, the effect of which was that the debt was only payable in so far as there were assets of Moapa available to pay the general body of creditors. The action of the Prasads to recover payment direct from Luna'eva was an attempt to circumvent the provisions of the Companies Act and for that reason specific performance could not be 20 granted.

[49] From the bar Mr. Niu advised me that Luna'eva had not paid the balance of the purchase price to Moapa or Rampra's debt because after taking over the business it had learned that Moapa had a tax liability of over $11million and that Moapa had incurred other large debts, including a debt of over $1million owed to Boston Agrex, Inc for the purchase of chicken, which Luna'eva had been required to pay. He argued that anything Luna'eva owed under the sale agreement had to be paid to the Ministry of Revenue on account of Moapa's tax liabilities. Had Luna'eva known of these matters it might not, Mr. Niu submitted, have entered into the sale agreement.

30 [50] It was an unsatisfactory aspect of the case that Luna'eva chose not to call any evidence. There was nothing before me about Luna'eva's ongoing obligation to make payment towards Moapa's tax liabilities nor did I hear from any witness about a debt owed to Boston Agrex, Inc.

[51] However, with his customary fairness Mr. Edwards acknowledged that Moapa had a tax liability which was said to be in excess of $11million and that Luna'eva was obliged to make payment of anything it owed to Moapa to the

Ministry of Revenue and Customs. In relation to the debt said to have been incurred with Boston Agrex, Inc Mr. Edwards was able to refer me to invoices in the Prasads' bundle of documents (documents 49-51) which showed that the chicken was supplied to Luna'eva after it had taken over Moapa's business. He said the chicken had also been sold by Luna'eva. I understood Mr. Niu to accept that this was indeed the case.

[52] Mr. Edwards Snr advised me that Moapa did not wish to make any submissions other than to support the arguments presented for the Prasads.

Discussion

[53] I will deal first with the case that Luna'eva be ordered to pay Rampra's debt and then that it be ordered to pay the balance of the purchase price of Moapa's business.

Rampra's debt

[54] There are a number of odd features about the manner in which the case has been presented that require explanation.

[55] The first of these is that it is the Prasads and not Rampra suing for recovery of Rampra's debt. This action was original commenced by Rampra and Rulesh Prasad against Luna'eva alleging breach of the management agreement in the performance of which Rampra's debt was to be paid. The Prasads were substituted as plaintiffs and the claim amended to avoid an argument that had been raised by Luna'eva that the management agreement was an illegal contract under the Foreign Investment Act 2002. As the Prasads have not themselves directly suffered any loss as a result of Luna'eva's failure to pay Rampra's debt damages are to their mind an inadequate remedy and they seek to enforce Luna'eva's obligations by specific performance in favour of Rampra.

[56] Secondly, in the sale agreement the debt owed to Rampra is stated to be $3,353,050. This sum was made up as to $2,640,000 for unpaid stock and a balance for other assets. The Prasads do not seek an order that Luna'eva make payment to Rampra of $3,353,050 or even $2,640,000 but the lesser sum of $2,005,676. It appears that the value of the unpaid stock was overstated in the sale agreement and Mr. Edwards advised me that no claim is being made to recover the value of the 'other assets' to avoid the possibility of competing claims to those assets from the liquidator.

[57] Related to this, the amount of $2,005,676 includes a sum of $198,245 for stock supplied after Luna'eva took over Moapa's business. This amount of $198,245 cannot possibly be the subject of any claim under the sale agreement. I understand Mr. Edwards to accept this to be the case.

[58] The Prasads' claim faces insurmountable hurdles and cannot succeed. To understand why this is the case I begin with the premise upon which the action is founded. As noted earlier, the Prasads contend that under the sale agreement Luna'eva promised the Prasads (and Moapa) that it would pay Rampra's debt.

[59] When I asked Mr. Edwards to identify what clause in the sale agreement gave rise to such an obligation he relied upon clause 1 which relevantly provides:

> Subject to the provisions set forth in this agreement…the Seller hereby sells, conveys, assigns, and transfers to the Buyer the "Assets" and Rampra's "Debt" as set forth on Schedule 1…and the Buyer hereby accepts the sale, conveyance, assignment, and transfer of the "Assets" from the Seller, and "Debt" owed to Rampra.

[60] Mr. Edwards contends that by this clause Moapa transferred the obligation to pay Rampra's debt to Luna'eva. However, as a matter of contract law, contractual burdens or obligations are not transferable or assignable. In Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, 668 Lord Collins MR. said:

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulder of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

[61] In Crane Ice Cream Co v Terminal Freezing & Heating Co (1925) 128 A 280, 283 (referred to in J. Kirby 'Assignments and Transfers of Contractual Duties: Integrating Theory and Practice' (2000) 31 VUWLR317) the Court said:

> [A]ny one who is bound to any performance whatever or who owes money cannot by any act of his own, or by any act in an agreement with any other person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. If this

were not true, obligers could free themselves of their obligations by the simple expedient of assigning them.

[62] That is not to say that it is not possible to ever transfer a contractual obligation. One such method is by novation. The term novation describes the circumstance of a new contract substituting for an existing one (Scarf v Jardine (1882) 7 App Cas 345, 351 per Lord Selborne LC).

[63] A novation occurs when contracting parties A and B agree that the contract between them will be replaced by a contract between B and a third party C. Thereby the substituted party A is released from its obligations and the remaining original party B is able to enforce the contract only against C (Savvy Vineyards 3552 Ltd & anor v Kakara Estate Limited & anor [2014] NZSC 121 at [24] and National Trust v Mead (1990) 71 DLR (4th) 488, 500-501). Party B must agree to both the termination of the original contract and to the formation of the new contract between it and C.

[64] In Kirby's article, to which I earlier referred, the following helpful discussion of principles appears:

> From A's perspective, the main advantage of a novation is that it creates a "clean break"; that is, subject to the terms of the rearrangement agreed between the parties, A does not have ongoing obligations to B once it terminates its contract with B. Rather, B can sue C directly under its contract with C if C does not perform. Novation is the only means enabling A to "transfer" its obligations in the sense that A is no longer liable for any default in the performance of its obligations. C may also prefer a novation as, subject to the terms of the rearrangement agreed between the parties, C's rights are not then subject to equities resulting from anything done by A.
>
> Whilst novations can be effected formally (for example by the parties entering into a deed of novation or exchanging other documentation), novations can also be effected informally. In Karangahape Road International Village Limited v Holloway Chilwell J stated:
>
> Novation can be inferred from acts and conduct but ordinarily it is not to be inferred from conduct without some distinct request.

[65] In this case what was intended was not an assignment of Rampra's debt from Moapa to Luna'eva but a novation. The existing obligation of Moapa to pay

Rampra's debt was discharged and substituted with an obligation of Luna'eva to pay Rampra's debt under the management agreement.

[66] All of the requirements of a valid novation are present. Relevantly they are that Rampra accepted the management agreement with Luna'eva in full satisfaction and substitution for Moapa's liability for Rampra's debt, Moapa agreed to the termination of its contractual obligation to pay Rampra's debt and Luna'eva agreed to complete liability for payment of Rampra's debt.

[67] That a novation was intended and effected is confirmed by the following:

a. The sale of the business of Moapa to Luna'eva was forced upon Moapa by the cancellation of its business licence. Moapa had no ability to pay Rampra's debt except from trading which it could no longer do. This was well known to Mr. Prasad and his wife and through them Rampra. Unless a new buyer could be found for Rampra's goods Rampra faced a significant loss.

b. The agreement reached between Mr. Prasad and Mr. Mafi was that Moapa's stock would be transferred to Luna'eva "on the basis that it would pay the debt owing to the supplier, Rampra Investments Limited" (para 12 of Mr. Prasad's brief of evidence). Clearly Rampra did not intend to thereafter look to Moapa for payment.

c. Consistent with this, Mr. Prasad said that the purpose of the management agreement was to ensure that Rampra would be paid for the significant debt still owed to it.

d. Moapa was a party to the sale agreement and thereby agreed to the sale of the business and the 'transfer' of Rampra's debt to Luna'eva.

e. The management agreement states that Rampra has agreed to transfer the debt to Luna'eva which can only mean that Rampra agreed to accept Luna'eva's promise to pay the debt in substitution for Moapa.

f. The obligation of Moapa to pay Rampra's debt immediately was substituted with an obligation of Luna'eva to pay the debt over a period of up to five years from the operation of the new business under the management agreement. The acceptance of new payment terms by Rampra is incongruous with any continuing liability of Moapa.

g. The General Manager of Rampra Sunil Verma was aware of the sale of Moapa's business to Luna'eva and that Luna'eva had assumed liability to pay the debt formerly owed by Moapa.

h. In Rampra's financial records the debt is now shown as owing only by Luna'eva. Luna'eva has been substituted for Moapa as the party obliged to pay the debt.

i. Rampra did not take any steps to recover the debt from Moapa after the management agreement was entered into.

[68] The terms upon which Luna'eva agreed to assume the obligation for payment of Rampra's debt are contained in the management agreement. A person cannot sue on a contract that they are not a party to (Tweddle v Atkinson (1861) 1 B & S 393). The Prasads are not parties to the management agreement. The management agreement conferred no rights on the Prasads. On this basis the Prasads cannot enforce Luna'eva's obligation to pay Rampra's debt and their claim must fail.

[69] Had I accepted Mr. Edwards' submission that Luna'eva's obligation to pay Rampra's debt arose under the sale agreement I would still have refused to order specific performance at the suit of the Prasad's for two reasons.

[70] First, whilst I do not accept Mr. Niu's submission that the Prasads were not parties to the sale agreement they were parties for a limited purpose only. The sale agreement states that it is between Moapa and Luna'eva. Later in the recitals it states that the Prasads had agreed to join in the agreement but only for the specific purpose of 'making certain representations and agreements'. Those representations and agreements are contained in clause 4 which provides that the Prasads represent and warrant that the 'representations and warranties' in schedule 1 of the sale agreement are correct in all respects. Schedule 1 lists the assets of Moapa that are being sold and their values. I do not see how, as a matter of construction, the Prasads may enforce generally the terms of the sale agreement.

[71] Secondly, whilst Mr. Edwards did not refer to it in his written submissions I had understood that the Prasads relied on Beswick v Beswick [1968] AC 58 as authority that the Court may order specific performance in favour of a third party beneficiary to ensure that the benefit of a contract is received by that third party.

[72] In Beswick the defendant agreed to pay an annuity to his uncle and his uncle's wife in return for the uncle transferring to the defendant his business. The

annuity was to continue to the wife after the uncle's death but when the uncle died he made only one payment. Having taken out letters of administration in her late husband's estate the widow brought an action in her capacity as administratrix and in her personal capacity asking for specific performance of the agreement. The House of Lords held that whilst the widow could not sue in her personal capacity as the administratrix of her husband's estate she could enforce the agreement and ordered specific performance. Damages would have been an inadequate remedy because only nominal damages could be awarded to the estate since loss to it could not be proven.

[73] Beswick was an attempt to avoid a manifest injustice which can follow from the principle that a third party is unable to sue on a contract which is intended to benefit him. The important point is that the injustice arose because the widow was unable to assert her own rights. Lord Pearce at page 89 said:

> It is argued that since the widow personally had no rights which she personally could enforce the court will not make an order which will have the effect of enforcing those rights. I can find no principle to this effect. The condition as to payment of an annuity to the widow personally was valid. The estate (though not the widow personally) can enforce it. Why should the estate be barred from exercising its full contractual rights merely because in doing so it secures justice for a widow who, by a mechanical defect of our law, is unable to assert her own rights? Such a principle would be repugnant to justice and fulfil no other object than that of aiding the wrongdoer. I can find no ground on which such a principle should exist.

[74] In the present case the Prasads seek to bring an action for the benefit of Rampra but Rampra is able to assert its own rights. It has a direct contractual relationship with Luna'eva under the management agreement and can bring its own action. The only reason it is not doing so is for fear that its claim will be defeated by a valid defence at law. It would be entirely wrong for the Court to grant the Prasad's specific performance in those circumstances.

The balance of the purchase price.

[75] The Prasads claim that Luna'eva be ordered to pay the balance of the purchase price under the sale agreement must also fail and for similar reasons.

[76] The Prasads were parties to that sale agreement for limited purposes and have no right to enforce payment of the purchase price.

[77] In any event the liquidator of Moapa is able to bring an action to recover anything that is owed to Moapa. There is no risk of injustice justifying the Court enforcing Luna'eva's obligations at the suit of the Prasads.

[78] In addition, as I noted above Mr. Edwards acknowledged that Luna'eva is under an obligation to pay any balance of the purchase price to the Ministry of Revenue on account of Moapa's outstanding tax liabilities. There is before me no information about what steps the Ministry may be taking to recover the tax from Luna'eva. It would be wrong to make the order sought in circumstances where Luna'eva may be subject to conflicting claims (Beswick at page 82 per Lord Hodson).

Restitution

[79] Mr. Edwards raised the possibility of a claim in restitution. British Steel Corporation (supra), which he relied upon, is not a case that assists the Prasads. It concerned the situation where a party may recover a reasonable sum for work that is done pursuant to a request contained in a letter of intent to enter into a contract when the contract never came into existence. This is not such a case.

[80] In any event I am not prepared to consider a claim in restitution which was not pleaded and not clearly articulated.

The Companies Act

[81] For completeness only I should say that the argument advanced for Luna'eva under the Companies Act was misconceived in my view. The effect of the novation was that Rampra was not a creditor in the liquidation of Moapa. Even if Rampra had remained a creditor of Moapa the liquidation would not prevent it enforcing legal rights it has against Luna'eva.

Result

[82] The Prasads' claim is dismissed.

[83] It appears to me that there are reasons why costs should lie where they fall but if any party wishes to apply for costs they may do so within 14 days.

Police v Faka'osi

Supreme Court, Nuku'alofa
Cato J
AM 8/2017

17 August 2017

Criminal — leave by Crown to appeal out of time — manifest error by Magistrate supports waiving time limit — justice outweighed need for timely conclusion of legal loose end

On a charge of negligent driving the Magistrate mistook the charge for the more
10 serious reckless driving. The Crown appealed against the acquittal but was beyond the time permitted for an appeal.

Held

The error by the Magistrate here is so plain and obvious and so clearly in error that the interests of justice require leave to appeal be granted.

Cases considered

R v Unger [1977] 2 NSWLR 990
R v Knight [1998] 1 NZLR 583,
Kentwell v The Queen [2014] HCA 37

20 **J U D G M E N T**

[1] This is an appeal brought out of time by the Applicant against the decision by Magistrate Ma'u on 10th August 2016 discharging the Respondent after a contested trial of the offence of reckless driving contrary to section 25(1) of the Traffic Act.

[2] That section provides that;

> "Every person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for the persons using the road is guilty of an offence against this Act."

[3] More serious offences involving reckless driving, or driving at a speed and in a manner dangerous to the public; or driving under the influence of drink or a drug to such an extent as to be incapable of having control of the vehicle commit offences under section 25(2)(a) and (b), respectively.

[4] The Crown's complaint was first that the Magistrate had misdirected himself on the standard of proof when he said;

> "It is the role of the Prosecution to prove all the elements of the offence that the Accused is alleged to have committed beyond any doubt to the thinking of this Court, that is that the Accused did commit the offence of reckless driving".

[5] A second ground that, in my view, is more persuasive, is the Learned Magistrate had seriously misdirected himself when he said of a material prosecution witness that he did not give evidence in relation to recklessness or in a manner that might be dangerous to the public.

[6] In this case, Mr. 'Aho advised that there was evidence that the respondent had driven a vehicle through a stop sign onto the Vuna Road in a northerly direction turning west and had collided with a vehicle coming towards him in a westerly direction. There was evidence implicating the respondent as the driver.

[7] Mr. 'Aho's complaint, which I find has substance, is that the Magistrate did not apply the correct standard under section 25(1) but the higher standard of recklessness and dangerous driving required for conviction under section 25(2). Equally plainly, it seems to me, as Mr. 'Aho submitted, the Magistrate would seem to have come to a plainly wrong conclusion on the evidence under section 25(1) that the Respondent had not driven without due care and attention or without reasonable consideration for the persons using the road when he failed to give way and proceeded to collide with the vehicle travelling towards him in a westerly direction along the Vuna Road.

[8] In this case, however, the Crown had failed to file a notice of appeal within the 28 days allowed under section 75(1) of the Magistrate's Court Act. This was more seriously compounded by a delay caused by the file being overlooked and not being the subject of an appeal until the 27th February 2017. Ordinarily, I would have exercised my discretion against extending time under section 75 for such a lengthy delay because of the principle expounded in several leading cases cited to me by Mr. 'Aho of the importance for the public interest of finality in litigation (*R v Unger* [1977] 2 NSWLR 990, at 995; *R v Knight* [1998] 1 NZLR

583, *Kentwell v The Queen* [2014] HCA 37 at para 33, but, in my view, the error here is so plain and obvious and the Magistrate was so clearly in error that "the interests of justice require leave to be granted". (Richardson P in Knight at p585), and the matter remitted for trial before a different Magistrate.

[9] Mr. 'Aho pointed out to me that in *R v Fifita* AM 22 of 2014, the Magistrate appears to have fallen into similar error in referring to the standard of recklessness in a prosecution falling within section 25(1) and not 25(2) (a) of the Traffic Act. Perhaps the title to the section referring to Recklessness has contributed to this misunderstanding. Section 25(1), however, is concerned with
10 carelessness, a lower threshold than recklessness or driving in a manner dangerous, and hence the lower penalty.

[10] In my view, the Crown was correct in its submission that leave should be granted to appeal out of time in this case. I add that I would have been less likely to have granted leave on the first ground nominated by Mr. 'Aho that is the standard of proof since I doubt that this was more than a slip in language than one of principle and would not justify leave being granted in my view, at least so far out of time.

R v Fua

Supreme Court, Nuku'alofa
Cato J
AM 12/2017

21 August 2017

Reckless driving — appeal against lenient Magistrate's reprimand

The respondent is a senior policeman who drove his vehicle into the rear of a recently parked vehicle. Nobody is hurt and the respondent admits fault and offers to pay for the damages. Police arrive and some note that the respondent appears affected by alcohol but no test is taken supposedly because the breath testing machine was broken.

The Magistrate noted that the respondent had paid for the damages and reprimanded him and recorded no conviction. The Crown appealed and the Judge said that the sentence was manifestly too low.

Held

Convicted of reckless driving and fined $500.

Counsel for the Appellant : Mr. Kefu

Mr. Fua in person

JUDGMENT ON APPEAL

[1] The Crown appealed the sentencing decision of Magistrate Tu'akalau ordering the Respondent be severely reprimanded after pleading guilty to reckless driving under section 25(2) of the Traffic Act. The Magistrate after considering the nature of the offending, the circumstances of the Respondent, his payment of repairs to the complainant ($1290) that his loss was $3000.00, the maximum sentence which was imprisonment up to two years and, or a maximum fine of $2000 imposed no conviction and simply severely remanded the Respondent. I am satisfied that the sentence was manifestly inappropriate and the sentencing process miscarried. The Respondent did not oppose the Crown appeal and accepted that he should be re-sentenced by this Court. Had there been injury to the occupants of the car, the matter would have been much more serious.

[2] The Respondent is a Chief Inspector of the Tonga Police and is currently an acting Superintendent of police. On the night of the 26th December 2016, the complainant and passenger were travelling south on the Taufa'ahau Road at Fanga returning to their residence at Tofoa. They turned to the side of the road and parked in front of a Chinese takeaway and faced south. After they had parked and before they could get out, another vehicle driven by the Respondent collided with the rear of their vehicle. The passenger got out of the vehicle to talk to the Respondent who was driving that vehicle. The Respondent apologized to the complainant and his passenger and told them he would repair their vehicle. The accident was reported to the police. A number of policemen arrived and officers noted that the Respondent's eyes were bloodshot and he smelt of alcohol. Police officer Taufe'ulungaki took the Respondent to the hospital while the other officers took the vehicles and the complainant and his passenger to Central police station. Police officer Taufe'ulungaki informed the Respondent they could not perform an alcohol breath test because their testing equipment was not working. The Respondent accepted that he was at fault and told the police officer that he would fix the complainant's car which was a rental vehicle.

[3] I accept that he paid for the repair of the vehicle and for a replacement vehicle while the car was being repaired. He accepted responsibility also for the offending with his prompt plea of guilt. He has, I am told, apparently suffered some embarrassment within the police and also the public for his offending.

[4] The issue that I have to decide here on the basis of the Crown appeal is, was the sentence imposed by the Magistrates one that was manifestly inappropriate? There was no conviction imposed in this case. There is now in Tonga, provision for a discharge without conviction under the Criminal Offences legislation but this must be exercised very sparingly, and it is very unlikely that the Respondent could have met the criteria for this, had application been made. It was wrong in principle that no conviction was entered here.

[5] I agree with the Crown also that a fine should have been imposed. The maximum fine is one of $2000. I agree with the Crown's suggestion that a $500 fine should be imposed taking into account all mitigating factors. I also take into account on the level of fine together with other mitigating factors mentioned that the Respondent has paid for repairs to the complainant's motor vehicle. The Magistrate's decision merely to severely reprimand was, however, plainly manifestly inappropriate and inadequate, and sent out entirely the wrong message to the public.

[6] The appeal is allowed. He is convicted of reckless driving under section 25(2) of the Traffic Act and fined $500 to be paid within one month which he assures me he will pay within this period.

R v Vaivelata

Supreme Court, Nuku'alofa
Cato J
CR 37/2017

22 August 2017

Criminal Law — Attempted rape — serious indecent assault

Girl 19 after a wedding accepts a lift with a man she had socialized with in bars previously. They kissed for a while, there were other people in the car and getting a lift. The accused drove off at speed and they fought over control of the car. The car stopped and the accused was on top of her and pulling his pants and her pants off. A police car drove by, she screamed and the police stopped and took them to the station.

The Judge found the complainant's evidence consistent and he saw no reason why she would lie about an attempt to rape. The incident occurred near a church on the main road, an unlikely place to attempt a rape. Police evidence supports the complainant.

Held
Guilty of attempted rape.

Counsel for the Prosecution : Mr. Kefu
Counsel for the Accused : Mr. Tu'utafaiva

V E R D I C T

[1] The accused, Ma'ili Vaivelata, was indicted on three alternatives counts; the first, attempted rape contrary to section 130 of the Criminal Offences Act, the second, serious indecent assault under section 124(1), 3 (a) and (5) of the Criminal Offences Act, and the third, common assault under section 112(b)(f) of the Criminal Offences Act. The trial commenced on 14th August 2017 and submissions were completed on the 17th August 2017. I reserved my verdict until the 22nd August, 2017.

THE EVIDENCE

[2] The complainant, A, was about 19 at the time of the incident and had left school in 2016 in the sixth form. On the 6th October 2016, she said that she had

gone to a wedding at the Vakaloa during the day. She had a meal at the wedding and two glasses of wine. They left the Vakaloa at about 5 or 6 pm. She said she felt none of the warm effect of alcohol. Later, she and relatives went to the Reload bar in Nuku'alofa at about 9pm. She said she had not consumed any alcohol before that. She said they danced and drank beer. She said she had brought two beers. She had only started to drink the second beer before closing time about 12.30.

[3] They then went to Digicel square. She said they looked for a vehicle to take them to Ma'ufanga. There was herself, two sisters, a girl named Koleti, a boy named Sepeti, a friend of a cousin Marian and a boy named Sitaleki. Her cousins got into a vehicle driven by another. The accused, who was known to Sepeti, was parked under a mango tree. She said that she knew him by face as she had gone to the bar before. She said that she had danced with the accused inside at times in the bar and had smoked with him and there was one night had given her and a cousin a lift to the market area around the Billfish, about a month before. She said she had socialized with him once at the bar before this incident. She said there were two occasions when they had socialized and he had shown attraction to her but she had not shown him any. She said she had travelled in the front seat with Marian and Sitaleki being in the back. Her sisters and the others were waiting to be taken in the next load by the accused. The vehicle had a backseat for three and a sliding door. It was a small car with two seats in the front.

[4] They initially went to her aunt's place in Ma'ufanga and then decided to go to the flea market area to wait for the others. This was close to her aunt's house. When they got there, Sitaleki wanted to be dropped home with Marian. They went to Sitaleki's residence but Marian did not want to get off. Marian wanted food so A said they should go to the Fiesta restaurant in Salote Road but instead Sitaleki wanted to go to Talahiva. They then proceeded to the Talahiva restaurant in Town.

[5] Before that, she told the Prosecutor, Mr. Kefu, that, in the short time that they had been at the market area, the accused had kissed her and she had kissed him. She said it was short not even a minute. She said she did this to try to convince him to drop them at her aunt's home so he could go and get the others. She said she stopped the kissing and he did not try again.

[6] Sitaleki and Marian got off at the Talahiva and she sat in the car and waited with the accused. The accused proposed that they drive to the area of Digicel to pick up the rest of the group. She said she told him to wait so she could tell Marian and that she was about to get out when she was pulled inside and he started to drive off and speed up. She said they had a struggle over the steering wheel of the car and got to the Salote memorial round about, and turned left. She

ceased to hold the wheel as a car was approaching and the accused turned to the left and drove up to the frontage of the residence of the Church Minister. She said that he told her to get off so he could go because he had got some food preparation to do. That was at about 2am.

[7] She then said she got out of the vehicle and intended to go back to Talahiva. It was close by. She said she started to walk back but the accused came around the vehicle and tackled her towards the vehicle, opened the door, pushed her and she fell into the car. She said that he had hit her with his shoulder and opened the door and pushed her inside. He then climbed on to her and was seated on the lower part of her body. When she tried to sit up, he would force her down. He had one hand wrapped around her and one hand was trying to close the sliding door that she thought he had locked from inside because she could not open it.

[8] After he closed the door, he took his pants off and underwear. He still had clothes on the upper body. He proceeded to take off her underwear. The dress ended above her knees. Her tights came off but they fought over the removal of her underwear with him trying to pull it down and she holding it up. He did this with one hand. The underwear was stretched and had come down to her knees. She said she bit him on the ear hard. He got up and then came down with his weight on her. The door was close to her feet. She tried to open it. She also bit his shoulder. He got up. He was still pulling her underpants when she noticed the police pass by and she screamed and called the police. He then moved to the side and pulled on his pants. She said that she was sitting up when she called. The police vehicle stopped in front of their vehicle.

[9] One of the officers got out of the car with a torch and shone it on their vehicle. The accused was sitting beside her. She said the door would not open. She said the police officer opened the door from the outside. The police officer asked what is happening and she said that the accused was trying to rape her. She got into the police vehicle and one other officer came and drove the accused's vehicle. The accused was also brought to the Nuku'alofa Police Station. She said that, at the station, she swore at the accused. She said she told police that she wanted to continue with her complaint. She said that her tights had not been put back on. The accused had put his clothes on when the police came and parked. She said she took her underwear off and washed it and took it back to the police station, a few days later.

[10] The underwear was produced in evidence. It was, the witness said, navy blue. She said they were stretched. She said of the accused's statement that he

never laid a hand on her and that she just screamed when the police came that was a big lie. She said he was trying to force her.

[11] Under cross-examination, it emerged her first statement to the police was made at 2:30am on the 7th October, 2016. A second statement was taken on the 9th October, 2016. She said she had danced with the accused before he became a security. She said she did not know his name and was not well acquainted with him. She had known him a month or two before he became a security officer. She denied that she had approached the accused at his car on the evening of the incident for a lift home. She said it was the second time the accused had taken her home. She denied she was drunk. She said that they had been waiting for a taxi but the accused had offered to take them home. She confirmed that she had once smoked with the accused and danced with him and the second time he had taken her home with her cousin. She said on the night of the incident, she had not asked the accused to take her home; it was a friend of the accused known to them called Sepeti who had arranged the trip for them to Ma'ufanga. She said she had not talked to the accused that night. She said the accused liked her. She denied being drunk on the evening in question. The idea she said was to drink at the beach near her aunt's place where they would be able to get alcohol.

[12] She said they went to Talahiva and Marian and Sitaleki got off to buy food. She said the accused told her that they should go and get the rest, and she told him to wait while she told Marian. She denied the accused had said that what you people are doing is annoying and he had to go. There was cross-examination about whether the accused had told her to get off and join the others whilst he picked up the others at Digicel with her account that she had been grabbed when she got out and he had driven off with her. On the 7th October 2017 she had made no mention of this but simply had said that they had been waiting for a long time and she was surprised when the vehicle started running. They had argued over the gear of the vehicle and we almost had an accident. She also agreed in evidence that the accused had said what she was doing was annoying.

[13] She confirmed that she had kissed the accused but not for any amorous reason at Ma'ufanga but because she wanted him to take her to the aunt's place. She said the accused had kissed her. She denied that the accused had told her he would go to his home and would take her to her home at Ma'ufanga. She said she had waited and the accused had asked her if she and he can go and pick up the others and take them to Ma'ufanga. She had said that she told him to wait while she went and saw the other girl. She was about to pull open the door and about to get out when he grabbed her, pulled her back inside and left because the engine was on the whole time. She said on several occasions that police had not taken

down all she said. There was cross-examination about different versions as to what happened at Talahiva before the accused drove off. She said that when he took off, she thought he wanted simply to get her away from the other two because he had thought they were annoying. She did not think he would rape her. She said that they had stopped outside the church not because she had tried to get off but because the accused had stopped there. She said the reason she had been pulling on the steering wheel was because she had wanted to go back to Marian. She said when they had stopped the accused had told her to get off so he could go home and make food. It was put to her that he told her several times to get off and then the accused went to the back seat and sat there whilst she was in the front seat which she said was a lie. She had then, it was put to her in cross-examination, gone to the back seat and she said that was a lie. It was put to her that the accused had said it was annoying after she had asked whether he was angry with her and then the police car had driven by and she had told the police that he had tried to rape her.

[14] She said she did not shout out she was being raped but asked for help and it was when the police came that she had told them rape. She said she had told police that she did not have her tights (which she said had been taken off in the car) on the 7th October at the station, but her statement did not reveal this. She said she made her statement about 5 minutes after being taken to the police station. She later agreed that she had not told police about her tights on the 7th October. She said she had told police about her panties being stretched in her statement on the 9th. She said that she had made a second verbal statement to an officer before the formal statement on the 9th was taken. She said her tights were taken off in the car and her purple panties were stretched. She said that she had told police the panties were ripped. It was pointed out that she had said her panties were violet. She said in answer to a question that those were not the pants she wore that night that the ones produced in evidence were. She also said that in her first statement she had said that she bit the accused's ear but there was no record of that in the first statement. It was, however, recorded in the second statement. She confirmed she had a conversation with police at 11am on the Friday before her second recorded statement was taken on the 9th. She stated that she had told police she was grabbed in her conversation of the 7th but it did not show in her first statement.

[15] Kapine Havea was one of the officers who arrived at the scene. They had stopped a vehicle nearby and parked in front of the accused's vehicle. They heard someone shouting for help maybe three times. He saw two people by flashlight in the car. He said the male was grabbing one hand on the female and one hand on the chest like they were wrestling. He went to the car and saw the girl was crying. She asked for help because the male was forcing her. The accused whom he knew said that nothing happened. The girl and the accused were both sweating. There was no

search of the accused's vehicle. The distance between the police car and the accused's car was about ten metres. The distance between he, with his torch and the accused's car, was also about ten metres. He said he flashed the torch to the front of the car. He said that when he flashed the light the boy was on the left and the girl was on the right.

[16] Samiuela Pekipaki was another police officer who was present and confirmed that someone called out police. He walked to the vehicle and saw that there were two people inside and the girl shouted there is rape. He asked her to open the door but she could not. But he was able to open it from the outside. He said he opened the left door at the back and it was the boy who was closest to him. He said the girl said that he was trying to rape me. He said they had their clothes on. The boy said she was lying. He noticed they were both sweating. He said in answer to a question suggesting the girl was on the left side that it was the boy and that they were sweating.

[17] Officer Leveni said that he talked with the complainant on the 7th October at her place of business at about 11am. In that statement, which was recorded in his diary of action but unsigned by her, she had said that when she tried to get out of the car the suspect pulled her back inside, grabbed her mouth, took off his trousers and his underwear, he reached in, touched between her legs, massaged her breast, kissed her mouth and lay on top of her. He had taken off his clothes when the police showed up. She called the police and because of that she had said that the accused put on his clothes. He said her statement was later recorded on the 9th October 2016 because of the new evidence. Leveni gave evidence also that he interviewed the accused on the 9th October 2016. The time of the record of interview was 10:23am.

[18] In it, the accused denied any sexual misconduct. He said he had not been working that night. He said he had been in security at Reload bar but was not working that night. He said that, at about midnight, he had gone into the bar, brought 2 beers and had drunk there until the bar closed. He said he walked outside and the complainant had asked him to take them to Ma'ufanga. He said he knew the complainant and this was the third time she had asked him to drop her at Ma'ufanga. He drove them to the fair in Ma'ufanga but they did not want to get out and he drove them to Talahiva. He said that the couple, a boy and girl, went in and then he said to the complainant who was in the front passenger seat that he was tired of what they were doing and that she should get off and let him return. He said that she asked to be taken home and he drove straight ahead and turned left at the roundabout at Tonga Power. He said they drove down that road and at Mosimani she opened the door to get out. He veered the car to the side and parked

it at the front of the Church close to Mosimani. He told her three times to get out but she swore at him. He got out and got into the back seat. She got off and got into the back seat. At the same time, a police vehicle drove by and parked in front of his car. She had asked whether he was angry and he said yes because she was tiring. She then yelled out three times "polisi ko e tohotoho" (Police its rape).

[19] He said they were parked at the front of the Church for about 5 minutes before Police came. He denied any incident that was stopping the complainant from getting out of the car. He said that she was lying. He had already told her to get off but she insisted that he take her to her house and that is why he drove off. He also denied that he had run after her when she got out of the car at the church, smothered her mouth with his hand and put her into the car. He said she did not get out. She was lying. She just sat in the car.

[20] He denied any sexual activity in the car. He said she was wearing a blue dress. He did not know whether she was wearing shorts or not. He said he did not touch her. He later said in his voluntary statement that all allegations were false. Leveni was cross-examined and said that he did not examine the accused after learning in the complainant's second statement that she had bitten his ear. Nor did he examine the accused's shoulder.

[21] Meleseini Fetu'u a police officer, took a second statement from the complainant on the 9th October 2016. She gave evidence that before her statement was taken, the complainant was cautioned about giving truthful evidence or she could be charged with a crime. In that statement, A said that she had bitten his ear and when, he came down, his shoulder.

[22] Officer Toutai was the officer in charge of the traffic group. He confirmed that he heard a female voice calling out police. He saw Pekipaki open the left door as he saw the girl get off. He heard her say he was forcing her. She was on the backseat but on the right side. He could see she was sweating. She was crying. Then they went to the police station. Tu'utafaiva put to him they were not sweating but the officer maintained they were. He said they were at the scene for about 5 minutes. The girl was very angry. They were trying to settle her down. He said they arrived at the station about 2am.

[23] The accused gave evidence. He said he was satisfied with his statement forming part of his evidence. He said he went into town to watch TV and then go back to preparation of food. He said that the complainant asked him to take her to Ma'ufanga inside the bar. She came up to him outside. He said she was drunk. She could not control her walking when she came out of the bar. He denied kissing the

complainant at Ma'ufanga. He denied that she had ever bitten him. He said the police evidence that she was crying outside the church area was wrong. He denied they were sweating. He said when the door is locked from the inside you cannot open it from the outside. He said the complainant's tights were not in his car.

[24] Under cross-examination from Mr. Kefu the accused denied that she was trying to get away from him at the church. It was put to him there was a conflict in his saying she had tried to get off causing him to drive and stop at the church and her getting in to the back seat with him. He said he went to the backseat because she had sworn at him. He said he did not want to sit with her in the front seat. He said at Talahiva he left because she had asked him to take her home. Mr. Kefu suggested that was in conflict with her trying to get out of the car. He put to him that the complainant would not close the door and sit in the back seat if she was trying to get away from him. He said it was the complainant who had closed the door. He was asked why he came to sit in the back seat if he was in a hurry to prepare food.

[25] He said he had already asked her to leave and that is why he had parked there. He denied he was sweating when the police arrived. He said the police were all lying. He denied that she was crying or that he had rushed her from Talahiva or that it was his chance because he had known her before. He denied that he had pushed her into the back seat. He said the complainant was making up her evidence about rape. He denied doing anything inside the vehicle. He said he was on the right when the police came and opened the sliding door and not on the left closest to the door. He did not know any reason why the complainant got into the back seat with him. He did not know why she had cried out rape. He said she asked him if he was angry and he had said he was.

SUBMISSIONS

Mr. Tu'utafaiva submitted;

[26] That there were difficulties in accepting the complainant's evidence when she had failed to mention things of importance to the police when first taken back to the police station such as the fact that her undergarment tights had been removed in the car, and further she had not mentioned biting the accused until her second statement on the ninth October.

[27] He emphasized the onus and standard of proof.

[28] He said that there were important inconsistencies in A's accounts between the first and second statements when in her first statement she made no mention of being grabbed as they left Talahiva and did in her second statement. He pointed out she had mentioned grabbing a gear in the first statement but steering wheel in the second.

[29] He criticized her for not mentioning in her statements important matters such as she had known him before, kissing at the market in Ma'ufanga, or for crying out for help earlier outside the Church.

[30] He said it was illogical that the accused would try to rape the complainant
10 outside the Church, with windows up and in the road area under lights.

[31] He said the door was not locked as the policeman appeared to be able to open it from the outside.

[32] He submitted that there was a conflict as to who sat where in the car. One officer said the accused was on the left side whereas others placed him on the right, the argument as I understand it being that if he had pushed her in the left side, one would have expected him to be on that side.

[33] He submitted that officer Havea from the distance he said could not have seen the accused with his hand on the complainant's mouth even with the assistance of a flashlight.

20 [34] He was critical of the underwear which he said had been described by the complainant in her second statement as violet when it was a dark blue. He also said she had complained only of her panties being stretched when they had been it appeared ripped in two places.

[35] He said the accused had given his explanation for moving into the backseat that is because the complainant had refused to get out of the car and she was abusive. He had given that explanation to police on oath.

[36] He submitted her complaint was nothing more than a false complaint as the accused had said in evidence.

Mr. Kefu in his submission emphasized:

30 [37] The conflict and implausibility of the accused on the one hand stating that the complainant had tried to get out of the car causing him to park in the Church

area and then her getting into the back seat with him, the accused maintained on a voluntary basis.

[38] He maintained that the panties were ripped and that violet was not so different from their appearance which he suggested was purple.

[39] He criticized the submission that this was a false complaint. Why would she call out for police assistance and then allege rape exposing herself to this ordeal unless the allegations had substance. He emphasized in this regard that she was only 19. Aside from the accused, there was no evidence that she was drunk.

[40] He emphasized also the fact that the complainant had called out for help and that this was inconsistent with her getting into the back seat and nothing happening between the two. It was entirely consistent with what she had said occurred as was the evidence of the police officers that both were sweating.

FINDINGS

[41] Although the complainant, as Mr. Tu'utafaiva emphasized, had not apparently mentioned relevant matters in her initial statement to the police such as her undergarment leggings being removed, or biting the accused, being with the accused on a previous occasion, and kissing him exposing her to the criticism that she was embellishing her evidence and accordingly unreliable, I can well understand that, at or about 2am in the morning after what to her, if true, must have been a traumatic experience she would be unlikely to give a settled or detailed account of all that had occurred.

[42] I can well understand that the next day police would want to take a more detailed account from her which was forthcoming on the 9th October only two days later.

[43] It was concerning for me that she had said on more than one occasion that she had told police matters that had not been recorded on the first occasion. However, on that night the police said she was very angry and in these circumstances she may well have considered she had told police details which she had not without being dishonest. In assessing her reliability as a witness and considering all of Mr. Tu'utafaiva's criticism of her evidence, it is important for me to pay regard to the whole of the evidence adduced in the case.

[44] In my view, her allegation of attempted rape was consistent from the time she first encountered the police and asked for help, making the first complaint to

the police at the scene, and then supporting this in two written statements and in her trial evidence, albeit that there may have been some inconsistencies and lateness in revealing some matters. But on the material allegation of attempted rape, she was quite consistent and adamant that this had occurred.

[45] I cannot see any reason why the complainant would make a false complaint of attempted rape, in this case. The natural inference to be drawn from the fact of her crying out for help and her very recent, if not spontaneous complaint, is that an attempted rape had taken place.

[46] Further her cry for help is consistent with police finding her in a distressed state and witnessing her crying. The accused denied this but I see no reason to disbelieve the three police officers who were simply on the scene by chance and took no further part it seems in the investigation once she had been taken back to the station. Likewise, the police noted that both parties were sweating consistent again with the complainant's account that she had resisted the accused's advances in the back of the vehicle shortly before police observed them.

[47] I also find inconsistent with the accused account in his record of interview that the accused had attempted to get out of the car and consequently he had stopped close to the church that she should then voluntarily get into the back seat with him, it seems for no good reason at all. Likewise, I consider it most unlikely that the accused would simply get into the back seat after telling her to go even if she was abusive as he alleges. I think it much more likely he would have driven her back to either Talahiva or the Dateline area or even home to Ma'ufanga to get rid of her so he could get home. I prefer her explanation that she did try to get out but that he bundled her into the back seat and if that is true, as I find it to be beyond a reasonable doubt, it follows that I believe her also beyond reasonable doubt that he attempted to rape her.

[48] I have taken on board the fact that it was a somewhat unlikely place for sexual activity to occur near a church, on a roadside in a built up area, with lighting and car windows open, but I see no available inference other than the accused took this course of action perhaps rather opportunistically when faced with her leaving the car. Again, I consider the evidence of the police officers, her cry for help, her complaint, the fact she was distressed and the fact both parties were sweating as important supporting evidence that an attempted rape did take place.

[49] I find the police evidence in this case of compelling importance. Whilst the evidence of the torn panties in my view is also supportive of her account, it is the independence of the police's observations and the timing of those observations

that is of much greater importance than the panties. Mr. Tu'utafaiva suggests in his submission that the panties were not the ones she was wearing but she was never really cross-examined on this point, the cross-examination being more at her assertion that they were stretched. But as I have said it was the Police's observations that I found compelling in this case, and not the panties.

[50] I also consider that though there may have been some difference between the statements in the account of the departure from Talahiva, the essential fact is that the departure from the complainant's aspect was unexpected and shortly after led to the incident at the church, not far away.

[51] I accept the complainant's account of what happened and that she was a witness of the truth. Although only 19, she was robust in her defence of her position. I note that prior to making her second statement the evidence revealed that she had been warned of the serious consequences of not telling the truth. I detected at times she was frustrated with what was a lengthy and skilled probing of her evidence by a very experienced counsel, but for all his criticism of her, I found her evidence of attempted rape reliable when the police observations at the scene were considered together with what I considered was an unlikely explanation by the accused for the parties to be found in the backseat together. The accused suggested she was drunk but none of the police officers said that she was that night, one observing that she was very angry. I accept her evidence she was not drunk.

[52] I accept her evidence beyond a reasonable doubt that the accused had removed his pants and that could only be because he intended to have sexual intercourse with her which he knew she did not want. His actions went beyond mere preparation.

VERDICT

[53] I find beyond a reasonable doubt the accused is guilty of attempted rape. It is unnecessary for me to proceed to consider the alternative counts in the indictment.

Nuku and Ors v Fuapau and Ors

Land Court, Nuku'alofa
President Paulsen
LA 27/2015

24 August 2017

Land — condition that a town allotment be built upon — validity of condition considered — condition not met and Minister revokes lease — validity of revocation of lease

The Minister granted town allotments to the plaintiffs. He purported to impose verbally at a meeting of all proposed lessees in a village subdivision, a condition upon the grants that the plaintiffs were required to build upon and occupy their town allotments within two years or forfeit their allotments.

Deeds of grant were issued but not registered. 7 years later the plaintiffs had not fulfilled the condition to build and the Minister then cancelled the plaintiffs' grants and re-granted the town allotments to the defendants.

The issues that arose were whether the Minister of Lands has the power under the Land Act to impose such a condition upon the grant of a town allotment and if so whether he may cancel the grant in the event that the condition is not fulfilled.

Held

1. The Minister's powers relating to land are entirely derived from the Land Act and there is no power to impose a condition to build within a certain time – express or implied.
2. The Minister's decision to cancel was unlawful and he is to register the allotments and issue deeds to them.
3. The leases were valid despite the fact that they were not registered.

Cases considered

Lisiate anor v Eli anor [2012] Tonga LR 30
Manu v Aholelei & Minister of Lands [2015] Tonga LR 135
Folau v Taione ors [2016] Tonga LR 189
Sete v Palu anors [2015] Tonga LR 296
Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale & Minister of Lands [2011] Tonga LR 71 (CA)

Statute considered

Land Act section 44(2)

Counsel for the plaintiffs	:	Mr. L. Niu SC
Counsel for the 1st, 2nd and 3rd defendants	:	Mr. S. Tu'utafaiva
Counsel for the fourth defendant	:	Mr. S. Sisifa SC

R U L I N G

The issue

[1] The Minister granted town allotments to the plaintiffs. He purported to impose a condition upon the grants that the plaintiffs were required to build upon and occupy their town allotments within two years or forfeit their allotments. The condition was not fulfilled and the Minister then cancelled the plaintiffs' grants and re-granted the town allotments to the first to third defendants.

[2] The issues that arise are whether the Minister of Lands has the power under the Land Act (Cap 46.02) to impose such a condition upon the grant of a town allotment and if so whether he may cancel the grant in the event that the condition is not fulfilled.

The facts

[3] The Court is not required to resolve any disputed questions of fact. In so far as they are relevant the facts can be stated briefly and with a high level of generality.

[4] In 2006 the Minister of Lands approved the subdivision of land at Ha'asini into town allotments.

[5] On 17 April 2007 at a meeting at the Hall of the Free Wesleyan Church at Ha'asini the Minister allocated the town allotments to men of the village. The Minister verbally purported to impose a condition that those men that were allocated allotments had to build upon and occupy the allotments within two years and if they did not do so the allotments would be forfeited (the condition). There is no contemporaneous record of the condition but for the purposes of the proceeding the plaintiffs have accepted that the Minister purported to impose the condition.

[6] The plaintiffs applied for and were validly granted town allotments. The first plaintiff's lot was Lot 5 S/Plan 74/97-P9. The second plaintiff's lot was Lot 16 S/Plan 74/97-P9. The third plaintiff's lot was Lot 35 S/Plan 74/97-P9.

[7] Deeds of grant were prepared and signed by the Minister for each of the plaintiffs' allotments. The first plaintiff's deed of grant was 406/76. The second plaintiff's deed of grant was 383/76. The third plaintiff's deed of grant was 383/92. The deeds of grant were not issued to the plaintiffs and were never registered in the Register of Town Allotments.

[8] On 17 March 2009 the then Town Officer of Ha'asini, Falanisesi Fiva, wrote to the Minister noting that the condition had been complied with in the cases of only 6 of 36 allotments. He asked the Minister to make an inspection, clearly with a view to enforcing the condition and re-allocating the town allotments, but nothing was done to cancel any of the grants. There was a notation on the Town Officer's letter which was signed by the Minister and dated 20 September 2009 to the effect that the Minister wished to give the allotment holders more time to work on their allotments.

[9] In October 2014 the Acting Deputy Secretary of Lands, Sione Uele, conducted an inspection of the allotments. As a result the Minister issued a direction on 17 October 2014 to cancel the allocations made to those men who had not developed and occupied their allotments.

[10] The plaintiffs had not developed and occupied their allotments.

[11] On 20 October 2014 Sione Uele wrote to the plaintiffs on behalf of the Minister advising them that their grants were cancelled due to their failure to comply with the condition. The letter stated that the allotments would be re-allocated to other residents of Ha'asini. The re-allocations were made generally in accordance with the recommendation of the Town Officer, Mr. Fiva.

[12] The first plaintiff's grant was cancelled and his allotment re-allocated to the first defendant. The second plaintiff's grant was cancelled and his allotment re-allocated to the second defendant. The third plaintiff's grant was cancelled and his allotment re-allocated to the third defendant.

The submissions

[13] For the plaintiffs, Mr. Niu began by arguing that all the plaintiffs had been granted their allotments and that the grants were valid notwithstanding that they were not registered (*Lisiate anor v Eli anor* [2012] Tonga LR 30; *Manu v Aholelei & Minister of Lands* [2015] Tonga LR 135 and *Folau v Taione ors* [2016] Tonga LR 189 The defendants do not take issue with this analysis.

[14] Dealing with the condition, Mr. Niu argues that the evidence established that this was imposed by the Minister verbally and was not the matter of any agreement with the plaintiffs. He contends that the imposition of the condition was unlawful as the Land Act does not confer upon the Minister any power to impose such a condition. The Land Act is, he said, a complete code in respect of all lands in Tonga (*O.G. Sanft & Sons v Tonga Tourist and Development Co. Ltd* [1981-1988] Tonga LR 26; *Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale & Minister of Lands* [2011] Tonga LR 71 (CA)). Mr. Niu said that if such a condition was valid it would provide the Minister with the power to cancel grants without affording the holder natural justice. It would also circumvent the requirements of section 44(2) of the Act which provides that the Minister may apply to the Court for an order that an abandoned allotment be forfeited. As the Minister had no power to impose the condition, he could not rely upon it to cancel the plaintiffs' grants.

[15] For the first, second and third defendants Mr. Tu'utafaiva correctly acknowledged the difficulty that the defendants face to defend the Minister's position in light of the authorities. He largely relied upon the submissions of the Minister. He did argue that whilst the Land Act does not contain an express power to make conditional grants of allotments it does not contain a prohibition against that. He submitted that such a power should be implied because, as in this case, it allows the Minister to have consideration for the interests of people who are entitled but cannot obtain a grant of land and there is no injustice to a conditional grantee if the allotment is taken from him if he is aware of the condition.

[16] For the Minister, Mr. Sisifa accepted that the plaintiffs had been granted their allotments but said the condition had been imposed by the Minister and not complied with. Turning to the central issue of whether the Minister had the power to impose the condition, Mr. Sisifa referred me to section 19 of the Land Act. As the Minister is the administrator of all land matters in the Kingdom he has, Mr. Sisifa argues, an interest in ensuring the fair distribution of land and that land is appropriately utilised. It should therefore be implied from section 19 that the Minister may impose conditions such as he did in this case to further those interests and that the plaintiffs, having known of the condition and accepted their grants, were bound by the condition. On this analysis, upon the plaintiffs breaching the condition the Minister was entitled to regard their allotments as forfeit.

Discussion

[17] The Minister's powers in granting allotments are derived from the Land Act (section 19 and 43). He can only act within the limits of the powers conferred

upon him under the Land Act. If he purports to exercise a power that is not conferred upon him, he does so unlawfully.

[18] The Land Act confers no express power upon the Minister to make a grant of an allotment subject to a condition that the grantee must build upon and occupy the land within a certain time decided upon by the Minister. The 'conditions' contemplated by the Act upon the making of a grant are those set out in section 43(2) which provides that a grant shall be subject to the provisions of the Act, made in the prescribed form, the applicant must produce a birth certificate or other proof of his date of birth and pay the prescribed fees.

[19] Whilst acknowledging that there is no express power of the Minister to make conditional grants the defendants argue such power should be implied. A similar issue arose in *Sete v Palu anors* [2015] Tonga LR 296 (LC); (Unreported Court of Appeal of Tonga, AC18 of 2015, 8 April 2016 (CA)). In *Sete* the issue was whether the Minister had a general power to cancel deeds of grant which he considered invalidly made and to re-grant the land. The Land Court held that the Minister had no such express power nor did such power arise by implication. It was held by the Land Court that whilst the Court may sometimes 'fill in gaps' in a statutory framework when that is required to make an Act work as it was intended this could only be the case if it was necessary, reasonable, proper as a matter of interpretation and not displaced by the express words of the Act.

[20] The decision of the Land Court was upheld by the Court of Appeal. The Court of Appeal noted that the Minister had powers to make grants and to cancel existing grants in particular and limited circumstances only. The Minister had no power (express or implied) to cancel grants in other cases not expressly provided by the Land Act because (at paras 15 and 16):

> But the Minister is given no express general power to cancel a deed of grant that has not been voluntarily surrendered by the holder with Cabinet consent under s.54. That is understandable as the circumstances in which cancellation might be sought by someone other than the holder are very likely to involve a dispute concerning entitlement to the land. Resolution of such a dispute would take the Minister beyond his administrative role under the Act and might require him in some cases to adjudicate in a dispute involving his own actions or those of a predecessor. Therefore, it is only the Land Court that is empowered by the Act, under section 149(1)(b), to hear and determine all disputes, claims, and questions of title affecting any land, which s.150 authorises it to do "on the application by

any person claiming to be interested or on the application of the Minister".

It follows that, like the Land Court, we do not accept the submission of the appellants that the Minister must be taken, in the absence of an express power, to have an implied power to cancel a grant that he considers to have been issued unlawfully. Such an implied power, far from being suggested by what is said expressly or being necessary for the Minister to perform the functions given to him would, in our view, be inconsistent with the division of functions and powers under the Act between the Minister and the Court. If the Minister considers that a grant has been made unlawfully, and the holder, fully apprised of his rights, is unwilling to execute a surrender of it, the Minister's proper course is to apply to the Land Court for its cancellation, provided, of course, that action is not statute barred by s.170.

[21] The starting point must be that the Land Act is intended to be a complete code. It confers on the Minister the power to grants allotments but does not provide that such grants may be subject to conditions of the Minister's choosing. Had Parliament intended that the Minister would have such an extraordinary power it would have been an easy matter to have said so and it is inconceivable that the matter was simply overlooked (*The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board* (supra) at [6]. of course, if such a power had been included in the Land Act it would be expected that it would be subject to rules and processes governing its use and there is nothing like that in the Act (*Sete* (LC) at [36]).

[22] Mr. Sisifa argues that the Minister has an interest in the fair distribution and use of land in the Kingdom. Such interest does not justify the imposition of the power to make conditional grants of allotments. The Minister has an administrative function when making grants of allotments. To accept that he has the power to make conditional grants and thereby reserve to himself the power to cancel grants if the condition is not fulfilled is to confer upon him a quasi-judicial role which is 'inconsistent with the division of functions and powers under the Act between the Minister and the Court' (*Sete* (CA) at [16]).

[23] Furthermore, the Minister's interests as identified by Mr. Sisifa can be adequately protected by the proper scrutiny of applications for allotments. In so far as the Minister may be concerned that land is not being put to productive use the Land Act already provides that he may take proceedings under section 44(2) for forfeiture of the land. Mr. Sisifa argues that section 44(2) is unsatisfactory as it imposes a heavy burden on the Minister to establish that land has been abandoned

before the Court can declare that an allotment has been forfeited but that is the burden that Parliament has imposed and must be taken to have been intended.

[24] The implication of a power that the Minister may make conditional grants of the kind he purported to impose in this case is neither necessary for the proper exercise of the Minister's functions nor is it reasonable. It would also circumvent the requirements of section 44(2) of the Act. The Minister had no power to impose the condition and it must necessarily follow that he had no power to cancel the plaintiffs' grants.

Result

10 [25] The plaintiffs are successful. The Minister's decisions to cancel the grants of town allotments to the plaintiffs and re-grant the town allotments to the defendants were unlawful and are aside. The Minister is to register the plaintiffs' town allotments and issue deeds of grant to them forthwith.

[26] The plaintiffs are entitled to their costs as fixed by the Registrar if not agreed.

Latu v Police

Supreme Court, Nuku'alofa
Cato J
AM 10/2017

28 August 2017

Sentencing — cumulative sentence above Magistrate's power

An offender was found guilty of housebreaking, theft and wilful damage. He was sentenced on each offence consecutively so that the term of imprisonment was over 4 years. The Magistrate suspended 18 months of the sentences, presumably so that the total was under 3 years and therefore within the Magistrate's powers under section 11(2) of the Magistrates Court Act.
Section 11(2) says – "the Magistrate's Court has jurisdiction to hear and determine criminal cases in which the maximum punishment provided by law does not exceed three years imprisonment or a fine of $10,000.".

Held

1. Although section 11(2) of the Magistrates' Court Act gives a Magistrate the power to consider all cases where the maximum sentence is three years, a Magistrate does not have the power to effectively impose a cumulative sentence so that the overall sentence is above three years imprisonment;
2. If a sentence of over 3 years prison is suspended in part to reduce the prison period to less than 3 years, the sentence is still beyond the Magistrate's power to make;
3. The court allowed the appeal and imposed its own sentences for the offences.

Statute considered

Magistrates' Court Act, section 11(2)

Counsel for the Appellant	:	Mr. Niu
Counsel for the Respondent	:	Mr. Aho

J U D G M E N T

[1] This is an appeal against a sentence imposed by Magistrate Kaufusi delivered on the 7th April 2017. The Appellant had broken into a house and stolen a significant amount of Tonga kava worth about $500.00. The Magistrate, in a very short sentencing decision given without reasons, sentenced him to housebreaking, 2 years imprisonment; theft, 2 years imprisonment, wilful damage, 1 month imprisonment. The accused was sentenced to 3 years imprisonment, with one year and one month to be suspended for two years.

[2] First, this is another example of a practice which I have criticized in several judgements of a Magistrates sentencing without giving any or adequate reasons. Reasons must be given when sentences are imposed. Not only do they focus the sentence on the issues but they provide a reasoned basis for an appellate Court to consider the matter should an aggrieved defendant appeal.

[3] No doubt, in suspending the final year and one month of the sentence, the Magistrate considered that he was imposing a sentence which met the statutory three year maximum that a Magistrate is entitled to impose by law under section 11 (2) of the Magistrates Court Act. Section 11 (2) provides;

> "Subject to subsections three and four, the Magistrate's Court has jurisdiction to hear and determine criminal cases in which the maximum punishment provided by law does not exceed three years imprisonment or a fine of $10,000.".

[4] Although the section gives a Magistrate the power to consider all cases where the maximum sentence is three years, I do not consider that a Magistrate has the power to effectively impose a cumulative sentence so that the overall sentence is above three years imprisonment. In certain cases falling within section 11 (4) of the Act, a Magistrate has an enhanced jurisdiction to sentence to a maximum of seven years imprisonment and a fine of $50,000 but those provisions did not apply here.

[5] In this case, the housebreaking must have been a simple housebreaking which carries a maximum sentence of 3 years (serious housebreaking carries 10) and the theft, one of no greater than $500.00 value of the property which carries a maximum sentence under section 145(a) of the Criminal Offences Act of 2 years imprisonment. It was, accordingly, plainly within the jurisdiction of the Magistrate to hear these charges, but he was not able to impose an overall cumulative sentence which exceeded three years. The sentence he imposed was effectively a cumulative

sentence of 2 years for housebreaking, two years for theft together with one month for wilful damage. The combined sentence of four years and one month imprisonment was beyond his jurisdiction to impose. That he suspended a year and one month did not bring the sentence within the three year statutory maximum. Suspending a sentence reduces the length of actual imprisonment that an offender is require to serve before being released on licence but it does not reduce or alter the length of the sentence of imprisonment imposed. The suspended portion is a part only of the sentence of imprisonment. Thus, an offender who violates his suspension by violating the terms of his suspension may be recalled under section 24(3)(c) of the Criminal offences Act to serve the balance of his term of imprisonment.

[6] The Magistrate erred also, in any event, in accumulating the sentences in these circumstances for theft and house breaking. The theft arose out of property taken during the housebreaking and it is usual in those circumstances for the sentence to be concurrent. The one month sentence imposed for wilful damage, however, arose out of separate offending committed on a different date and justified a cumulative sentence. In these circumstances, I propose to uphold the appeal and vary the sentences after taking into account his guilty pleas and record which did include a previous housebreaking and a robbery in 2006 for which he served a substantial sentence.

[7] The sentences I impose are:

> on the housebreaking, which I view as the more significant of the charges, two years imprisonment;
>
> on the theft of the kava 6 months imprisonment to be served concurrently with the housebreaking;
>
> and for wilful damage, one month imprisonment cumulative on the sentence of housebreaking.

[8] My sentence, however, is affected by the fact that, after the Magistrate gave his decision, I had to sentence the Appellant on manslaughter (in CR 20 of 2017) to three years imprisonment with the final year suspended on conditions:

> That he was not to commit any offences punishable by imprisonment for the period of suspension;
>
> He was placed on probation for a period of suspension to live where directed;

He was to undergo a course of alcohol and drug addiction and an anger management course;

He was not to consume alcohol or take drugs during the period of suspension.

[9] These rehabilitative conditions were imposed because I was aware that Mr. Latu had encountered problems with drugs over the years and this was his final opportunity to address that issue.

[10] I have now to consider the totality of the sentence I impose on Mr. Latu to take into the account the sentences I imposed on the housebreaking and other offending Magistrate Kaufusi had to deal with and my sentence on the manslaughter. I indicated to counsel at the hearing that I proposed to combine or impose one year of the accumulated sentence for the offending arising out of the housebreaking and wilful damage to be served cumulatively upon the three year sentence for manslaughter (CR20 of 2017).

[11] I have also taken into account that the sentence of imprisonment imposed by Magistrate Kaufusi probably took effect from the date of sentence being the 7th April 2017, the sentence on the manslaughter being backdated to his date of remand in custody for that offending. In my view, the 12 month period I have imposed adequately redresses any period of time that the appellant may have served either on remand or after sentence for the housebreaking and other offending. Accordingly, the combined sentence arising out of this appeal is;

He is sentenced to;

i 2 years imprisonment for simple housebreaking;

ii 6 months for theft to be served concurrently with (i);

iii He is sentenced to one month imprisonment cumulative upon the sentence imposed in (i) for simple housebreaking.

I order that 12 months of his combined sentence on (i) and (ii) be served cumulatively upon his sentence of 3 years imprisonment for manslaughter (CR 20 of 2017);

I order that the final 12 months of this combined sentence of 4 years imprisonment be suspended on the following conditions;

i That he is not to commit any offences punishable by imprisonment for the period of suspension;

ii. He is placed on probation for a period of suspension to live where directed;

iii He is to undergo a course of alcohol and drug addiction and an anger management course;

iv He is not to consume alcohol or take drugs during the period of suspension.

This sentence is to be backdated to the date of Mr. Latu's remand in custody on the manslaughter charge.

[12] I have noted the submissions in the Appellant's Notice of Appeal in which Mr. Niu SC submits that the sentences that should be imposed for the housebreaking charges should be reduced to good behaviour. I do not share his view because the Appellant is not a first offender; indeed, he has a significant criminal record. I add also that the sentences I have imposed in this judgment varies in one respect from my oral indication this morning of the revised sentence on appeal which I indicated was to be recorded in a later written judgment. I was unaware at the time of the hearing that the wilful damage arose in a separate incident from the other offending and hence the sentence should be cumulatively imposed as I understand the Magistrate correctly approached the matter. However, the end result is the same because I have required only 12 months of this combined sentence to be served cumulatively upon the manslaughter sentence.

R v Vi

Supreme Court, Nuku'alofa
Cato J
CR 55/2017

31 August 2017

Criminal law — provocation — delay in reaction — defence

Sentencing — Criminal law — provocation — defence — reducing starting point

A fireman becomes drunk at the station and the senior officer quietens him by holding him down and kicking him in the head until the police come and take him away. The fireman comes back later with iron bars and bashes the senior officer and injures him quite badly. The fireman claims he was provoked. The Judge finds that the kicking was probably a trigger for the later assault but a minor mitigating factor warranting just a 6 month reduction. There is too long a delay for the kicking to constitute provocation as a defence.

Held

1. There is too long a delay (several hours) for the kicking to constitute provocation as a defence.
2. The starting point for punishment is 5 years and would be more if there was permanent personal injury. In this case the starting point is reduced to four and a half years.
3. 18 months mitigation and suspension of last year of sentence.

Counsel for the Prosecution : Mr. 'Aho
Counsel for the Prisoner : Mr. Niu SC

S E N T E N C E

[1] The prisoner, Moale Vi, pleaded guilty to one count of grievous bodily harm contrary to section 106 of the Criminal Offences Act in that he did, on the 22nd December 2016, at Longolongo wilfully and without lawful justification

caused grievous bodily harm to Penisimani Fifita when he hit him on the head with an iron rod, thereby causing an open fracture on the right frontal part of his skull.

[2] Mr. Niu SC informed the Court on his plea that the summary of facts was disputed. He indicated that his client, who was a serving fire officer at the time of the incident, alleged that the actions of fire officers at the station in Longolongo were provocative and contributed materially to his actions resulting in grievous bodily harm.

[3] I heard evidence in relation to these events which arose probably an hour before the incident resulting in grievous bodily harm to fire officer Fifita. My conclusions from the evidence I heard in relation to this matter and the balance of the agreed facts which form the basis for my sentence today are;

> In the early hours of the 22nd December, 2016, the accused, an employed fire officer, who had been granted leave from his station duties to attend to cooking for an event, had consumed alcohol and arrived back at the station drunk. The evidence revealed that he had a knife of some kind which he had used to chop at a table but he did not have this in his possession at the time of the assault which followed. He was seen also to throw chairs but was not doing so at the time of the assault. Plainly, on the evidence I heard the prisoner was drunk, unruly, in a rather aggressive frame of mind and appeared to bear some kind of grievance which was not clarified, when I heard sentencing submissions, a couple of days ago.
>
> I am satisfied, however, that the officer in charge of the station at the time, Paulo Kolo who was asleep at the time, was summoned by another officer and he went downstairs, and had words with the prisoner who was sitting down. This led to a fight between the two in which Officer Kolo appeared to get the better of the prisoner forcing him to the ground and placing his foot on him. The complainant, Officer Fifita, then came down to assist and the evidence reveals that he kicked the prisoner several times in the head as the prisoner was guarding his head. This occurred over a period of 7 to 8 minutes before police arrived. The prisoner was then taken away by police and charged with disorderly behaviour. No evidence of injury was seen by a police officer who came to the scene nor any of the fire officers involved. Nor I find on the evidence was the prisoner, at any time, rendered unconscious.
>
> The evidence revealed that, after the prisoner was taken way, Officer Fifita returned to his bed at the station. About an hour later, the prisoner

returned to the station this time with two iron rods one of which he used to hit officer Fifita on the back of the head as he lay on his bed, and then, after he had turned to face him, he hit him again causing a frontal bone fracture with a fractured fragment lodging within the frontal sinuses and haemorrhage in the front sinuses.

Officer Fifita was in hospital about ten days and was off work for two months whilst he recovered. I adjourned this sentence so that Mr. 'Aho could give me an up to date report on the health of officer Fifita.

After the assault, the prisoner had chased after Officer Fifita who was able to run from the station and was seen bleeding from the head. The prisoner had threatened to tear him apart. Officer Fifita was admitted to hospital.

The facts reveal that the prisoner who was arrested soon after the incident was co-operative on his arrest.

[4] On these facts, I conclude that the prisoner was drunk and unruly at the station. I accept and it was confirmed by Officer Paulo Kolo in his evidence that this was out of character for him. I find that, although the officers were entitled to take reasonable steps to restrain and subdue the prisoner who had plainly become a nuisance and prevent any violence, Officer Fifita did use excessive force when kicking him several times to the head area. In my view, that was unjustified and dangerous although I am satisfied that the prisoner was not injured and nor did he lose consciousness as he had originally claimed.

[5] I note all Mr. Niu had to submit about provocation, his submission being based on the fact that his action was so out of character for his client that it could only be explained by the fact that he had been assaulted by Officer Fifita earlier, and this was a material reason why he had reacted in the way he did. I accept that the actions of the fire officers in restraining the prisoner using force as they did and probably the kicking by Fifita was a likely trigger that motivated the prisoner to return to the station and exact revenge later that morning. Provocation as a mitigating factor in sentence was usefully described in R v Taufeki (CA 384/2004, 17th February 2005) by a Full court of the New Zealand Court of Appeal in this way;

> "Provocation: Where the offender has been provoked, that may justify a lower starting point. It is not enough simply to claim to have been incensed by the actions of the Victim or another, rather the sentencing Judge will need to be satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and

which remained an operative cause throughout the commission of the offence."

[6] I accept that the actions of Officer Fifita in particular could reasonably be said to have inflamed or provoked the prisoner so that he returned to exact revenge on him. It seems the only rational basis for his actions and a motivating factor. However, as a mitigating factor I do not consider that I should regard this as a significant mitigating factor. The actions of Fifita arose well before the prisoner returned to the station and in my view long after a normal person's angry reaction to a provocative act would have been expected to have subsided. I qualify this by saying a normal person who was not greatly affected by alcohol, as the prisoner was that evening. Further, the retaliation, in my view, was out of proportion to the perceived wrong suffered by the prisoner earlier. I consider the actions of the prisoner were essentially motivated by his already angry disposition, and a desire to seek revenge on Officer Fifita. Because the actions of Officer Fifita, were excessive and contributed further to the prisoner's already angry disposition and hostile actions and to that extent was a material part of the background to this offending, I uphold Mr. Niu's submission to the extent that I will reduce the starting point by 6 months imprisonment to reflect the complainant's excessive use of force in apprehending the prisoner at the station until police arrived. I did not hear from Officer Fifita who was overseas.

[7] As to the starting point, I agree with the Crown submission that a starting point of 5 years imprisonment was appropriate for using a weapon to inflict serious injury upon the complainant who was in bed at the time. Had there been any permanent injury and I am satisfied, having heard from Mr. 'Aho this afternoon, that there probably is not then the starting point would have been significantly higher and one that would reflect the seriousness of the injury. The starting point I adopt here after reduction for the factor in paragraph 5, is 4 and half years imprisonment. A significant starting point is required in cases of this kind where weapons are used to attack the head of a victim and this may include also kicks delivered to the head which can be just as damaging. Often it is a mere matter of chance where the head is impacted what the nature and the extent of any injury will be. It is the duty of this Court to deter such actions and to protect society from violence of this kind. Mr. Niu emphasised that this was not a large pipe but a narrow pipe but even so, it did significant damage.

[8] As to mitigation, I accept that the accused has pleaded guilty at an early stage, has been co-operative, probably is remorseful, and had lost a job of which he was very fond. I accept the offending was out of character for him this being his first offending, and that he is well regarded in the community in which he lives. I

have read the references and his probation report. His wife speaks well of him and he is the father of two young children. This, I consider, is another case of which this Court sees, unfortunately too many, involving people of good character who fall from grace because they have drunk excessively and have lost their power of rational thought and control. The degree of his intoxication here and the prisoner's mood together with what is reported on this topic in his probation report would suggest that he had developed a problem with alcohol which this judgement will assist him to arrest. I allow the accused 18 months imprisonment by way of mitigation. The sentence I impose upon his conviction for grievous bodily harm is 10 3 years imprisonment. That sentence is backdated to the date of his remand in custody on this offending.

[9] I consider that he is plainly deserving of some suspension of this sentence. He has pleaded guilty, been co-operative and is a first offender with a young family. I consider, however, that the minimum he should serve, consistent with the seriousness of his offending, is two years custodial imprisonment. Thus, I suspend the final 12 months of his imprisonment on the following terms;

1. He is not to commit any offences punishable by imprisonment for the period of his suspension;
2. He is placed on probation for the period of his suspension;
20 3. He is to live where directed;
4. During the period of his suspension he is not to consume alcohol;
5. He is to undergo a course under the direction of probation in alcohol and drug abuse under the Salvation Army and one in anger management.

[10] He is warned that a failure to abide by these conditions may result in his being returned to prison to serve the final 12 months of his sentence of imprisonment.

Lord Nuku v Lord Luani and Yan Jian

Court of Appeal, Nuku'alofa
Paulsen P, Handley J, Blanchard J
AC 6/2017 and AC 7/2017, LA 29/2015

6 September 2017

Land — surrender to title holder — conditions — unlawful quarrying — joint tortfeasors — damages for unlawful quarrying

A leaseholder surrendered his lease so that it reverted to the estate holder Lord Luani. This was by agreement with Lord Nuku by which the lessee gained another lease from Nuku and $130,000. The lessee tried to bind the Minister of Lands to grant the surrendered lot to Nuku's son.

Meanwhile the second defendants entered on the land and for 28 months conducted quarrying operations. When the land reverted to Lord Luani he stopped the quarrying.

Lord Luani sued for damages for the quarrying.

Held

1. The lessee had no right either under ss 72 and 73 or under s.54 of the Land Act to bind the Minister to grant the surrendered Lot to the person he nominated.
2. Both the quarriers and Nuku who purported to allow it were joint tortfeasors and liable in damages.
3. Damages awarded for net value of minerals taken away.

Cases considered

Tu'akoi v Tu'akoi [2016] TOLC 5
Jones v Lanwert UDC [1911] 1 Ch 393, 404
Vestergard Frandsen A/S v Bestnet Europe Ltd [2013] 4 All ER 781
Peruvian Guano & Co v Louis Dreyfus & Co [1892] AC 166
Sakalia v Vailea & ors [1995] Tonga LR 130

Statute considered

Land Act, s.54

Counsel for the Appellant in AC 6/2017 and the Second Appellant in AC 7/2017	:	Mr. W. C. Edwards SC
Counsel for the First Appellant in AC 7/2017 and Third Respondent in AC6/2017	:	Mrs. P. Tupou
Counsel for the First Respondent in AC 6/2017 and Respondent in AC7/2017:	:	Mr. S. Fonua

JUDGMENT OF THE COURT

[1] These appeals from the judgment of Scott J sitting with an assessor in the Land Court concern the title to tax allotment Lot 85 B/K 76/95 at Malapo, comprising an area of 8 acres 1 rood which forms part of Lord Luani's hereditary estate. Appeal no 6 of 2017 was lodged by Lord Nuku, the first defendant, and appeal no 7 was lodged by the second and third defendants, Yan Jian Group Co Limited and Yan Jian Tonga Limited (the companies). Lord Luani sued the defendants on various causes of action based on quarrying on Lot 85 between 2011 and 2013 to obtain aggregate for use in road construction. The quantity removed was found to be 85,009 cubic yards of rock.

[2] On 5 May 2017, Scott J gave judgment in favour of Lord Luani for TOP $5,556,000 against Lord Nuku and the companies jointly and severally as damages for trespass to Lot 85. He found substantially in favour of the defendants on Lord Luani's claims for mesne profits or damages for trespass in relation to Lot 90. There has been no appeal from the judgment on the Lot 90 claims, and we will say no more about those claims.

[3] The summary of the facts that follows is based on the findings of Scott J unless otherwise indicated.

[4] Before the events that gave rise to the claims now in question Lot 85, was owned by Paula Kava. At some time towards the end of 2010 Lord Nuku approached him with a view to acquiring Lot 85 in order to make it available to "The Chinese Technical Team", the trading name of the second defendant. An informal agreement was reached for Mr. Kava to apply under s.54 of the Land Act for consent to the surrender of Lot 85. This would normally enliven an entitlement in his heir under s.54 to claim the Lot for himself, but Mr. Kava promised that his heir would not make such a claim. If after 12 months from publication of notice of the surrender no such claim had been received the Lot would revert to the Estate

holder, in this case Lord Luani, under s.54. Lord Nuku's son, Mr. Valevale, would then apply for the Lot for himself. In return Mr. Kava would receive a tax allotment at Ha'ateilho and Lord Nuku would pay him TOP$130,000.

[5] Mr. Kava lodged his application for consent in January 2011. On 24 January he wrote to "The Chinese Technical Team" stating that he had surrendered Lot 85 to Mr. Valevale. The letter was also signed by Mr. Kava's heir and by Mr. Valevale. On 31 January Lord Nuku entered into an informal agreement with "The Chinese Technical Team" which Scott J held "leased" Lot 85 to the second defendant for 20 years and authorised its use as a quarry for the extraction of stone for road works. In a letter attached to this agreement Lord Nuku "certified" that the land could be legally used as a quarry. The rent for the 20 year lease was TOP$500,000 to be paid within 7 days.

[6] On 24 February 2012 Cabinet consented to the surrender but said nothing about a grant to Mr. Valevale and on 7 May the first s.54 notice was advertised. Mr. Kava's heir did not apply for the Lot within the 12 months that followed and on 8 May 2013 it reverted to Lord Luani.

[7] Mr. Edwards and Mrs. Tupou challenged the finding that Lot 85 had reverted to the hereditary estate of Lord Luani since there was no evidence that all the advertisements required by s.54 had been published. This submission must fail because the reversion was admitted on the pleadings and evidence of the facts was not required. In any event s.54 (1) and (3) clearly provide for the allotment to revert to the holder of the hereditary estate if the heir of the previous owner fails to claim the land within 12 months after the appearance of the first advertisement. A disappointed heir may be able to bring a late claim but a stranger whose rights were not affected cannot complain.

[8] Mr. Edwards and Mrs. Tupou based a further challenge to the rights of Lord Luani on ss 72 and 73. Mr. Kava agreed to surrender Lot 85 in return for payment of TOP$130,000 and the grant of a tax allotment in Ha'ateiho. In his application to surrender he nominated Mr. Valevale to succeed him as the new owner of Lot 85.

[9] Mr. Edwards and Mrs. Tupou argued that Lord Luani was not entitled to damages because the Minister was bound to grant Lot 85 to Mr. Valevale, and therefore the quarrying had not caused him any substantial loss. There are many answers to these submissions.

[10] In the first place neither Mr. Kava nor Mr. Valevale were parties to the proceedings in the Land Court, and any interference with their rights cannot be relevant.

[11] In any event Hampton CJ said in *Sakalia v Vailea & ors* [1995] Tonga L.R 130, 135:

> "(d) The person surrendering ... is not given power to impose conditions on the surrender e.g. who should succeed him to the land; succession to the land is determined by the law.
>
> (e) The surrender of land ... was complete when cabinet gave its consent and the [former holder] has no more interest in the lands".

[12] Scott CJ said in *Tu'akoi v Tu'akoi* [2016] TOLC 5 at [26], [27]:

> "[26] The Act provides a procedure for advertising the pending reversion of a surrendered allotment and gives an opportunity to claimants to the legal succession to the land to notify the Ministry of their claim which, if upheld, prevents reversion occurring. There is no statutory procedure for advertising an intention to apply for permission to surrender and there is no provision for persons other than those who can advance a section 82 right to inherit to be notified that the application is pending or even to register their interest, whatever it might be, prior to the expiry of the 12 month notice period.
>
> [27] In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for the land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperilled by the reversion itself".

[13] Moreover there is no evidence that Mr. Valevale ever applied to become the holder of Lot 85, or sought Cabinet approval under s.56 for the lease of the Lot to the second defendant.

[14] In any event the reversion of Lot 85 to Lord Luani was likely to be a substantial benefit to him. He was entitled, under ss 8 and 34(2) to be consulted before a tax allotment was granted from his hereditary estate. Section 34(1) entitled him to reserve part of his hereditary estate for his sole use and s.33 gave him the

right, subject to the approval of Cabinet, to lease up to 5% of the total area of his hereditary estate.

[15] The defendants did not lead evidence or cross examine Mr. Moala, the Registrar of Lands, to establish, if possible, the existence of a practice of the Ministry in dealing with applications under ss 33 and 34 which could limit the benefits a hereditary owner could receive from an allotment that had reverted to him under s.54.

[16] The Judge said that it was common ground at the trial, that shortly after 24 January 2011 the second defendant entered onto Lot 85 and commenced quarrying. Quarrying continued until a date early in May 2013 when, after the Lot had reverted to Lord Luani, he re-entered, stopped further quarrying and excluded the second defendant.

[17] The principles which govern the liability of joint tortfeasors are well established. In The Koursk [1924] Probate 140,155 CA Scrutton LJ said that joint tortfeasors include:

> "…persons who agree on common action in the course of which, and to further which, one of them commits a tort…there is one tort committed by one of them on behalf of, and in concert with another."

[18] The principles were helpfully elucidated by Lord Neuberger in *Vestergard Frandsen A/S v Bestnet Europe Ltd* [2013] 4 All ER 781,790 [34]:

> "…in order for a defendant to be party to a common design [he or she] must share with the other party or parties to the design each of the features of the design which make it wrongful. If, and only if, all the features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some of the relevant acts, will not stop all from being jointly liable."

[19] These principles were applied to a case of private nuisance in Harris v *James* (1876) 45 LJ QB 545 at 546 where Blackburn J said:

> "…the field was let for the very purpose and object of being worked as a lime quarry…When then it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object then I think we must say that the landlord authorised…the nuisance

> arising from it as being the necessary consequence of letting the field in the manner and with the objects described."

[20] Lord Nuku did not do any of the quarrying himself or employ others for that purpose, but by the agreement of 31 January 2011 and his accompanying letter, he authorised the second defendant to enter and carry out quarrying operations on Lot 85. Moreover the high rent payable to Lord Nuku evidenced a joint enterprise in the use of the land for a quarry, with the proceeds shared between the parties, albeit unequally. In our judgment that implicated him in the trespasses committed by the second defendant.

[21] However there is no evidence that the third defendant was involved in the quarrying operations carried out after its incorporation on 20 June 2012. Accordingly the judgment for damages against the third defendant as a joint tortfeasor must be set aside.

[22] The re-amended statement of claim pleaded a title in Lord Luani to sue in trespass based on the doctrine of trespass by relation. Since trespass is essentially an injury to the plaintiff's possession, a plaintiff out of possession with a right to immediate possession could only sue in trespass by the doctrine of relation under which, by a fiction, the plaintiff was treated as having been in possession since his right to immediate possession accrued. We agree with Mr. Edwards' submission that Lord Luani did not have a right to immediate possession during the period between the submission of Mr. Kava's application for leave to surrender his allotment and its reversion to Lord Luani pursuant to s.54. We also agree that the reversion did not operate retrospectively to any earlier date.

[23] This does not matter because the re-amended statement of claim alleged that Lord Luani's reversionary interest had been damaged by the removal of so much rock from the land, and the necessary facts were pleaded. Clerk & Lindsell on Torts 20th ed 2014 page 1234 states:

> "Although, in general, the only person who can sue for a trespass is the person who was in actual or constructive possession at the time of the trespass, an exception exists where the trespass has caused a permanent injury to the land affecting the reversionary interest. The reversioner may sue at once without waiting until his future estate falls into possession.".

In *Jones v Lanwert UDC* [1911] 1 Ch 393, 404 Parker J said:

> "…a reversioner cannot maintain actions in the nature of trespass…without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question [of fact]."

[24] However the gross value of the rock extracted adopted by the Judge as the measure of damages based on *Martin v Porter* (1839) 5 M & W 351, cannot be supported. The general rule emerging in later cases is that the plaintiff is not entitled to the gross value of the minerals extracted by the trespasser, but only the net value after allowing for the cost of extraction. In general the compensatory principle applies because the plaintiff could not have obtained saleable minerals without incurring the cost of extraction. See *Jevon v Vivian* (1871) LR 6 Ch App 742, 760-1 per Lord Hatherley LC:

> "Now it strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any expense for getting and hewing. Suppose the mine worked out, then what he has lost is the coal, but this rule [*Martin v Porter*] would give him besides all the cost of getting and hewing.".

[25] In *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 34-5 Lord Hatherley said:

> " …the owner shall be re-possessed as far as possible of that which was his property … that has been…removed…which cannot..be restored in specie [and that] there shall be such compensation made to him as will in fairness to both parties give to the one party the whole value of that which was his, and will at the same time give to the other…just allowances for all of those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has, by misfortune and inadvertence on both sides, and through no fault been done.".

These principles were applied by Lord Macnaghten in *Peruvian Guano & Co v Louis Dreyfus & Co* [1892] AC 166 at 174-6. The exception which allows the owner to recover the gross value of the severed minerals only applies in cases of fraud or conscious wrongdoing.

[26] The principles derived from *Martin v Porter* were summarised by Todd "The Law of Torts in New Zealand" 7th ed 2016, para 9.2(4):

> "Where the trespass is committed knowingly and deliberately the measure of damages is the market value of the material ... when it was first severed from the land and became a chattel, without any allowance to the trespasser for the cost of getting and severing. Where the defendant is not guilty of fraud or conscious wrongdoing the penal rule does not apply and the plaintiff's damages are confined to ... the value of the ... minerals in the ground".

[27] The general rule was applied in *Townend v Askern Coal & Iron Co* [1934] Ch 463 where the defendant mined the relevant land after it had applied to a statutory authority for leave to do so before leave was granted, because the trespass was not fraudulent but inadvertent.

[28] There is no finding and no evidence that Lord Nuku and the second defendant were guilty of fraud or conscious wrongdoing.

[29] Accordingly the judge's award of TOP$5,556,000 for the gross value of the rock extracted must be set aside. It was based on the evidence of Semisi Topui. This witness calculated the net value of the rock extracted, after allowing for the cost of extraction, at TOP$3,380,335.

[30] The appeals must be allowed to the extent of substituting judgment against the first and second defendants for the lower figure in lieu of that entered by Scott J.

[31] The following orders should be made:

> Appeals by Lord Nuku and Yan Jian Group Co. Ltd allowed in part.
>
> Judgment for the Plaintiff in the Land Court against Lord Nuku and Yan Jiang Group Ltd in respect of Lot 85 set aside.
>
> In lieu thereof judgment for the Plaintiff against Lord Nuku and Yan Jiang Group Ltd for TOP$3,380,335 and costs with effect from 5 May 2017 with interest at the rate of 10% per annum from that date until satisfied.
>
> Appeals by Lord Nuku and Yan Jiang Group Ltd otherwise dismissed with no order as to costs.
>
> Appeal by Yan Jian Tonga Ltd allowed with costs limited to the additional costs incurred by reason of its joinder in the appeal by Lord Nuku.

The judgment for the plaintiff against Yan Jian Tonga Ltd set aside.

In lieu thereof enter judgment for Yan Jian Tonga Ltd in the action.

The Plaintiff to pay the costs of Yan Jian Tonga Ltd of the proceedings in the Land Court limited to the additional costs incurred by reason of its joinder with the second defendant.

Costs, if not agreed, to be fixed by the Registrar.

Kaufusi v Funaki and Tufi

Land Court, Nuku'alofa
President Paulsen
LA 9/2017

20 September 2017

Land — estoppel claimed against eviction and based on the promise of former owner — an estoppel binding on successors is not allowed under the Land Act — time bar to eviction under s 170 Land Act

10 The First Defendant says he cleared and improved land and built a house on the promise that the land had been given to him. He was granted a lease that had expired but claims the lease was just so he could borrow to build. He claimed that the promise was enforceable even against successors of the landowner.
The Second Defendant said the owner knew of building and occupation and asked for small money and fobbed off requests to register the land till later. 5 years after building his house he received a letter telling him to leave in 14 days. He ignored the letter and 20 years later received another letter telling him to vacate. The Defendant says that the application to evict was time barred under s 170 of the Land Act as it was more than 10 years after the landowner's claim first accrued.

20 Held

1. The First Defendant (Suliasi) cannot prove to the civil standard the promise of the land so there is no estoppel. An estoppel necessarily binding successors in title would be akin to an equitable interest in land which is a concept that is contrary to the scheme of the Land Act and the principles in OG Sanft; & Schaumkel.
2. The Second Defendant was in occupation for 27 years; the time under s 170 of the Land Act started on first occupation as the landowner must have known the defendant was on the land. The claim for eviction is time barred.

30 Cases Considered

Ongolea v Finau [2003] Tonga LR 147
To'a v Veikune [1974-80] Tonga LR 107
Alofi v Fine [1998] Tonga LR 24
Pulu v Bloomfield [1974] Tonga LR 105
Motuliki v Namoa ors [1981-88] Tonga LR 141

Tafolo v Vete [1998] Tonga LR 164
OG Sanft & Sons v Tonga Tourist and Development Co Ltd [1981-88] Tonga LR 26 (PC)
Schaumkel v 'Aholelei (Unreported Court of Appeal, AC 14 of 2012, 17 April 2013
Payne v Fakahau & ors (Land Court, LA23 of 2014, 10 March 2017, Paulsen P

Statute Considered

Land Act, s 170

Counsel for the plaintiff : Mrs. F. Vaihu
Counsel for the defendants : Mr. S. Tu'utafaiva

R U L I N G

The nature of the action

[1] The plaintiff is the holder of a tax allotment at Haveluloto called Tufitokelau. The first defendant and second defendant have both been residing on the land for many years with their families in houses they have built on the land. The plaintiff seeks to evict them from the land.

[2] The defendants oppose the plaintiff's claim. After the evidence was heard each defendant advanced only one ground of defence. The first defendant says that he relied upon a promise from the plaintiff's grandfather to give him the land and that the plaintiff is estopped from relying on his title to evict him. The second defendant says that the plaintiff's claim is time barred under s.170 Land Act.

The facts and evidence

The land

[3] There was some uncertainty about the chain of ownership of the tax allotment but that is not material to the result of this case. The tax allotment was first registered in 1952. It was later registered in the name of the plaintiff's grandfather Tevita Kaufusi (Tevita). In around 1990 Tevita had a plan of subdivision prepared dividing the land up into lots, some of which he surrendered in favour of people who I understand were related to him. The tax allotment was then much larger than its present 2A 3R 6P because of those surrenders and also because the plaintiff has also surrendered lots since it has been registered to him.

This is shown on a helpful plan produced into evidence by the Senior Land Registry Officer Mr. Fataua Halatanu (P15). The lots in dispute are shown on that plan as lot 16, which is occupied by the first defendant Suliasi Funaki (Suliasi), and lot 14, which is occupied by the second defendant ‘Alani Tufi (Alani).

[4] In around 1994 Tevita purported to surrender the tax allotment in favour of his son Mo’ale Uluilakepa (Moale). Mo’ale was not the heir. The heir was the plaintiff’s father Viliami Kaufusi (Viliami). Viliami successfully challenged Mo’ale’s grant in the Land Court but he died in January 1998 shortly before an appeal by Tevita and Mo’ale from the Land Court decision was dismissed in the Court of Appeal (No 297/96). The plaintiff (Naitingi) then claimed the land as Viliami’s heir and it was granted to him on 17 May 1998.

The plaintiff

[5] Naitingi is 49 years old and described himself as a planter. He was born in Tonga but was educated in American Samoa. He stayed in American Samoa until 1996 when he says he came back to Tonga. However he has returned and lived in American Samoa for periods since then.

[6] Naitingi has no direct knowledge of the circumstances under which Suliasi and ‘Alani came to occupy the land and his evidence was curt. He was aware that Tevita granted Suliasi a lease and says that the lease has expired and Suliasi has no right to be on the land. Naitingi says that ‘Alani is a squatter.

[7] Naitingi claimed that he became aware that Suliasi had been occupying the land in 1998 but was not aware of ‘Alani’s occupation until 2015. He said that he was in Tonga in 1998 following the Court case and there was no house on lot 14. He also said that after the Court case he had gone to the Ministry of Lands to find out the status of his land but had been told to wait and it was not until 2015 that Mr. Halatanu had prepared the plan for him.

[8] Naitingi said that both Suliasi and ‘Alani had asked him for their land in 2015 but he did not give them the land. He denied asking for money for the land. He said he did not give Suliasi his land because on one occasion he had failed to go kava drinking with him as he had promised and was therefore a liar. He said that he did not give ‘Alani his land because he had failed to supply him with a girl to serve him his kava. I found those reasons to be trivial and peculiar and they indicated a degree of ill-will towards Suliasi and ‘Alani.

Suliasi

[9] Suliasi is 62 years old and married with six children. He was originally from Ha'apai but was not the heir to any land in Ha'apai or Tongatapu. He became friendly with Tevita in 1986 and learned that Tevita had land at Haveluloto and asked him whether any part of it could be given for him and his family to live on. Suliasi said that Tevita showed him land which was covered in bush and was swampy in parts and that Tevita told him to occupy that land to become his own town allotment. This was lot 16. Suliasi cleared the bush, filled the swampy areas, built a Tongan house and moved onto the land. He said that he provided assistance to Tevita by giving him free taxi services, assisting him with his money and food contributions at New Year's Eve and Prayer Week and gifted him T$2,000 'for giving me the allotment'.

[10] In 1990 Suliasi wanted to build a better house. He said that he asked Tevita if the land could be used as security for a loan from the bank and Tevita saw the poor state he and his family were living in. According to Suliasi, Tevita told him that granting him a lease would be the quickest means to get security for a loan because surrendering the land would be a long process requiring both Cabinet and his heir's consent. A lease was subsequently registered against lot 16 in Suliasi's name under No. 5148 in April 1991. It was for a term of 20 years expiring on 9 April 2011 at an annual rental of T$15. In September 1991 the lease was mortgaged to the Bank of Tonga for a loan of T$6,994. The loan was used by Suliasi to build a new house and fruit and other trees were planted on the land. Suliasi's evidence was that Tevita told him that he could continue to occupy the land after the lease expired and that Tevita was present during construction of his house.

[11] Suliasi acknowledged that in 2014 he prepared a letter to be taken to Naitingi in Samoa for his signature surrendering lot 16 to him. He did not know Naitingi but he said he thought Naitingi might ask him to move off the land. The letter never got to Naitingi but relevantly for present purposes it read:

> This lot is clearly shown on the office map SP5446 Lot 16. Letter written is based on the said lot which was allocated to me by Tevita Uluilakepa of Havelu which was not registered but instead was leased to a Suliasi Funaki in 1990 whereby the term of the lease had expired in 2011. I wish to state herein that I am the grandson heir to the allotment, my father is Viliami Uluilakepa who is deceased. Nonetheless, I wish to state that I consent to the surrender of the said lot to Suliasi 'Apisai Funaki.

[12] Suliasi also acknowledged that in 2015 he had gone with his wife and daughters to a meeting that Mo'ale had called at which Naitingi was present and

had asked for the land. He said he was told by Mo'ale that the price of the land was $T60,000 and upon being told this he cried as he remembered all he had spent on the land, that Tevita had promised him the land and all he had done for Tevita for free.

[13] Suliasi was aware that a letter had been sent to him in November 2016 by Naitingi's lawyer telling him to vacate the land. He said he was in Hawai'i at the time but was told of it by his daughter. He has not moved off the land.

[14] Suliasi's case is summed up in his evidence:

> I say … I cleared the bush on the allotment, filled the swampy area, built my house and [planted] fruit and sweet smelling flower trees in my true knowledge that Tevita Uluilakepa had given the allotment for me, and I did not try to get a [*sic*] land anywhere else here in Tonga for I trusted on the grant that Tevita Uluilakepa gave me.

'Alani

[15] 'Alani is 61 years old and is married with three children. He said that in 1989 he was told by one Sione Latu to go and live on lot 14. He understood that the land had been given to Sione Latu by Tevita. The land was covered in bush and was swampy and he cleared the bush and filled the land. In 1990 he built a house and planted trees. According to 'Alani, Tevita was present when the house was being built and that Tevita visited, ate with him and the construction workers and also asked him for small amounts of money from time to time which he gave Tevita. In 1994 or 1995 'Alani extended the house by adding a kitchen, bedroom and toilet. 'Alani said that he asked Tevita three times to surrender the land to him and that Tevita's response was that he should occupy and develop the land and that the registration would be done later.

[16] In around 1994-1995 'Alani received a letter from Viliami giving him 14 days to get off the land but he said that the letter was received after he had completed his house and he did not leave and Viliami did not take any steps to move him off the land.

[17] 'Alani also received a letter from Naitingi's lawyer in November 2016 telling him to vacate the land. He said that as a response he had spoken to Mo'ale who had told him that each lot was T$60,000 but that he could have his land for T$25,000 as it had been swampy. He had later spoken to Naitingi who said that he

would do as Mo'ale had told them; that is he would sell the land. He then went to see the estate holder and was told to remain on the land.

The plaintiff's submissions

[18] Mrs. Vaihu began her submissions by stating that there is no dispute that Naitingi was granted his tax allotment following the Court case. This is not disputed by the defendants. She also submitted that Naitingi made no promises to Suliasi or 'Alani that they could live on the land. This is also not disputed. More controversially, at least as far as Suliasi is concerned, Mrs. Vaihu argued that as Naitingi was not a party to or aware of any promises that Tevita may have made he cannot be bound by them.

[19] As far as Suliasi is concerned, Mrs. Vaihu argued that the evidence established that the only right he had to live on the land was pursuant to the lease and as the lease had expired he must now move from the land as Naitingi had demanded him to do.

[20] As far as 'Alani is concerned Mrs. Vaihu argued that Naitingi's claim against him is not time barred as 'Alani never had any right to be on the land and, in any event, time could not begin to run against Naitingi until 2015 when Mr. Halatanu had prepared the plan and he learned 'Alani was living on the land. In support of this submission she referred me to the exhibit P11 which is a letter Naitingi wrote to the Minister of Lands in May 2015 recording his understanding that the Minister was to have cancelled grants made as a result of the surrenders effected by Tevita and Mo'ale before the Court case and expressing his wish 'that you ascertain to me all the pieces of land I still hold so that I can do work on them'.

The defendants' submissions

[21] In response to the claim against Suliasi, Mr. Tu'utafaiva relied upon *Ongolea v Finau* [2003] Tonga LR 147 as authority that equity will recognise and enforce a promise made by a landholder to another person to go on and occupy land in circumstances where that person in occupation has acted in reliance upon the promise. He argued that *Ongolea* is also authority for the proposition that the promise will bind the landholder's successors in title.

[22] As to whether such a promise was made Mr. Tu'utafaiva submitted that this is a question of fact but that Naitingi had not rebutted Suliasi's evidence that Tevita promised him the land and that he acted upon that promise. Mr. Tu'utafaiva argued that the lease was not evidence that Suliasi was not promised the land but

simply a means by which he could raise a loan quickly to build his house as shown by the fact that Suliasi did not look for other land upon the expiry of the lease.

[23] In response to the claim against 'Alani Mr. Tu'utafaiva submitted that it was time barred having been brought more than 10 years from when Naitingi's right to bring his action first accrued. He argued that at the very latest time began to run against Naitingi when he received his grant in 1998 yet he did not bring this claim until 2017. Mr. Tu'utafaiva rejected Mrs. Vaihu submission that time did not run against Naitingi until 2015 as Naitingi was familiar with the land and there was nothing stopping him making enquiries as to who was living on the land and bringing his action in 1998.

Discussion

[24] Naitingi has proved his title to the land occupied by the defendants and *prima facie* his entitlement to an order for possession of it from them. The onus rests upon the defendants to establish a defence at law or equity which is an answer to Naitingi's claim for ejectment.

The claim against Suliasi

[25] It is well established that if a person is encouraged by the owner of land to occupy the land in the expectation that he has an interest in it and that person does with the owner's knowledge and without objection enter onto the land and expend money on the land equity will protect that person and may refuse to the owner an order for possession of the land. (*To'a v Veikune* [1974-80] Tonga LR 107; *Alofi v Fine* [1998] Tonga LR 24; *Pulu v Bloomfield* [1974] Tonga LR 105; *Motuliki v Namoa ors* [1981-88] Tonga LR 141; *Tafolo v Vete* [1998] Tonga LR 164 and *Ongolea* (supra)). Such rights, are sometimes referred to as equities of possession or equitable licences.

[26] In *Tafolo v Vete* (supra) the Court of Appeal recognised that such an equity may be varied or discharged by any subsequent arrangements made between the parties themselves (at page 172).

[27] I am unable to accept Suliasi's defence to Naitingi's claim for three reasons. First, Mr. Tu'utafaiva is correct that whether Tevita promised Suliasi the land is a question of fact. Despite Suliasi's evidence I am not satisfied that the land was promised to him. The evidence appears to me overwhelming that Tevita did not promise him the land.

[28] I accept that Suliasi went on to the land in around 1986. When in 1990 he wanted to obtain a loan Tevita only agreed to give him a lease and did not surrender the land so that Suliasi could apply for it. Whilst Suliasi says this was because Tevita believed this was the quickest way to raise a loan I cannot see why it would take any longer for Tevita to surrender the land in favour of Suliasi than it would for him to grant a lease.

[29] It is important that Tevita said that it might take longer to surrender the land because that would require the consent of his heir. That suggests that Tevita was aware that his heir's consent might not be forthcoming and that he could not give Suliasi the land.

[30] Furthermore, if the lease was simply a device to raise a loan it is incongruous that nothing was subsequently done by Tevita to surrender the land in favour of Suliasi particularly when the evidence of Mr. Halatanu was that between 1991 and 1994 Tevita surrendered four lots in favour of others.

[31] In addition Suliasi's own conduct leads me to the view that he was never promised the land as his own. I am not satisfied that once the lease was granted he made requests that Tevita surrender the land and the letter that he prepared to be taken to Naitingi in 2014 states that the land was leased to him not that it was given to him by Tevita.

[32] I do not see any significance in the fact that Suliasi did not look for other land after the lease expired. He was clearly hopeful that Naitingi would give him that land. He had no incentive to look for land.

[33] Suliasi's defence must fail because he failed to establish to the civil standard that Tevita promised him the land.

[34] Secondly, even if Tevita had originally promised to give Suliasi the land it was open to Tevita and Suliasi to alter that arrangement between themselves (*Tafolo* (supra)). The entering into of a lease is just such an alteration. There can be no suggestion that the lease was a sham when it was used to raise a loan from a third party and Suliasi said that he always paid the rent under the lease. Suliasi acknowledged also that he understood that Tevita was granting him only a lease and that he agreed to that.

[35] Thirdly, regardless of what promises Tevita made to Suliasi the effect of any estoppel could only be to impose upon Tevita a restriction from obtaining an eviction order against Suliasi. It did not bind his successors in title who had no

notice of Suliasi's equity. This is the case as a matter of principle and by weight of the authorities. An estoppel necessarily binding successors in title would be akin to an equitable interest in land which is a concept that is contrary to the scheme of the Land Act and the principles in *OG Sanft & Sons v Tonga Tourist and Development Co Ltd* [1981-88] Tonga LR 26 (PC) and *Schaumkel v 'Aholelei* (Unreported Court of Appeal, AC 14 of 2012, 17 April 2013).

[36] It follows that Naitingi is entitled to the order that he seeks for Suliasi's eviction from the land.

The claim against 'Alani

[37] I accept 'Alani's evidence that he went onto the land in around 1989, cleared and filled on the land, built and extended his house on the land and has remained on the land for around 27 years. Whilst Naitingi says that he did not see any house on lot 14 in 1998 his witness and uncle Mo'ale, who has lived on the land since 1988 or 1989, said that 'Alani might well be correct as to when he went on the land. I found that Naitingi was not a reliable witness due to his evasive and argumentative manner when answering questions from Mr. Tu'utafaiva and his apparent ill-will towards the defendants and I prefer 'Alani's evidence.

[38] Section 170 of the Land Act provides:

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

[39] I recently had cause to consider section 170 in a relevant context in *Payne v Fakahau & ors* (Land Court, LA23 of 2014, 10 March 2017, Paulsen P) and held that in a case such as this a landowner's right of action to recover land first accrues when a defendant physically interferes with his right to occupy the land, typically by building or living on the land.

[40] In the present case time begun to run against Naitingi from the date he was granted the land in 1998. From that date there can be no question that 'Alani was occupying the land without Naitingi's consent and that Naitingi could have taken an action to eject him. As he did not file this action until 2017 his claim is time barred. (*Tu'ifua v Tui* (supra) and *To'a v Veikune* (supra)).

[41] I do not accept Mrs. Vaihu's submission that time ran from 2015 when Naitingi was given Mr. Halatanu's plan and learned that 'Alani was on the land. Knowledge that one's right of action has accrued is not a requirement of s170.

[42] In any event, I agree with Mr. Tu'utafaiva that there was nothing to stop Naitingi from inspecting the land and identifying who was occupying it from at least the time that it was granted to him. Naitingi was clearly familiar with the land. He was involved in the Court case (as a party following Tevita's death) and the evidence of Mr. Halatanu was that between 2000 and 2003 he surrendered four lots all of them in close proximity to 'Alani's lot 14. If Naitingi was unaware of 'Alani's occupation (and I am not satisfied he was unaware) it was because he failed to make any proper enquires and absented himself from Tonga.

[43] It follows that Naitingi's claim against 'Alani is time barred and he is not entitled to the order he seeks.

Result

[44] There shall be judgment for Naitingi on his claim against Suliasi and an order that Naitingi shall recover possession of lot 16 from Suliasi.

[45] Naitingi's claim against 'Alani is dismissed and there shall be judgment for 'Alani.

[46] If any party seeks costs then Counsel shall file memoranda within 21 days.

Sione Moehau v Epic International Limited and Ors

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 72/2014

25 September 2017

Land — application to move action from Supreme to Land Court — no power

The Plaintiffs sought the removal of the action to the Land Court claiming that is the correct court and the only one with full power to make orders foreseen in the action.

Held

1. The Plaintiffs failed to show that the action was within the exclusive jurisdiction of the Land Court.
2. The Supreme Court has no power to order the removal of an action to the Land Court.
3. Re-filing of the action in the Land Court is the allowed procedure.

Cases referred to

Public Service Association Inc v Tu'ivakano [2015] Tonga LR 432
Fonua v Westpac Bank of Tonga [2015] Tonga LR 410

Counsel for the plaintiffs	:	Mr. W C Edwards Snr SC
Counsel for the first and second defendants	:	Mr. S Sisifa SC
Counsel for the third defendant	:	Mrs. D Stephenson

R U L I N G

The application

[1] The plaintiffs seek an order removing this action to the Land Court on the ground that the action is within the Land Court's exclusive jurisdiction. The defendants oppose the application principally on the ground that this Court has no power to order removal.

The background

[2] The plaintiffs' latest pleading is a second amended statement of claim filed 6 June 2017. The relevant facts for the purposes of this application are taken from paragraphs [3]-[17] of the ruling in the related proceedings Moehau & Or v Kingdom of Tonga & Or (Unreported Supreme Court, CV 51 of 2016, 26 April 2017 Paulsen LCJ) and the plaintiffs' second amended statement of claim.

[3] TIL is a registered company and wholly owned by the Government of Tonga. It has recently been restored to the Register of Companies by order of this Court on the application of the plaintiffs in CV 51 of 2016.

[4] In 2007 TIL proposed to dispose of assets including leases of land. It put the leases up for public tender and on around 20 July 2007 the first plaintiff (Mr. Moehau) lodged a bid for three leases. His tender was accepted. Mr. Moehau nominated the second plaintiff (Epic) to complete the purchase of the leases. One of the leases was registered lease number 2934 (the lease) which is the subject of this action.

[5] On 8 October 2007 TIL and Epic entered into a written agreement for the transfer of the lease. The agreement recorded that the transfer price was TOP$725,000. Epic paid a 10 percent deposit of TOP$72,500. A further 30 per cent of the transfer price amounting to TOP$217,500 was paid on 24 August 2007. The balance of TOP$435,000 was payable within 14 days of Epic being advised in writing that the lease transfer documentation had been completed by the Lands Department and that the transaction had been approved by Cabinet.

[6] On 30 November 2007 TIL gave notice to Epic calling for settlement in terms of the agreement. However, on 6 December 2007 TIL wrote that Epic should disregard TIL's letter of 30 November 2007 until further notice.

[7] Cabinet did not approve the transfer of the lease until 8 February 2013. On 18 February 2013 TIL gave notice that the lease transfer documentation had been completed and that Cabinet approval had been obtained to the transfer of the lease. Epic was given 14 days to pay the balance of the transfer price or Epic would forfeit its deposit.

[8] On 25 February 2013 TIL again wrote reminding Epic that it had seven days (i.e. by 4 March) to pay the balance of TOP$435,000 on the transfer of the lease and again stating that failure to pay would result in Epic forfeiting its deposit.

[9] On 6 March 2013 TIL advised Epic that due to non-payment of the balance of $435,000 by 4 March 2013 Epic had forfeited both the $72,500 deposit and the further payment of $217,500.

[10] On 12 March 2013 Mr. Moehau wrote to TIL acknowledging receipt of the letter of 18 February 2013 and explaining that after TIL's lengthy delay a decision had been made to utilise its funds on other projects. He proposed that the parties enter into an instalment plan to pay the outstanding balance.

[11] On 5 June 2013 the Board of TIL resolved to transfer the lease to the third defendant TAMA. TAMA is another company owned by the Government of Tonga. Cabinet approved the transfer on 1 July 2013. However on 12 July 2013 TIL was removed from the Register of Companies.

[12] It was not until 24 June 2015 that the Minister of Public Enterprises, purporting to act on behalf of TIL, signed an assignment of the lease to TAMA. The assignment was registered that same day.

The pleading

[13] The second amended statement of claim alleges that TIL's purported termination of the agreement for the sale of the lease and forfeiture of the payments was unconscionable such that 'a Court of Equity' would intervene to avoid injustice.

[14] The circumstances said to have made TIL's conduct unconscionable includes the lengthy delay between the agreement for the sale and purchase of the lease and TIL calling for settlement, the short period of notice given to Epic to settle after such a long period of delay and the failure to keep Epic advised of events and give it sufficient time to obtain funds to settle. Relevant for present purposes, paragraph 22(e) of the second amended statement of claim pleads that the transfer of the lease to TAMA was unconscionable:

> ..where there was no cause nor reason for such transfer other than to defeat any claim by the purchase [sic] as Plaintiff from having recourse to attaching it as the Seller, a judgment and/or decree to specific performance and/or damages.

[15] The pleading goes on to state that the plaintiffs are prepared to complete the purchase of the lease provided there is a variation of the agreed terms so that the purchase price is payable by instalments.

[16] There is a further pleading that the first defendant has seized goods of the plaintiffs from the leased property to the value of $121,614.

[17] The relief sought by the plaintiffs is the following:

a. Specific performance of the agreement for the sale and purchase of the lease subject to a variation of its terms allowing for the balance of the purchase price to be made by instalments;

b. Damages in lieu of specific performance;

c. Damages for the conversion of the plaintiffs' goods;

d. In the alternative a declaration that the money paid by the plaintiffs for the lease was not forfeit; and

e. Interest on any sum awarded.

The application for transfer

[18] The application alleges that the plaintiffs' claim for specific performance of the agreement for the sale and purchase of the lease brings the action within the exclusive jurisdiction of the Land Court. I do not accept that is the case but in any event in his oral argument Mr. Edwards advanced the application on a different basis. He argued that the plaintiffs challenge TAMA's title to the lease and for that reason the exclusive jurisdiction of the Land Court is engaged (section 149(1)(a) Land Act) notwithstanding that other issues arising in the action could otherwise be determined by the Supreme Court.

[19] Mr. Edwards also argued that the Land Court is both the most appropriate and convenient forum because the action is almost ready for hearing and because, unlike the Supreme Court, the Land Court can hear all of the issues arising in the case. He relied upon Fonua v Westpac Bank of Tonga [2015] Tonga LR 410 in which the Court of Appeal noted the public interest in having one Court whose jurisdiction is legally invoked dealing with the entire controversy between the parties (at [12]).

[20] Mr. Edwards also relied upon Public Service Association Inc v Tu'ivakano [2015] Tonga LR 432 where the Court of Appeal held that the Supreme Court had jurisdiction to order the removal of an action from the Magistrates' Court to the Supreme Court. Mr. Edwards submitted that 'the point is clear that the Supreme Court has the power to exercise the powers for the time being vested in or capable of being exercised by the High Courts of Justice in

England and Wales'. He referred me to The Allocation and Transfer of Proceedings Order 2008. Mr. Edwards accepted that this Order did not directly apply to this case but cited it as 'an example of how proceedings are able to be transferred between the Courts'.

[21] For TAMA, Mrs. Stephenson argued that there is no authority in statute, the Rules of Court or in the case law which permits a civil action commenced in the Supreme Court to be removed to the Land Court. In the absence of authority Mrs. Stephenson contends that if a plaintiff has made a claim in the Supreme Court that invokes the exclusive jurisdiction of the Land Court their only option is to discontinue the action and commence a fresh action in the Land Court.

[22] The first and second defendants oppose the application but they presented no submissions.

Discussion

[23] The power exists for the making of rules providing for the removal of proceedings between the Courts of Tonga (s.6 Supreme Court Act and s.168 Land Act) and there may be good reason why such rules should be made. However, at the present time there are no such rules and I have formed the clear view that not only does the Supreme Court not have the power to order the removal of this action to the Land Court but that had such power existed I should refuse in the exercise of my discretion, to order it. On either basis the application must fail. My reasons are three-fold.

[24] First, I do not accept Mr. Edwards' submission that the exclusive jurisdiction of the Land Court has yet been engaged upon the pleadings presently before the Court. Whilst TAMA was joined as a party to the action at a late stage there is no cause of action pleaded against it challenging its title to the lease. Furthermore, there does not appear to be any relief sought against TAMA. In his oral submissions, Mr. Edwards did not articulate the legal basis upon which a challenge to TAMA's title to the lease would be made and it is not for the Court to speculate on how such a claim might be framed. The Court should not order the removal of this action unless it is satisfied that a challenge to TAMA's title to the lease is arguable.

[25] Secondly, on the question of this Court's power to remove an action to the Land Court, I begin by noting that in so far as the Court's practice is a source of its powers this suggest strongly against the plaintiffs' application. In cases where proceedings have been filed in the Supreme Court and found to be within the

exclusive jurisdiction of the Land Court, the practice has not been to order removal to the Land Court.

[26] No authority was cited to me where the Supreme Court has claimed for itself the power to order the removal of an action to the Land Court. I note also that Mr. Edwards has not argued that the Supreme Court has an inherent power to order removal derived from its right to regulate its own procedures and I found no authority directly in support of that proposition.

[27] There was no provision that I was referred to under the Constitution, the Supreme Court Act, the Land Act or the Rules of the Court which expressly confers upon the Supreme Court the power to make an order removing this action to the Land Court.

[28] The plaintiffs rely upon Public Service Association (supra) but two points should be noted about that case. First, the facts are distinguishable from the present case. What was in issue was the removal of an action from an inferior court to a superior court. This case is concerned with an application to transfer an action between superior courts. Secondly, the Court of Appeal found that the source of the Supreme Court's power to order the removal of the action to the Supreme Court was derived from section 41(1) of the County Courts Act 1984 (UK) as applied by section 5(1) of the Supreme Courts Act. Section 5(1) declares that the powers of the Supreme Court shall include, mutatis mutandis, all the powers for the time being vested in or capable of being exercised by the High Court of Justice in England and Wales. The Court held at [10]:

> In our opinion, section 41(1) can and should be applied to the Supreme Court by adapting the provision so as to empower the Supreme Court to remove the proceeding from the court immediately below it in the judicial hierarchy, namely the Magistrates' Court.

[29] The Court of Appeal did not refer to any other source from which the power of the Supreme Court to order the removal of the action was derived.

[30] Mr. Edwards concedes that as far as he is aware there is no provision in any legislation or instrument in the United Kingdom vesting powers in the High Court which might by section 5(1) be applied to the circumstances of Tonga giving the Supreme Court the power to make the order that the plaintiffs seek. In the absence of any such provision the Public Service Association case does not advance the plaintiffs' application.

[31] Thirdly, the Court of Appeal stated in the Public Service Association case that a power to remove a case from one Court to another was likely to be made 'rarely and sparingly'. That leads me to consider the reasons advanced by the plaintiffs in support of the application, assuming the power to remove exists.

[32] Mr. Edwards argued that this action has advanced to the point where it is almost ready for hearing and that it can be heard more quickly if removed than would be the case if the plaintiffs must discontinue the action and re-file in the Land Court. I do not accept those submissions.

[33] Through little fault of Mr. Edwards, who has been Counsel for a short time, the plaintiffs conduct of this case has been shambolic paying no regard for the concerns of the Court and the other parties. Without attempting to list all matters relevant to my characterisation of the plaintiffs' conduct I note the following matters. The action was originally commenced against persons who clearly should not have been parties, there was an attempt to join new parties without seeking leave of the Court and in the case of TIL when it had been removed from the Register of Companies, there was a lengthy delay when the plaintiffs sought inappropriately to have TIL restored to the register in this proceeding and timetabling directions of the Court have been habitually ignored by the plaintiffs causing much inconvenience and delay. The plaintiffs have been aware at least since May 2015 (see the further amended statement of claim dated 27 May 2015) that the lease was transferred to TAMA but took no steps to seek the removal of the action until September 2017. In addition to all that, after three years since the action was commenced the plaintiffs' pleadings are still plainly inadequate.

[34] Mr. Edwards also advises that an application is to be made joining the Minister of Lands as a party and I understand that there is to be consideration given to whether the Kingdom of Tonga should remain a party. The joinder of the Minister will cause further substantial delays.

[35] This case is not even remotely close to a hearing and will not advance more quickly should it be removed to the Land Court.

[36] The re-filing of the action afresh in the Land Court (should the plaintiffs choose to do so) would provide a much needed opportunity for the plaintiffs to reconsider the claim, the causes of action they rely on and the persons who are necessary parties.

[37] I accept that should the plaintiffs discontinue they may be subject to applications for costs, although only TAMA has indicated that it will seek costs. Given the unsatisfactory manner in which the plaintiffs have pursued the action to date, and the very considerable unnecessary costs to which it has put the other parties, I see no injustice in that.

[38] For the reasons I have given above this is not one of those cases where the Court would exercise its discretion in favour of the plaintiffs and remove the action to the Land Court even if I had been of the view that the Court had power to do so.

Result

[39] The plaintiffs' application to remove this action to the Land Court is refused.

[40] The third defendant is awarded costs on this application to be fixed by the Registrar if not agreed.

[41] Mr. Edwards indicated that if I refused the application he needs time to refile on the plaintiffs' behalf in the Land Court as he has other pressing commitments which will prevent him from doing so immediately.

[42] I adjourn this action to be called again at 9am on 24 November 2017 for mention by which time I would have expected such proceedings to have been filed if the plaintiffs intend to do so.

Tonga and Ors v Tonga Rugby Football

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 15/2016

3 October 2017

Companies — meeting of Incorporated Association — 75% majority required to change Constitution — bare majority only — no prior notice given

A meeting was held of the Tonga Rugby Union. The Constitution of the TRU says that there must be prior notice of the business of the meeting, and alterations of the Constitution require a 75% majority. No notice was given and in several purported amendments of the Constitution only a bare majority was in favour.

Held

1. The amendments to the Constitution were invalid because there was no 75% majority and the required notice of proposed business was not given.
2. It was not necessary to exhaust the dispute resolution procedures before the Court could be called on to declare the purported amendments invalid.
3. Courts are reluctant to interfere with the internal workings of clubs but here there is a clear breach of the club's rules and the court will intervene.

Case considered

Taumoepeau and ors v Sika and ors [2016] Tonga LR 253

Counsel for the plaintiffs	:	Mr. W. Edwards Jr
Counsel for the defendants	:	Mr. S. Tu'utafaiva

RULING

The issue

[1] The Tonga Rugby Union Incorporated (TRU) is an incorporated society. The plaintiffs seek a declaration that amendments made to the TRU's Constitution at an Annual General Meeting on 11 May 2016 are void on the grounds that no notice was given to the members of the intention to vote on the amendments prior

to the Annual General Meeting and they were not passed by 75% of the representatives attending the meeting as required by the Constitution.

House keeping

[2] The relevant pleadings are the amended statement of claim dated 20 June 2016 and the amended statement of defence dated 20 July 2016.

[3] A challenge to further resolutions of the TRU passed at a meeting of the TRU on 27 November 2015 is not now pursued.

[4] The second named plaintiff has passed away. Mr. Edwards had intended to apply to substitute another plaintiff in his stead but did not do so. I understand there is no objection to me ordering the removal of Mr. Taumoepeau as a party. I so order and the intituling on any future documents filed should reflect this.

[5] It is accepted by Mr. Tu'utafaiva for the TRU that the remaining plaintiffs have standing to bring this action.

[6] The plaintiffs called just one witness. That witness was Feleti Fa'otusia. His evidence was brief and not subject to any significant challenge in cross-examination.

[7] The defendants did not call any evidence. Mr. Tu'utafaiva advises me that the TRU would prefer to have all of the issues raised in this action canvassed at its Annual General Meeting and he has only limited instructions. The stance adopted by the TRU is surprising. I have found no reason to disbelieve the evidence of Mr. Fa'otusia in its important respects. There is nothing before me either as to the reasons the TRU wished to amend its Constitution, the circumstances existing at the time or the consequences should the Court declare the amendments void. These are matters which might have a bearing on whether the Court should exercise its discretion to grant or decline the plaintiffs a remedy notwithstanding any improper action by the TRU.

Evidence of Feleti Fa'otusia

[8] Mr. Fa'otusia is the President of the Spartan Rugby Club. The Spartan Rugby Club is part of the Vaheloto Sub-union. Mr. Fa'otusia is a representative of the Vaheloto Sub-union and has the right to attend and vote at Annual and Special Meetings of the TRU.

[9] The Annual General Meeting of the TRU was scheduled for 11 May 2016 and Mr. Fa'otusia attended. No notice was given of the business to be discussed at the meeting. He understood that as it was an Annual General Meeting there would be the election of Officers but that "What took place was contrary to what I had thought and I say that it was never disclosed to the members before the Meeting held on 11 May 2016".

[10] Specifically, Mr, Fa'otusia said that he was not informed of the intention to amend the TRU's Constitution and no opportunity was given to discuss the proposed amendments with his club or sub-union.

[11] Immediately prior to the meeting Mr. Fa'otusia was given a document containing proposed amendments to the Constitution (document 70-74). In broad terms what was proposed was, inter alia, an amendment to allow changes to the Constitution to be made on a simple majority vote, the appointment of the Prime Minister as the President of the TRU, the removal of the members' right to elect the President, the reduction in the number of representatives of sub-unions who were members of the TRU and a quota of local players to be selected in the national team.

[12] The meeting of 11 May 2016 was initially chaired by the second defendant who was the interim President.

[13] There were 32 persons attending the meeting. Amendments were tabled by the second defendant.

The proposed amendment

[14] The first matter voted on was the proposed amendment to clause 34 to allow the Constitution to be altered, added to or rescinded by a bare majority vote rather than by the vote of 75% of the representatives attending a duly convened meeting. Mr. Fa'otusia said that 17 people voted in favour of the amendment with 7 people voting against it and 8 people abstaining. This evidence conflicts with the minutes of the meeting (documents 76-83) which state that there were two votes taken and the amendment was passed on the first occasion 27 in favour and 5 against and on the second occasion 17 in favour and 5 against. I am inclined to think the number 17 is a typographical error and the minutes were intended to record the same vote on both occasions. However as the TRU called no evidence and Mr. Fa'otusia was not challenged on his evidence in cross examination I accept his evidence as to the voting numbers.

[15] The meeting then voted on the proposed amendment to appoint the Prime Minister as the President. Then the representatives cast votes on each of the other proposed amendments that had been tabled.

[16] Mr. Fa'otusia did not give evidence as to the voting numbers in respect of these other amendments to the Constitution but said that they were passed by a bare majority of the representatives in attendance. This too conflicts with the minutes.

[17] Mr. Edwards advised me that further evidence was not called on the voting numbers because it had been conceded by the IRU that except in relation to clause 34 no amendment was passed by a vote of 75% of the members at the meeting. Mr. Tu'utafaiva accepted that such a concession could well have been given. He did not rely on this point in his submissions. Had he done so I would have given the plaintiffs leave to call further evidence.

[18] I therefore find that the amendments to the Constitution were all passed by a bare majority and not by the vote of 75% of the representatives attending the meeting.

[19] A good deal of Mr. Fa'otusia's evidence dealt with concerns he has about the effect of the amendments on the rights of members of the TRU, particularly in relation to the appointment of the Prime Minister as President. There is no need for me to traverse his concerns. It is sufficient for me to say that I accept that they are genuine concerns and that the amendments were a substantial alteration to the rights of members of the TRU.

[20] In cross-examination Mr. Fa'otusia confirmed that he had voted against the amendments but that he had not sought an adjournment of the meeting so that he could have more time to consider them or discuss them with his club.

[21] He maintained that on important matters, such as proposed amendments to the Constitution, the members must be given reasonable notice before the meeting. He also said that after the meeting he discussed the amendments with his club and they did not agree with them.

[22] Mr. Fa'otusia was not aware of clause 31 of the Constitution which sets out a dispute resolution procedure but confirmed that he took no steps to invoke it.

The plaintiffs' submissions

[23] The plaintiffs' case begins with section 5(l)(e) of the Incorporated Societies Act (the Act) which provides that the rules of a society must provide for the mode by which the rules of the society may be altered, added to or rescinded.

[24] Under section 21 of the Act the society may alter its rules in the 'manner provided by the said rules...'.

[25] The plaintiffs argue that the Court has jurisdiction to declare the amendments void under section 21(4) of the Act which provides that on an application by a member of a society if the Court is satisfied that an amendment to the rules of the society has not been duly made in accordance with its rules or the Act, it may in its discretion 'declare that alteration to be void in whole or in part'. The Court may also order that registration of any alteration be cancelled and 'give such directions and make such provisions as seem just in the circumstances of the case'.

[26] The plaintiffs contend that the TRU purported to amend its Constitution by a simple majority of its representatives voting at the meeting in breach of clause 34(1) of the Constitution. Clause 34(1) provides:

> This Constitution shall not be altered, added to or rescinded except on a vote of 75% of the Representatives who attend a Meeting of the Union duly convened.

[27] In addition the plaintiffs argue that the representatives were not given appropriate notice of the intention to amend the Constitution prior to the 11 May 2016 meeting. In this regard clause 19(2) of the Constitution sets out the agenda for an Annual General Meeting, clause 19(4) sets out the manner in which notice of the meeting is to be given and clause 19(5) provides:

> No business other than that stated in the notice shall be transacted unless notice thereof shall have been given in writing to the Chief Executive Officer of the Union at least seven days prior to the Meeting.

[28] I understood Mr. Edwards to be also relying on a broader proposition at law that proceedings of a society's members may be declared invalid by a Court if adequate notice of a meeting is not given.

[29] Mr. Edwards acknowledged that the Courts have shown a reluctance to interfere in the internal affairs of societies but argued that the TRU's breaches of its Constitution are serious justifying the Court's intervention in this case.

The defendants' submissions

[30] Mr. Tu'utafaiva presented three arguments. First, he submitted that there is no evidence that the plaintiffs had attempted to utilize the dispute resolution provision which is clause 31 of the Constitution. Whilst Mr. Tu'utafaiva accepted that the Court has jurisdiction to grant the relief sought he contends that it should refuse to do so unless the plaintiffs had first invoked clause 31.

[31] Secondly, Mr. Tu'utafaiva argued that whether or not clause 34 was lawfully amended is a question of fact and the requisite 75% majority was in fact obtained.

[32] Thirdly, Mr. Tu'utafaiva submitted that the plaintiffs should not be heard to complain about the lack of notice of the business of the meeting when they did not seek an adjournment of the meeting and there was nothing to have prevented them from doing so.

Discussion

[33] I am satisfied that the Court has jurisdiction to grant the declaratory relief sought. Such jurisdiction exists under section 21(4) of the Act and also arises from the Court's jurisdiction at law to determine disputes between a member and a society (Mark von Dadelzen 'Laws of Societies' 3rd Ed, LexisNexis at page 55 and Taumoepeau and ors v Sika and ors [2016 Tonga LR] 253.

[34] I accept the evidence of Mr. Fa'otusia that the amendments to the Constitution were not approved at the meeting of 11 May 2016 by 75% of the representatives in attendance in breach of clause 34 of the Constitution. The minutes of the meeting suggest that it was thought that the members could by a bare majority alter clause 34. There is not correct. Clause 34 is equally subject to the restriction against amendment except upon a vote of 75% of the representatives attending a duly convened meeting as any other clause.

[35] I am also satisfied that proper notice of the intention to vote on amendments to the Constitution was not given to the representatives prior to the meeting of 11 May 2016. Mr. Fa'otusia said that no notice at all was given of the proposed amendments until he arrived at the meeting and he was not challenged on his evidence.

[36] Reading clauses 19(4) and (5) of the Constitution together it is plain that the business to be conducted at an Annual General Meeting must be stated in the

notice given of the meeting. The evidence is that that did not occur in this case. In any event it has been held that notwithstanding specific terms of a society's rules notice of a meeting may be inadequate where it does not adequately inform the members of the business proposed to be discussed (von Dadelzen at page 178 and the cases at footnote 33). That must surely be the case where substantial amendments to the Constitution were only provided at the meeting itself so that representatives could not discuss them with the clubs or sub- unions they represent.

[37] Turning to the defendants' arguments, there are two principal reasons why the plaintiffs' failure to invoke the dispute resolution provision (clause 31) is not an answer to the plaintiffs' case. First, the Constitution encompass the contract between the members and between the members and the TRU. It creates contractual rights and obligations capable of both enforcement and waiver. In full knowledge of clause 31 the defendants have participated in this action, have responded to interlocutory proceedings, filed defences, attended directions conferences and presented a defence at trial. They have never sought to stay the action in reliance upon clause 31 despite the matter being raised directly with Counsel at a directions conference on 31 May 2016. It follows that the defendants have agreed to submit the substantive dispute to the jurisdiction of the Court and waived any right to object on the basis of non-compliance with clause 31 (Williams & Kawharu on Arbitration, LexisNexis, 2011 at 4.13-4,13.3 pages 120-122).

[38] Secondly, it is the case that the Courts will strive ·to give effect to agreements for the resolution of disputes unless there are good reasons for departing from them (Heli-Flight New Zealand Ltd v Massey University (HC, Auckland, CIV 2005-404-4855, 30 November 2005). One such reason is if the agreement is not sufficiently certain to be enforced (Hooper Bailie Assoc v Natcon Group (1992) 28 NSWLR 194 (SC)). This is such a case.

[39] It is not clear whether clause 31 contemplates a range of possible options for resolving disputes between members (or between members and the TRU) or is a multi-tiered dispute resolution process beginning with 'legal opinion or legal advice' and passing through mediation and arbitration. Regardless, except in relation to arbitration (for which there are processes set out in clause 32) there is no detail as to how the processes are to be engaged and implemented or for resolving disputes on matters of process between the parties should they arise. This is a very practical objection. The documents in the bundle (which were admitted by consent) disclose that in relation to the earlier dispute concerning the resolutions passed at the 27 November 2015 meeting Mr. Edwards had unsuccessfully sought to invoke clause 31.

[40] The second argument advanced that clause 34 was not amended by a bare majority fails. For the reasons set out above I accept Mr. Fa'otusia's evidence on the matter.

[41] I do not accept either the third argument advanced by Mr. Tu'utafaiva that the plaintiffs did not seek an adjournment of the meeting and should not therefore be granted a remedy. There is no evidence that the plaintiffs or Mr. Fa'otusia waived their rights to object to the lack of notice and they voted against the amendments.

The discretion

[42] I have been concerned whether I should interfere in the affairs of the TRU having regard to the Court's reluctance to adjudicate on disputes involving the internal management of clubs. I have decided that I should interfere for the following reasons.

[43] First, what has been proved is that the TRU has failed to comply with clear provisions in its Constitution as a result of which unlawful decisions have been made which are significant and affect the rights of the members. This is a category of case where the Courts have been willing to interfere (von Dadelszen at 114).

[44] Secondly, if the TRU disagrees with the conclusions I have reached it only has itself to blame. The TRU has failed to call any evidence, challenge the evidence or Mr. Fa'otusia in any meaningful way or put before me any reasons why I should not exercise my discretion in favour of the plaintiffs.

[45] Thirdly, I understand that the TRU is having its Annual General Meeting before the end of the year and it will have an early opportunity to put forward the amendments again following a lawful process.

Result

[46] I make a declaration under section 21(4) of the Act that the amendments to the Constitution of the TRU tabled and voted upon at the meeting of 11 May 2016 are void.

[47] I grant leave to any party to apply for further directions as may be required on 7 day's notice.

[48] The plaintiffs are entitled to costs to be fixed by the registrar if not agreed.

R v Fakatava

Supreme Court, Nuku'alofa
Cato J
CR 36/2017

10 October 2017

Criminal law — rape — barely corroborated

A woman alone in a house had been out drinking and chatting all night until about 4am. She claims that the next-door neighbour, a man she knew and had some social dealings with, came into her room and removed her underclothes and was raping her when she awoke and she chased him off and complained to an aunt and reported this to the police within hours.

The accused says that he was drunk also and that he came to her room and they agreed to have sex and did by consent.

The Judge preferred the evidence of the complainant, backed up by an Aunt to whom she first complained while upset. The Judge found it important that the complainant had no reason to make up the story and report it to the police.

Held

Accused guilty of rape.

Counsel for the Prosecution	:	Ms. Aleamotu'a
Counsel for the Defendant	:	Mr. Tu'utafaiva

V E R D I C T

[1] The accused, Liua Fakatava, stood trial for rape contrary to section 118(1)(a) of the Criminal Offences Act before me as a Judge sitting without a Jury between the 1st – 4th September 2017. The particulars were that on or about 21st September 2016 at Ma'ufanga, he did carnally know A against her will. Further, he stood trial for serious housebreaking arising out of the same incident the particulars being that he trespassed into the residence of A and committed a crime therein.

[2] The Crown's case was that the accused, who was a neighbour of A's and had been for several years, had entered her home which was next door to his mother's residence where he was residing in the early hours of the 22nd September 2017 whilst she was asleep and had raped her. The accused had denied this, but admitted having intercourse with her which, he said, had been consensual. After the incident, the complainant was seen to be upset, had approached her grand aunt for assistance to go to the police and a complaint to the police was made on or about the 23rd September, 2016. The accused was arrested shortly after and in his record of interview claimed that intercourse was consensual.

THE EVIDENCE

[3] The complainant, A, gave evidence that, on the 21st September 2016, she had been to a funeral and after the burial she had gone for dinner with family to a bar where she had some liquor, (she said two bourbons and coke), and dinner. She went after that to a bar in town and was there for a short time arriving at about, 9.00pm. She then went to another bar until about 12.30. She said she drank another rum and coke (Woodstock) at the second bar. She went home where she was alone, her young children being with her grandmother.

[4] She noticed she did not have her phone and went over to the accused's mother's residence because she noticed a light was on. She asked for a phone so she could call her phone for a ringtone. She searched for her phone but could not find it. Later, the mother came to her house and they talked. One of her sons was asked to track down the road with her to see if he could find the phone. She said, as they were doing this, the accused came past in a car and they greeted each other before the car drove on. She said that she returned to her house, asked for cigarettes, and mother said she would ask for these from her boys who had accommodation in a building at the rear of her property. She said she gave the mother money to pay for credit on the phone and cigarettes. She thought this occurred at about 3 or 4 am.

[5] She said that she spent a long time looking for the phone. The mother had come over and they had talked she thought for about half an hour. She said she told her she was going to go to sleep and she went to sleep in her bed in the living room which was the main room in the house. She said she did not know if the mother had locked the door. She went to sleep at about 4pm, she thought.

[6] She said she woke up with a person on top of her. She said that it was still dark. There was some light from the kitchen, however. She knew the person on top of her was the accused and she swore at him. She said he had taken off her bottom

wear, her short pants, and was biting her neck and having intercourse with her. He was copulating into her, she said. The accused said that it was OK because it was him. She pushed him away and he got up to collect his clothes. He went home calling out that it was not like the first time you have ever done it. She said she swore at him and went and put her pants on. Then she went outside the house. The mother came over and called to the accused but he kept on walking.

[7] She said that he was going to where he slept at the house at the back. The mother came into her house and apologized for what her son had done. She asked her not to go to the police. She said that she told the mother that she would go to her grandmother and asked her to return her money. She went over to her grandmother's home, she said crying. It took her about 4-5 minutes to get there. She said she was angry.

[8] She said her grandmother asked her what happened but she could not tell her. She asked her to take her to the police station. They went there about 7am, and she made her complaint. Later, she went to the hospital for a medical examination.

[9] She said that the accused's mother residence was about 15 metres from her residence. She said she knew the accused as they grew up but he had only moved in with his mother last year. She said they would meet regularly and say hullo, but she never expected anything like this. She said, as neighbours, they would help each other.

[10] Under cross-examination, she admitted that she had gone to a bar night club where evidence was given that the accused worked in security, and that she would talk to him there and ask him to let her in for free. She denied a suggestion that she had invited the accused on one occasion to meet her under the mango tree at her house. She said she was not sure about the accused's living arrangements at the time. She thought he might come and go but she knew the boys shared separate accommodation at the rear of the property. She agreed she had arrived home with a ride from a friend about 1am. She said that she was not too drunk. She said she had about 4 bourbons and was very tired. She did not drink much when tired. She had not been to sleep because of a wake and the funeral for many hours.

[11] She did not know what time it was when the car with the accused drove past. She said she did not think credit would have been deducted because she only used the phone to ring hers. She admitted however, giving mother money for the phone and for cigarettes. She said the door was closed when she went to sleep but she did not know if mother had locked in when she went home. She seemed to agree that she spent several hours looking for the phone and talking to the mother.

She said, at about the time of the alleged rape, people were getting up to go to the flea market. She denied meeting the accused and having a cigarette that night. She denied inviting him back into her house and allowing consensual intercourse to take place. She denied taking any drinks home with her and drinking any cans of alcohol when the accused was present. She denied kissing the accused or sitting on the bed with him. She denied taking her clothes off. She said she was very tired and had fallen into a deep sleep and she did not know he had taken her underwear off. She said she was not drunk. She had stayed up all the previous night for the funeral wake and was tired. She said she was not too drunk but she was tired. She denied passing out through excess alcohol. She said that after copulation, that she had sworn at him and he got up and collected his clothes whilst she ran outside and swore at him. She said the accused did bite on her neck. She woke up to three or four love bites. She denied they were made by others. She said that the accused left his underpants and she picked them up and gave them to his mother that night to take to him. She said she was crying when she saw the mother and asked for money back. She wanted the money back because she said she was upset at her for asking her not to go to the police. She said she wanted the money to go to the police. She had no other money and told the mother she wanted it for her children whom she admitted was untrue. She said she had not told the mother what her son had done but that she had been standing at the house when she heard the swearing at him and his remark that it was not the first time that she had done this. The mother had come over and asked the complainant not to go to the police until she had spoken with him.

[12] The accused's mother was called to give evidence by the prosecution. She said that the complainant woke her up to ask for a telephone. She said she called for her younger son to help her look for the phone. Then, they talked and she was asked by A if she had cigarettes. The conversations she had with A took place at A's residence. She said she made telephone calls when there to other persons. She said that the complainant went to her boy's place looking for cigarettes and she had tried to get her these from the boys. She said the accused arrived and said he had no smokes and he left again. She said they returned to her house and she made more calls to her mother using up all her credit both Ucall and Digicel and then she gave her $50 to pay for the credit, and to keep the rest. She said she was still drinking Woodstock. She said she had returned home from speaking with A about 4 or 5am and engaged on her handicraft weaving. She said she got food for Taufui, a son, to give to the accused when he came home from work. She said it was still dark when she went home to her place, did some weaving and fell asleep. She was woken up by a daughter saying that A was screaming and she went to her residence and spoke to her. She said that she asked A why she was crying and she said the accused came into the house and they slept together. Mother said but Liua was still

eating at the time you are referring to. She said she was crying and the mother suggested her drunkenness came out. The mother said she apologized if Liua had done that kind of thing. She said that she had given him food about 20 minutes before she went to sleep. She thought she had gone to sleep about 5.30am.

[13] Under cross-examination, she admitted that she had not told police that she had seen A drinking a Woodstock can but said it was true. She said that she had gone over to the room where Liua, her son, was sleeping after she had been told by A what had happened, and he was drunk, so that she had difficulty waking him. She said that he had told her to go to sleep that A was too drunk and that what had happened was between him and her because both were consenting to it. She denied ever apologizing and asking A not to go to the police.

[14] The complainant's great aunt gave evidence. She recalled A coming to her on the 22nd September 2016, early in the morning when the complainant came to her about 6-7am. She was crying. She was told Liua had already satisfied himself with her. She went with her to the police station. Later that day, the accused' mother came to her to apologise to ask for forgiveness she thought.

[15] A doctor's report was placed in evidence by consent. It confirmed 2 bruises anteriorly of about 2.1 cm, 1.1 consistent with love bites. Aside from this, nothing forensically was of value.

[16] The accused's record of interview taken on the 23rd September, 2016 was put in evidence by consent. In it, the accused said he was well acquainted with the complainant. He said the matter happened at about 0300 hours or thereabouts. He said that he had been at the bar and came back to his home. He walked into the kitchen and saw A and talked at the front part of her house. They went inside and sat on her bed and kissed. They agreed to have sex and after that he went back to his house.

[17] He said that he was drunk on the night but he still knew everything. He said that he went to the bar at about 7.30 and stayed till the bar closed. He then went home and did not go anywhere else. He said that after they had smoked they went into the house and smoked jokingly and then kissed and had sexual intercourse.

[18] He denied doing anything else to her body. It was put to him by the police officer that he had picked up his clothes and left because she chased him and he forgot his undergarment and his mother had given it to him as A had told her to give it to him and he responded that was true. He said that as he saw her A was

drunk but alright drunk. He said A took off her clothes. He said he did not ejaculate inside her because he was drunk. He maintained that he was aroused and they had agreed to have sex. He later when charged said of both offences that it was a lie.

[19] The accused gave evidence and maintained that intercourse was consensual and that the complainant had entered her house with him after smoking a cigarette. He stayed in the smaller house at the back. He said he would see her in the bar, sometimes to get free entrance and, other times, to look after her. He was not working on the 21st. He said he went there at about 9.30. He was drinking red label. He said 5-6 nips. He said that was from 11pm to the bar closing. Then he went home with a co-worker named Soane. He said he felt that he was still under control. He said that he had played pool between 9.30 and 11pm. He said that he arrived home about 1-2 am. He said that when he had arrived home in the car, the complainant said hullo to him. They drove off again. The driver was a worker called Keveni, at the bar. He and Keveni went and finished their "drink up". That finished about 2.30. He finished his whiskey. He got back about 3am. He said he looked for food in the kitchen. He said that he saw the complainant with a cigarette at the frontage of our residence. She also had what looked like a glass. He went and smoked with her. They went into the house, kissed and had consensual intercourse. He said to her that he had to work the next morning so he had asked her to allow him to go and sleep. He thought he left about 4am.

[20] He went home and slept about 4pm. He went to work about 7.30 the next day. Police came to his workplace. He said that he was surprised. He denied that A had tried to stop him having intercourse. She did not try to push him away. He said she was lying when she said she was asleep. He said, in cross-examination, that he was not drunk that night and that he had not had sex with her when she was sleeping.

SUBMISSIONS

[21] Mr. Tu'utafaiva submitted that the complainant had been sexually attracted to the accused. She had talked to him in the nightclub and on occasions had asked him to get her in free and look after her. He said that she had on a previous occasion asked him to meet her under the mango tree (an allegation that she had denied).

[22] He submitted that she was unreliable. He questioned her timing of events; also, the fact the mother had seen her drinking at home. The fact that she, so the mother said, had used up her credit ringing other people. He also questioned her evidence that she was not smoking and did not have cigarettes that night.

[23] He criticized the prosecution for not producing her underwear. As a big woman, he submitted the accused would unlikely have been able to remove them she said without waking her up.

[24] He submitted that the marks around the neck were consistent with kisses and she had embellished her evidence in this regard, suggesting that it was this that had woken her up.

[25] He submitted that she was not a naive young girl or woman. She knew her own mind and was able to give consent and did.

[26] The prosecution emphasized that the Court should accept the complainant's evidence beyond any reasonable doubt. There was no reason for her to make any complaint on the evidence and her evidence and conduct was consistent with the complaint of rape. Although there were some inconsistencies in the evidence, they were not material and she should be believed as a credible and truthful witness.

FINDINGS

[27] I believed the complainant's account beyond a reasonable doubt. There was no evidence to suggest that she had any motive to make a false complaint and her conduct afterwards in crying, when talking with the mother, then seeking the assistance of her grand aunt and, within a short period making a complaint to the police was consistent with her not having given her consent for intercourse as the accused claimed.

[28] I prefer her evidence to that of the accused. I find that she wanted cigarettes that night, had not been given any and that the suggestion of the accused that she had been smoking with him before they went into her house, then chatted, kissed and removed their clothing voluntarily, before having consensual sexual intercourse, a fabrication.

[29] I accept her evidence that she was very tired that night, having attended a wake on the evening of the 20th September, a funeral and then dinner, before going to the nightclub and that she went to sleep quite late on the morning of the 22nd September having lost her phone and after contacting and speaking with the accused's mother.

[30] I accept her evidence that prior to waking up that she had only seen the accused in the car and had not had any previous association at home with him that evening before sexual intercourse took place.

[31] I accept that she was very upset and I consider that it is likely that the accused's mother knew why this was so because I find the mother, contrary to the accused suggestion, likely saw or heard the complainant protesting the accused's conduct as he left her house. Much of what the mother said supported the complainant's account but I did not accept her suggestion that she saw the complainant drinking Woodstock. I think she was in a very difficult position giving evidence for the prosecution at trial. I think she knew enough to approach the complainant's grand aunt hopeful at least that police action would not be taken against her son.

[32] I find there is sufficient evidence in the evidence of the grand aunt, whose evidence I accepted, that the complainant was very upset and angry about what happened and, although the complainant did not say much to her, the fact both went to the police station for the purpose of a complaint being laid is supportive of the complainant's credibility in asserting intercourse was non-consensual.

[33] I accept that the marks on her neck shown in photographs were bites or, at least, occasioned by forceful sucking. They were mentioned in the doctor's report of an examination taken after the complaint. I accept that this and the fact of intercourse had caused her to wake from a deep sleep and I reject the submission that the accused could not have removed her underwear without her waking up, tired as I accept she had been.

[34] I find that the accused, as he said in his evidence, was drunk although he suggested that he was not drunk at trial. He said that he was unable to ejaculate or maintain an erection in his record of interview because he was drunk. Likewise, I accept that he was chased by her from the house, as he admitted in his record of interview, and that he left an undergarment behind which the complainant had given to his mother. This is inconsistent with an orderly departure from the house after consensual intercourse.

[35] Accordingly, I reject beyond any reasonable doubt the accused's account of what happened that evening. I find, in the early morning of the 22nd September 2016, beyond reasonable doubt that the accused entered the complainant's home uninvited as a trespasser and had non-consensual sexual intercourse with her. I find there was no basis either for him to believe mistakenly that he could have consensual intercourse with her.

VERDICT

[36] Accordingly, I find the accused guilty of rape and serious housebreaking as indicted, and he is convicted of both counts.

R v Ma'ake

Supreme Court, Nuku'alofa
Cato J
CR 1/2017

25 October 2017

Reckless driving causing death — racing cars

A witness saw 2 cars racing and repeatedly passing each other. The accused crashed into a container on the side and the driver of the other vehicle was killed. The accused left the scene and presented to the police next day – the Judge drew no adverse inference from this. The accused said that the other vehicle had raced up behind him, collided and both cars hit the container.

Held
Not Guilty.

Counsel for the Prosecution	:	Mrs. Langi
Counsel for the Defendant	:	Mr. Tu'utafaiva

V E R D I C T

[1] The accused was charged with reckless driving causing death contrary to section 25(5) of the Traffic Act particulars of which were that, on or about the 18th September 2016 at Pahu, he did drive his motor vehicle recklessly by driving in a speed and manner dangerous to the public. The gravamen of the charge was that he had been racing with another vehicle and that he had caused it to swerve off the road and collide with a cargo container causing the death of the driver a Mr. Iteni Maile.

[2] The only witness called by the Crown who was in the vicinity of the accident was Ha'ahao Soane. She was travelling East along the Bypass road in the early hours of the morning when she saw two cars approaching her at speed. She said they were overtaking each other repeatedly. She had to pull over to the side as the cars passed by her. She stopped and then drove on. She then said she heard a bang from behind but she did not stop or drive back.

[3] The accused's car which was a smaller vehicle than the other vehicle which was a red four wheel drive van, was on the left hand side as the cars travelled in a westerly direction towards her. The red van was on the other side of the road and it was this vehicle that she had to avoid. She said from about a 100 metres she had seen them zigzagging, and overtaking one another. She admitted that the only lighting came from the cars lights. She estimated the time would be 3.30am. She agreed that the cars had proceeded around a bend that was behind her before the crash. She said, under cross-examination, that she saw two sets of lights coming towards her at speed occupying both sides of the road. She maintained that there was criss-crossing. As they went to pass, she said the red car was trying to pass the back car at speed. She was asked if it was overtaking, and her reply was that she did not know about that. She said that she was scared or afraid. She could not pay attention to them because she was paying attention to her safety.

[4] The accused was interviewed on the 20th September after he had voluntarily come to the police station. He had decamped with his car left in the middle of the road after the accident he said because he was afraid people in the van might try to beat him up and he did not know what to do. He went to sleep on a beach and then when in the afternoon he woke up he, he went straight back to the police station. He denied he was racing with the deceased.

[5] He said that he was driving home along the Bypass road when a vehicle was travelling behind him at a fast pace. He noticed it first when they were about 80 metres apart. He said he was travelling about 55 K/per hour. He said he had reached a curve when this vehicle tried to overtake him. He turned in front of his vehicle but he had not gone past when the left side of the wing and wheel of the other vehicle smashed into the right side of his car and he had tried hard to stop but could not control his car. The vehicle slid off together to the left hand side of the road and the passing vehicle smashed into the container, sprung back and hit his car which turned northwards.

[6] Officer Likiliki who took the record of interview also produced a video from a security camera taken from a nearby shop that showed the passing movement as the vehicles passed out of the corner and proceeded to slide. He agreed when it was put to him by Mr. Tu'utafaiva that what the video pictured was very similar to the explanation the accused had given for the accident. The video had not been shown to the accused before his interview.

[7] One further witness was called who had been at a "drink up" with the accused. He had been, however, in another vehicle at the drink-up and was not able to say what the accused was drinking. He lost sight of the accused when driving

away down the Bypass Road. He saw his car next after the accident had happened. He was unable to add materially to the evidence given earlier.

[8] The accused did not give evidence.

FINDINGS

[9] I do not consider that the evidence of the witness Ha'ahao Soane that the vehicles were zigzagging was a reliable basis for a finding that the accused had been driving recklessly. Her observations were based simply on lights coming from the oncoming cars and she herself admitted understandably that her focus was on taking evasive action to avoid the car coming towards her which I find was a red van which later collided with the container. She had very limited opportunity (only a short period in difficult circumstances) in my view to observe the passage of the vehicles towards her along the Bypass road at about 3am. The accused denied racing the vehicle. There was no evidence that the accused and the deceased were known to each other, or that either had reason to be racing or interfering with each other's' passage along the road.

[10] The video tends to confirm the accused's explanation that the van which was a four-wheel drive went past him at speed and then from the video the two cars are seen to travel off the road with the van colliding first with the container and then the accused's car colliding with it and then spinning around in a northerly direction where it stopped in the road, showing the accused leaving the vehicle. From the way in which both cars left the road before the red van collided with the container, I infer that the van must have collided with the right side of the accused's vehicle causing it also to shift to the left.

[11] I am not satisfied beyond a reasonable doubt that the accused was driving recklessly and in such a manner as to have caused or materially contributed to the accident and the unfortunate death of Mr. Maile. I cannot draw any adverse inference against the accused because he left the scene, in the light of his explanation.

VERDICT

Not Guilty. The accused is discharged.

R v Niutupuivaha

Supreme Court, Nuku'alofa
Cato J
CR 77/2016

25 October 2017

Criminal law — rape — sentencing — matters to be taken into account when sentencing

Sentencing — matters to be taken into account when sentencing rape

A man rapes a girl several times over several years, using some violence. He also attempted to rape the victim's sister. The accused is related to the victims and used deception to cause them to be alone.

Held

1. Predatory conduct means a starting point of 9 years; deductions for first offence.
2. Paramount in this sentencing is the need to protect girls and women and deter offenders.
3. Sentence in 9 years and 3 months with the last 15 months suspended with conditions.

Case considered

Mounga [1998] Tonga LR 154

Counsel for the Prosecution	:	Mr. 'Aho
Counsel for the Defendant	:	Mr. Tu'utafaiva

S E N T E N C E

[1] The prisoner had been found guilty after a trial before me sitting as a Judge without a jury of 3 counts of rape of A contrary to section 118(1) (a) of the Criminal Offences Act; one count of attempted rape of B (A's sister) contrary to sections 4 (118(a) and 120 of the Criminal Offences Act, and one count of serious

indecent assault on A contrary to section 124(1) and (3) of the Criminal Offences Act.

[2] I have set out the facts of the offending in a verdict delivered on the 25th August, 2017. The factors which I identify as making the offending particularly serious are these:

a. As a consequence of the first rape (Count 1) when she was 13, A lost her virginity. She had been at his home because the prisoner's father was the Bishop in their church ward and also was her grand uncle. The complainant's mother is also related to the accused. She was sleeping over with her friends who were the prisoner's sisters for a church activity. The prisoner was not living at his family home at the time but had been ordered out by his father. He used physical force including strangulation to overpower A and have intercourse.

b. The serious indecent assault (Count 2) occurred when A was in the sixth form. He duped her into coming to his home by representing in a text from his mother's phone that his mother wanted to see A. She left school and when she got to the house he had sexual intercourse without her consent. The Crown did not seek to amend the charge.

c. The second rape (Count 3) arose when she was again duped into coming to his house by a text message from his sister's phone saying she had money in the house and could A get it. He again strangled her and his callous indifference is demonstrated in his comment this is what he would call rape. This offending arose in April 2011.

d. On the final occasion in September 2015, Count 5 she was living next door to the accused with her family. He entered into her home pulled her out the back door and into a room at the rear of the house where he again raped her. On this occasion, he was found having intercourse by B, a younger sister, whom he had attempted to rape in 2011, and a cousin. B hit him on the head with a stick.

e. B was in her bedroom in 2011 when the prisoner attempted to rape her (Count 4), using force such as squeezing her throat and strangling her. Her mother interrupted and intervened to prevent a rape. The prisoner had been living by invitation of B's mother, who felt sorry for him after his father had ordered him out of their family home. B's mother later

reported this to his parents. No complaint was made to the police but an apology was made.

[3] I consider that the prisoner's actions were callous, cunning and predatory and led to a most humiliating experience for both victims, more particularly so since they were related to him and both victims were close to his family. Particularly serious, is the fact that on several occasions he used force to subdue and control his victims that included strangulation which must have been a terrifying experience for them. On two occasions, he had duped A into coming to his family residence by using other family members' phones to deliver false messages. Like Mr. Aho, I find particularly concerning that, in the second rape, he said this is what "he would call rape", and in the final incident he entered her house when she was sleeping and used force to overcome her.

[4] Despite what was a strong Crown case in relation to both victims he put them through the ordeal of trial and continues to maintain his denial in his probation report. Although there was a long period when A admitted there had been consensual sexual relations between them, this was not the case in relation to the indicted counts. I very much doubt , in any event, that there was any true relationship between A and the prisoner. A said that, during this period which lasted for a couple of years when she was still very young and when so she admitted consensual sexual intercourse had taken place it seemed quite regularly, he would humiliate her, saying that she was useless and worthless, and she had felt trapped. She eventually terminated the "relationship" and the incident involving serious indecent assault took place several months later. The victim impact report on A, who is now 26, records that the offending has had, understandably, adverse psychological consequences for her over a long period.

[5] I have read his probation report. The prisoner is aged 26. He is the ninth in a family of 13 siblings from two relationships. His father says of all the children the prisoner was the one who disobeyed him and has rejected the Mormon church and religion. He was educated to form 6. He entered the University of the South Pacific but did not continue his education. He worked for his father and was a driver for a long period before his arrest. His father suggested to his probation officer that his drinking might account for some of his offending, but if so, it did not feature in the evidence. I have read references attached to his probation report that suggests he is well thought of and has contributed to his community (Town Clerk, a ward Bishop, and others). The view is conveyed that others were surprised to find that he has offended, in this way. I observe that is not an uncommon sentiment because sexual offending generally takes place in private.

[6] I discussed with counsel the starting point that was appropriate, in this case. Mr. Tu'utafaiva submitted 8 years imprisonment would be appropriate. Mr. 'Aho seemed to suggest a much higher starting point of 9 years for the first rape because the complainant was a minor and strangulation was involved, 10 years for the second count of rape where he had said this is "what you would call rape", and where a ruse was involved to get her into his residence, and 8 years for the final rape which had involved a trespass into the victim's home from a neighbouring property when she was asleep. He submitted that I should take into account further the totality of the rape offending meaning an overall starting point of 12 years from which he suggested a reduction of one year was appropriate because the prisoner was a first offender. He submitted 6 years was appropriate for the attempted rape with a discount of 12 months because the prisoner was a first offender. He would not accumulate any part of the offending on B on the offending with A.

[8] I intend to approach the matter somewhat differently from Mr. 'Aho. As I indicated to Mr. Tu'utafaiva, I consider the starting point of 8 years is too low and does not adequately reflect the overall seriousness of the prisoner's offending. I have reflected on this matter over the weekend having heard submissions on Friday. In my view, the offending is predatory, and worthy of a starting point well above the five year starting point for a single rape in Fa'aoso [1996] Tonga LR 42. I have decided that count one should be the head sentence for the rape offending on A. For the three rapes, the serious indecency and taking into account all the aggravating circumstances, including the fact A was only 13 when the first rape occurred, in my view, an appropriate starting point is 9 years imprisonment.

[9] From this, I will deduct 9 months for his being a first offender. There are no other mitigating factors. The sentence I impose on him for rape in relation to Count one is 8 years and 3 months imprisonment.

[10] On the Count of serious indecent assault, this is plainly at the upper end of the five year maximum sentence for this offending. I consider that a starting point of 4 years imprisonment is appropriate. After allowing 9 months for his being a first offender, I convict and sentence him to three years and three months imprisonment to be served concurrently with Count one.

[11] In relation to Count three; rape, I sentence him after mitigation of nine months imprisonment for being a first offender, and upon conviction to five years and three months imprisonment to be served concurrently with Count one. I consider that for this offending and the rape in Count 5 starting points of 6 years are appropriate to reflect aggravating circumstances that I have mentioned that were present.

[12] In relation to Count 5 (the third charge of rape) I also sentence the prisoner upon conviction to five years and three months imprisonment after mitigation of 9 months imprisonment to be served concurrently with Count one.

[13] As to Count 4, the attempted rape on B, taking into account that the starting point for attempted rape in *Langi* [2014] Tonga LR 100 is 4 years imprisonment, the maximum being 10 years imprisonment, (for rape, 15 years imprisonment) I consider that the fact he used force to subdue B including strangulation, and that she also was only 13, a starting point of 5 years is appropriate. Plainly, but for timely intervention, rape would have occurred. Again, I allow him 9 months mitigation for his previous good character meaning that his sentence on conviction for the attempted rape of B is 4 years and three months imprisonment. In relation to this offending, I order, however, that one year of this offending be served cumulatively upon the 8 years and three months imprisonment for his offending with A making a total combined sentence of 9 years and 3 months imprisonment. Although the prisoner is only 26 and this is his first time before a court, the totality of his offending is such that the sentence in my view cannot be said to reflect a "crushing" or overwhelming judicial response. The paramount sentencing approach adopted here is the protection of girls and young women, deterrence and denunciation of this kind of offending so that others in the Tongan community minded to commit such offences know that condign punishment will follow.

[14] I also observe that the prisoner persisted in offending with A even after members of his family were aware that he had offended against B and an apology had been forthcoming.

[15] Mr. Tu'utafaiva urged me to suspend part of this sentence, which Mr. 'Aho opposed. Mr. 'Aho cited the Court of Appeal in *Tevita Vaka v R* AC4 /12, a case involving incest, where it was said ;

> "The glowing testimonials are entitled to little weight and cannot justify the suspension of these sentences because regrettably offences involving sexual abuse within the family are all too frequently committed by people of otherwise good character."

[16] The attitude he has displayed towards his victims is appalling, and I am not at all sure he is likely with his attitude to be rehabilitated. In my view, the prisoner's attitude suggests he is likely to represent a continuing danger to young women in the future unless and until he develops some insight into his offending and takes steps to arrest this. His apology in 2011 to B and the family's apparent

decision not to complain to the police then, did not inhibit him from later raping A after he had entered her house when she had been sleeping and using violence to subdue her.

Despite my initial reluctance to suspend his sentence, I think also after consideration over the weekend, that part of his sentence should be suspended on conditions requiring his supervision for the balance of his sentence. I consider it worthwhile that he be given the opportunity to attend courses on sexual abuse and alcohol abuse, a matter mentioned by his father in the helpful probation report that I read, to assist in his possible rehabilitation. Mounga [1998] Tonga LR 154 states that the criteria for suspension mentioned there are not exhaustive nor comprehensive. I believe that it is in Society's interest, that he, being a young man, with no previous experience of the courts, be afforded the opportunity to participate in programmes aimed at his rehabilitation whilst under supervision on his release from prison. I suspend the final 15 months of his combined sentence of 9 years and three months imprisonment on the following conditions;

i) He is not to commit any offences punishable by imprisonment for the period of his suspension;

ii) He is placed on probation for the period of his suspension to live where directed;

iii) He is not to drink alcohol during the period of his suspension;

iv) He is to attend the following courses under the direction of his probation officer:

(a) A course on alcohol and drug abuse under the direction of the Salvation Army or such other agency as Probation considers is appropriate, at the time of his release on suspension.

(b) A course on sexual abuse under the direction of the Womans' Crisis Centre or such other agency as Probation considers is appropriate, at the time of his release on suspension.

[17] He is warned that a failure to perform any of these conditions may result in his return to prison to complete the suspended part of his sentence of imprisonment. He is also warned that should he appear again before this Court on such offending, he is likely to be very severely dealt with.

Lopeti v Lopeti and the Minister of Lands

Land Court, Nuku'alofa
President Paulsen
LA 12/2016

7 November 2017

Land Law — election under s. 84 cannot be resiled from — method of election — lease needs cabinet consent by current lessor and lessee — unregistered lease does not bind a successor in title — only registered holder can grant a lease

Leaseholder promises lease to daughter; this was agreed by Cabinet but the lease was not signed or registered before he died. The son and heir initially elects to take the allotments whereupon his son would acquire the son's own allotments. His election under section 84 was presumed from his heir's affidavit. The Ministry lost this heir's affidavit and did not process the registration.
The son then changes his mind and rejects the succession to the allotments because on incorrect advice from the Lands Ministry he believes he would thereby lose his own allotments. The leases are granted to the grandson (heir's son). Some years later a lease of 50 years to the daughter (from her nephew who now had the land) was registered despite objections from son and grandson.

Held

1. There is no prescribed way that an election under section 84 is to be made, and it can be inferred from the heir's affidavit given to the Minister.
2. An election once made is conclusive generally at law, and this applies to an election under section 84 of the Land Act.
3. The lease to the daughter is not valid for 3 reasons -
   - If a lease is not registered a holder of land who has died cannot pass any interest in the land to any person;
   - Cabinet consented to a lease by the deceased and the daughter but did not consent to a lease from the nephew;
   - Deceased was never the registered holder as required by s. 56(1) of the Land Act and so he could not grant a lease.

Cases considered

Tu'uhetoka v Malungahu (1945) Vol II Tonga LR 53
Moala v Tu'i'afitu and Halalilo (1956) Vol II Tonga LR 104
Manakotau v Vaha'i (1959) Vol II Tonga LR 121
Minister of Lands v Kamoto (1962) Vol II Tonga LR 132
Minister of Lands and Kalanivalu v Tekiteki [1974-1980] Tonga LR 8
Kilifi & Kilifi v Heimuli and ors [1996] Tonga LR 31
Tonga and Ors v Minister of Lands & Ors [1924] Vol II Tonga LR 96
Scarf v Jardine (1882) LR 7 App Cas 345

Statute considered

Land Act, ss 84 and 85

RULING

The claims

[1] 'Alekisio Lopeti was the holder of a town allotment and a tax allotment. The first plaintiff (Tavite) is 'Alekisio's heir. The second plaintiff (Yohanny) is 'Alekisio's grandson and Tavite's heir. The first defendant (Luse) is 'Alekisio's youngest daughter.

[2] 'Alekisio agreed to give a lease over part of his town allotment to Luse but no lease was prepared or registered during 'Alekisio's lifetime. When 'Alekisio died Tavite elected to succeed to 'Alekisio's allotments but later purported to elect to retain his own allotments and 'Alekisio's allotments were both granted to Yohanny. It was only some years later that Luse's lease was registered.

[3] There are two aspects to the claim. First, Tavite and Yohanny argue that upon 'Alekisio's death Tavite elected to succeed to 'Alekisio's allotments as he was entitled under section 84 of the Land Act. He only later purported to change his election because of incorrect advice from an Officer at the Ministry of Lands, including that if he retained his own allotments Yohanny would lawfully succeed to 'Alekisio's allotments. Tavite and Yohanny seek orders declaring Tavite to be the lawful holder of 'Alekisio's allotments and Yohanny to be the lawful successor to Tavite's allotments. Secondly, Tavite and Yohanny argue that because Luse's lease was not registered before 'Alekisio died it is invalid and must be cancelled.

The facts

[4] Before 1920 the estate holder of Lapaha granted Filise ‘Auaea a tax allotment called Toafa and a town allotment called Felemei. Felemei had an area of 3 roods 26 perches. The allotments were registered on 8 January 1929.

[5] Filise’s eldest son was ‘Alekisio. ‘Alekisio had a town allotment called Pule where he raised his large family. Tavite is ‘Alekisio’s eldest son and heir and Luse is ‘Alekisio’s youngest daughter. Yohanny is Tavite’s eldest son and heir.

[6] In 1967 Tavite was granted a tax allotment called ‘Fo’i Hefa’.

[7] Tavite went to New Zealand in around 1973 and earned money. He returned and built a house for his parents and eight sisters on Felemei (which was then Filise’s land) thinking that he would one day inherit the allotment. Filise and his wife were also living on Felemei at this time.

[8] Filise died in 1984. ‘Alekisio succeeded to Felemei and Toafa and Tavite succeeded to Pule. ‘Alekisio was never registered as the holder of Felemei and was not given a deed of grant. Pule was not registered in Tavite’s name until 27 February 2009. The position then was that ‘Alekisio was the holder of Felemei and Toafa (although not registered as such) and Tavite was the holder of the town allotment Pule (again not registered as such until 2009) and the tax allotment Fo’i Hefa.

[9] In around 1996 ‘Alekisio agreed to lease part of Felemei to Luse. Luse’s husband does not have any land and Luse had provided care to ‘Alekisio and his wife. On 16 October 1996 Cabinet gave its consent to a 50 year lease of 810m² of Felemei from ‘Alekisio to Luse. The lease was not prepared or registered.

[10] ‘Alekisio died on 8 November 2007. On around 8 January 2008 Tavite, who lives in New Zealand, travelled to Tonga and lodged his heir’s affidavit claiming both Felemei and Toafa. Tavite’s evidence in this respect was confirmed by the Ministry Officer, Semisi Moala. It is quite clear that Tavite had understood that upon ‘Alekisio’s death, ‘Alekisio’s allotments would devolve upon him as heir and that his allotments would in turn devolve upon Yohanny. That is what he intended to happen when he lodged his heir’s affidavit and what he told Yohanny would happen after he returned to New Zealand having filed the heir’s affidavit. Tavite was told by the Ministry upon filing his heir’s affidavit that everything was in order and that there was nothing further for him to do.

[11] In around 2010 Tavite became aware that Felemei was being surveyed for Luse’s lease and he came to Tonga again to object to the granting of the lease. On

visiting the offices of the Ministry of Lands he was advised by a Registry Officer, Fataua Halatanu, that the Ministry did not have any record of his claim to Felemei and Toafa and that the allotments had reverted to the estate holder. Tavite returned to New Zealand and found his copy of his heir's affidavit and came back to Tonga and produced it to Mr. Halatanu. Mr. Halatanu told him that 'You were right all the time' and that he would start Tavite's claim for Felemei and Toafa afresh. I find that the Ministry understood that Tavite had claimed Felemei and Toafa.

[12] Importantly, Tavite was told by Mr. Halatanu that the maximum area of a town allotment was 1 rood 24 perches and as Felemei was larger than that the surplus area would revert to the estate holder. Tavite asked whether if he kept his own allotments Yohanny would take Felemei and Toafa. He was told that he would. I accept that it was because of what Mr. Halatanu had told him (which he believed to be correct) that Tavite instructed Mr. Halatanu that he would keep his own allotments and have 'Alekisio's allotments registered in Yohanny's name. He directed Mr. Halatanu accordingly and this was written down by Mr. Halatanu and signed by Tavite (document 5 of the Minister's bundle). Tavite also said, and again I accept, that he told Mr. Halatanu that he objected to Luse's lease and was told that there was nothing that could be done about that. For reasons I shall come to the advice that Mr. Halatanu gave Tavite was incorrect in important and material respects. There is no suggestion that Mr. Halatanu gave the advice other than in good faith.

[13] Tavite's evidence cogently explains why having initially elected to claim 'Alekisio's allotments he subsequently purported to change his election and keep his own allotments. Understandably after so many years Mr. Halatanu did not have a clear recall of his conversations with Tavite but under cross-examination he accepted that Tavite's evidence might well be correct. Furthermore, Tavite's evidence is consistent with how the parties proceeded and in important respects with the content of the Ministry's letter to Tavite of 17 August 2010 (document 4 of the plaintiffs' bundle).

[14] Tavite returned to New Zealand and was subsequently advised that the transfer of Felemei and Toafa to Yohanny had been approved. He travelled to Tonga and paid the relevant fees and later he received a letter confirming Yohanny was the holder of Felemei and Toafa. The Minister granted Toafa to Yohanny on 19 April 2010. It is not clear exactly when Felemei was granted to Yohanny, but it must have been before the date of the Ministry's letter to Tavite of 17 August 2010 and well before the registration of Luse's lease.

[15] On 23 August 2010 Yohanny wrote to the Minister of Lands objecting to a lease over Felemei to Luse but he received no reply. In January 2016 Tavite and Yohanny were in Tonga and arranged to see the Minister to complain about Luse's lease. They were told they could see the Minister at 8.30am on 13 January 2016. They went to see the Minister as arranged but did not get to see him until 2pm and were advised that their complaint was too late as the lease was registered that morning. The Minister said he would reconsider the matter. Tavite returned a week later to see the Minister only to be told that the Minister was overseas. He returned two days later and was told to speak to a Registry Officer, Sione Uele. Tavite spoke to Sione Uele but was told that there was nothing that could be done about the lease.

[16] Luse's lease was registered on 13 January 2016. There was conflicting evidence for the long delay between Cabinet giving its consent and the registration of the lease. Luse said that she followed up with the Ministry about registration of her lease. The evidence of Mr. Halatanu was that the most likely cause of the delay was that Luse did not follow the matter up. Where fault lies has no bearing on the result of this particular case.

[17] Luse's lease was registered as Lease No 8778 with the following details:

Lessee: Luse Lopeti

Lessor Yohanny Lopeti

Area 810m²

Term 50 years (13.01.2016-12.01.2066)

Purpose Residential

Rental TOP$50 per annum.

[18] This action was commenced in June 2016 and Tavite sought an interim injunction because Luse had dismantled the house he had built on Felemei and was building a new house on the land. That application was resolved on terms that should Tavite and Yohanny be successful in their application to cancel the lease Luse will leave the new house on the land for their benefit.

A preliminary issue

[19] An issue arose concerning the area of Felemei and specifically whether if Filisi had, prior to the introduction of the Land Act on 23 August 1927, been granted 3 roods 26 perches as his town allotment whether the full area devolved upon 'Alekisio or only 1 rood 24 perches, being the maximum size of a town allotment under the Land Act. It is now conceded by the Minister that prior to the enactment of the Land Act Felemei was granted 3 roods 26 perches of land as his town allotment and that the full area devolved upon 'Alekisio when Filisi's died.

[20] Mr. Niu presented interesting and comprehensive submissions on this issue and referred me to the relevant authorities which I list here for the benefit of later cases where the issue may arise again (Tu'uhetoka v Malungahu (1945) Vol II Tonga LR 53, Moala v Tu'i'afitu and Halalilo (1956) Vol II Tonga LR 104, Manakotau v Vaha'i (1959) Vol II Tonga LR 121, Minister of Lands v Kamoto (1962) Vol II Tonga LR 132, Minister of Lands and Kalanivalu v Tekiteki [1974-1980] Tonga LR 8).

Who was entitled to Felemei and Toafa upon 'Alekisio's death?

[21] Upon 'Alekisio's death without a widow his heir Tavite, who already held his own town and tax allotments, was entitled under section 84 of the Land Act to elect to take 'Alekisio's town and tax allotments or to retain his own. It is common ground that if Tavite elected to take 'Alekisio's allotments his own allotments would devolve to Yohanny (section 86 of the Land Act). However, if Tavite elected to retain his own allotments Yohanny was not entitled to 'Alekisio's allotments because Yohanny had no town or tax allotments of his own. This is the effect of section 85 of the Land Act (*Kilifi & Kilifi v Heimuli and ors* [1996] Tonga LR 31).

[22] Tavite claimed Alekisio's allotments within 12 months of 'Alekisio's death and the allotments therefore did not at any stage revert to the estate holder. Mr. Niu argues that when Tavite filed his heir's affidavit he elected 'Alekisio's allotments and relinquished his own allotments in favour of Yohanny. I agree with that analysis. In filing his heir's affidavit Tavite could only have been understood to have been making an election under section 84 of the Land Act. I have no doubt that when Tavite filed his heir's affidavit he did so intending to claim Felemei and Toafa for himself understanding also that his allotments would go to Yohanny. That is after all what happened when 'Alekisio had claimed Filisi's allotments and Tavite had inherited Pule from 'Alekisio. The Ministry must have understood Tavite was making his election, as having filed his heir's affidavit for Felemei and Toafa, he was told there was nothing more for him to do.

[23] Whilst the heir's affidavit does not state that Tavite was electing 'Alekisio's allotments in preference to his own, the Land Act does not prescribe how an election is to be evidenced (Tonga and Ors v Minister of Lands & Ors [1924] Vol II Tonga LR 96). What is important is that the person legally entitled to make the election has communicated that election to the Minister in which case the Minister is bound to give effect to it. That occurred in this case and it appears that the Minister did not give effect to Tavite's election only because Tavite's heir's affidavit was mislaid.

[24] The issue then arises as to whether having made his election (to claim 'Alekisio's allotments), Tavite was able to change his mind and make a fresh election (to retain his own allotments). The Land Act is silent on the point. It is generally recognised at both common law and equity that an informed election once made is final, binding and irrevocable (Scarf v Jardine (1882) LR 7 App. Cas. 345; Meagher Gummow & Lehane's 'Equity Doctrines and Remedies', Fourth Ed at [39-075] and Halsbury's Laws of England 'Equity' Vol 16, Fourth Edition at 852). It has been said that this conclusiveness of choice is 'the only thread of identity that runs through' all categories of election (Amos S Deinard and Benedict S Deinard 'Election of Remedies' (1922) 6 Minnesota Law Review 341, 342 referred to in Quia Liu 'The Use and Misuse of Equitable Election' (2013) UNSW Law Journal 1053). This principle should apply to elections under section 84 of the Land Act. Clearly from a policy perspective the desirability of certainty and finality in dealings with land would suggest that such elections once made should generally be irrevocable. It follows that having made an informed election to claim 'Alekisio's allotments, Tavite was bound by it and could not make a fresh election.

[25] In any event, I note that Mr. Halatanu's advice to Tavite which led him to purport to change his election was incorrect in material respects. Mr. Halatanu was incorrect that the balance of Felemei in excess of the maximum statutory area of 1 rood 24 perches would revert to the estate holder. He was also incorrect that if Tavite chose to retain his own allotments, Yohanny would succeed to 'Alekisio's allotments. Tavite relied upon that advice believing it to be correct. Tavite's fresh election was not in those circumstances informed but was mistaken as to matters upon which his right of election depended. There being no person who would be prejudiced by the revocation of the election it would not in my view have been binding upon him.

[26] It follows in my view that both as a matter of law and justice Tavite and Yohanny are entitled to the orders that they are seeking.

The lease

[27] 'Alekisio agreed to give a lease of part of Felemei to Luse and Cabinet gave its consent to the lease as required by section 56(1) of the Land Act. However, the lease was not registered until after 'Alekisio's death and Felemie had been granted to Yohanny. The plaintiffs and the Minister are in agreement that Luse's lease is invalid although they framed their arguments in a different manner.

[28] For Luse, Mr. Tu'utafaiva argues that Luse's lease is valid despite not having been registered until after 'Alekisio's death. Mr. Tu'utafaiva submits that a subsequent holder of an allotment over which a lease has been granted but not registered must be bound by the lease because otherwise injustice will be done to the person deprived of her lease and that this cannot have been intended by the Legislature.

[29] Mr. Tu'utafaiva also referred to section 126 Land Act which provides:

> "No lease….until registered in the manner hereinafter prescribed shall be effectual to pass or affect any interest in land…".

[30] He submits that this provision does not in its terms invalidate a lease already granted nor does it prohibit registration of a lease after the landholder's death or impose any time limit within which registration is to have occurred. It follows Mr. Tu'utafaiva argues, that Luse's lease was validly registered on 13 January 2016 and should not be cancelled.

[31] Despite all that Mr. Tu'utafaiva had to say I cannot accept that Luse's lease is valid. Section 126 is clear. An agreement to grant a lease (even if Cabinet approval to the lease has been obtained) does not pass any interest in land. It is only upon registration of the lease that any interest passes from the lessor to the lessee. The interest that then passes (but not before) is the exclusive right to possess the land during the term of the lease. A registered lease binds a widow or heir for the unexpired period of the lease (or the estate holder if there is no widow or heir) because of the effect of section 58 of the Land Act. But if a lease is not registered a holder of land who has died cannot pass any interest in the land to any person.

[32] Mr. Nui expressed the position succinctly in my view when he submitted:

> Because Luse's lease was not registered before 'Alekisio …died, Alekisio's interest….was not affected at all and no part of that interest had passed to Luse Lopeti, when Alekisio died. His whole interest devolved

upon his eldest son and heir when Tavite Lopeti lodged his claim thereto on 8/1/2008.

[33] Secondly, section 56(1) of the Land Act requires that the consent of Cabinet to a lease must be obtained. In this case Cabinet's consent was obtained to a lease between 'Alekisio and Luse. There is no Cabinet consent to the lease that purports to be between Yohanny and Luse. The simple point is that Cabinet has never given its consent to a lease other than between 'Alekisio and Luse.

[34] Thirdly, section 56(1) provides that the 'registered holder' of a town or tax allotment may grant a lease. Registration of an allotment is effected in accordance with section 121 of the Act by the issue of a duplicate deed of grant to the grantee and the binding of the other in the Register of Allotments. 'Alekisio was never the registered holder of Felemei and until he was registered he could not grant a lease to Luse.

[35] There is some limited force in Mr. Tu'utafaiva's submission that injustice may arise in particular cases such as this. Such injustice might result because a prospective lessee has paid for the benefit of the lease or has spent money developing the land only to find that they do not have a valid lease at all. But the risk of injustice should not be overstated and is not a significant factor in this case. A prospective lessee can take steps to protect their own interests by not making any payment for a lease or developing the land until the lease has been registered. In this case there is no suggestion that Luse paid for the lease and whilst she has developed the land she did so in the full knowledge that her expenditure might be wasted should the lease be held to be invalid.

Result

[36] I make the following orders

[36.1] The grant of the allotments Felemei and Toafa to Yohanny are to be cancelled.

[36.2] Tavite is declared the lawful holder of the allotments Felemei (with an area of 3 rood 26 perches or 3,694m²) and Toafa and is to be registered as such.

[36.3] Yohanny is declared the lawful holder of the allotments Pule and the Fo'i Hefa presently registered to Tavite and is to be registered as such.

[36.4] Registered lease No 8778 is declared null and void and is to be cancelled.

[36.5] The Minister is to forthwith give effect to the Court's findings above.

[37] If any party seeks costs they may apply by memorandum within 28 days.

Kioa v Kioa and Ors

Land Court, Nuku'alofa
President Paulsen
LA 5/2016

17 November 2017

Land Law — effect of dealings by antecedent — cancellation of registered lease — renunciation of claim by heir — residential use covenant — Defects in the section 54 procedure not fatal

The plaintiff 'Amanaki is the eldest son and heir of Viliami and inherited his tax and town allotments upon Viliami's death. His claims in this action relate to dealings with those allotments during Viliami's lifetime. 'Amanaki asks the Court to cancel a registered lease and a sublease of Viliami's town allotment on the grounds that:

1. Viliami expressed a clear intention to cancel the lease and the Court should give effect to his wishes;
2. The Minister breached duties to alert him to the application for the lease and to ensure that the granting of the lease was 'appropriate, reasonable and fair';
3. Solomone is in breach of a covenant to use the land only for residential purposes.

'Amanaki also seeks the cancellation of grants of lots made to the third and fifth defendants following the subdivision of Viliami's tax allotment and their eviction, on the grounds that the Minster failed to publish notice of the surrender of the lots as required by section 54 of the Land Act thereby depriving him of his right to assert his claim to the land as heir, and also that the grants are invalid having been made after the Minister had assured him that he would put further dealings with the land on hold.

Held

1. A registered lease can only be cancelled in a manner contemplated by the Land Act or by Order of the Court;
2. The purpose of the Minister's enquires before making a grant is to determine if there is some claim which might be an impediment to the grant or make the land unavailable. The interest of an heir is not such a claim;

3. Residential use of land does not become commercial use simply because rent is charged;
4. Defects in the section 54 procedure of notice by the Minister do not assist a person who has no claim against the surrender of lots as here where the heir had renounced any claim.

Cases considered

Tafa v Viau [2006] Tonga LR 287
Naulu v Tupou [2016] Tonga LR 163
Kioa v West (1985) 159 CLR 550
Sakalia v Vailea & Ors [1995] Tonga LR 130
Nuku v Luani & ors [2017] Tonga LR 366

Statute considered

Land Act section 54

Counsel for the plaintiff	:	Mrs. P Tupou
Counsel for the first to fifth defendants	:	Mr. S Tu'utafaiva
Counsel for the sixth defendant	:	Mr. 'A Kefu SC

RULING

THE CLAIM

[1] The plaintiff 'Amanaki Kioa ('Amanaki') is the eldest son and heir of Viliami Kioa ('Viliami') and inherited his tax and town allotments upon Viliami's death. His claims in this action relate to dealings with those allotments during Viliami's lifetime and fall into two parts.

[2] First, 'Amanaki asks the Court to cancel a registered lease of Viliami's town allotment that Viliami granted the first defendant, Solomone Kioa ('Solomone') and a sublease Solomone has agreed to grant to his nephew, the second defendant Joshaiah Sipu ('Joshaiah'). 'Amanaki argues that Viliami expressed a clear intention to cancel the lease and the Court should give effect to his wishes. Alternatively, he contends that the Minister breached duties to alert him to the application for the lease and to ensure that the granting of the lease was 'appropriate, reasonable and fair'. Finally he submits that Solomone is in breach of a covenant to use the land only for residential purposes.

[3] Secondly, 'Amanaki seeks the cancellation of grants of lots made to the third defendant Taniela Vaka ('Taniela') and the fifth defendant Heimuli Likiafu ('Heimuli') following the subdivision of Viliami's tax allotment. He also seeks the eviction of Taniela and Heimuli from the land. 'Amanaki argues that the Minster failed to publish notice of the surrender of the lots by Viliami as required by section 54 of the Land Act thereby depriving him of his right to assert his claim to the land as heir. He also claims that the grants are invalid having been made after the Minister had assured him that he would put further dealings with the land on hold.

THE FACTS

[4] 'Amanaki does not now rely on all of the matters raised in his pleading and the primary arguments advanced are those I have identified above. I will set out the facts in so far as they are relevant to these issues. First, I will set out the facts as they relate to the disputed lease and sublease. I will then deal with the surrender of lots.

The disputed lease and sublease

[5] Viliami was the registered holder of a town allotment at Kolofo'ou called Leangiangi. It was 39.4p and contained in Deed of Grant 122/66. There were four houses built on Viliami's town allotment. It is not entirely clear when the houses were built and at whose cost but it does not appear to be disputed that the houses belonged to Viliami and when they were let out the rent was paid to Viliami during his lifetime.

[6] Viliami and his wife Pisila, who predeceased Viliami, had nine children; three boys and six girls. 'Amanaki was Viliami's eldest legitimate son and heir. Solomone was the second son. At various times all of the children moved to live overseas. Viliami lived overseas at times but when in Tonga he lived on his town allotment.

[7] Viliami granted Solomone a lease of his town allotment. The application for the lease was made on 1 May 2009. Viliami signed the application at the offices of the Ministry of Lands and certified that there was no impediment to prejudice the lease. Viliami also wrote to the Minister giving as his reason for the lease that he was aging and that Solomone was his only child living in Tonga and 'carrying out the responsibilities'. Cabinet gave its approval to the lease on 11 November 2009 and it was registered on 4 February 2011 under no. 7952. The lease is for 50 years at a rental of $100 per annum and for residential purposes. Notwithstanding

the lease Viliami continued to live on the land when in Tonga and he received the rents.

[8] Despite what is stated in Viliami's letter of 1 May 2009, Solomone was not living in Tonga but he said that he returned to Tonga from time to time to check on the allotment and the houses. Solomone's evidence was that Viliami's intention was that he would look after the houses for the family and for the use of his siblings when they visited Tonga. To a degree this is supported by the terms of a will that Viliami made in July 2015, in which he bequeathed each of his four houses to specific children and grandchildren including 'Amanaki and Solomone. However, Solomone also gave evidence that Viliami said that he felt guilty that he had not given Solomone an allotment of his own and that Viliami was afraid that 'Amanaki would chase his brothers and sisters off the land.

[9] Vila Pau'uvale lived with Viliami in 2015 and said that he told her that he had granted the lease at the insistence of Pisila and his eldest daughter Siu. 'Ana Ma'ufualu, who is the Minister's secretary, said that Viliami had told the Minister in around September 2015, that he was 'stressed' (or burdened) by Solomone to grant the lease. These statements are not in my view reliable evidence of Viliami's state of mind at the time the lease was granted. They are contradictory, made almost six years after the lease was granted and, as I shall shortly note, after Viliami and Solomone had argued. More relevant to Viliami's state of mind when the lease was granted are Viliami's letter of 1 May 2009 and that on 14 August 2009 Mr. Sione Uele, a Registry Officer, spoke to Viliami and he confirmed his wish to grant the lease. On the evidence before me I am satisfied that in granting the lease Viliami was not subject to any inappropriate influence or pressure from Solomone or anyone else.

[10] In around November 2013 Solomone agreed to sublease 14p of the allotment to Joshaiah intending that Joshaiah would build a house on the land. Cabinet gave its consent to the sublease on 31 January 2014. The sublease is to be for a term of 47 years from 4 February 2014 and also for residential purposes but has not yet been registered.

[11] According to 'Amanaki, in 2015 he learned of the lease and spoke with Viliami about it. Solomone said that 'Amanaki was aware of the lease earlier. Regardless, I am satisfied that 'Amanaki was not consulted about Viliami's intention to grant the lease by Viliami or the Ministry.

[12] 'Amanaki said that when he raised the issue of the lease Viliami claimed not to know about it and said he would cancel the lease. Viliami returned to Tonga

and shortly thereafter he had an argument with Solomone. There was conflicting evidence as to what caused the argument. Vila Pau'uvale said Solomone objected to Viliami hiring security guards to protect him following a robbery. Solomone said he objected to Viliami inviting a man and his son to live on the land. During the argument Solomone asserted that he had rights over the land under the lease. This may have been a further cause of upset for Viliami although Solomone believed that the argument was cleared up the next day.

[13] Viliami then met with the Minister wanting to cancel the lease. Following that meeting, 'Ana Ma'ufualu wrote a letter to the Minister for Viliami dated 27 July 2015, requesting the cancellation of the lease so that 'I am able to freely live in peace on my allotment until I die then the Heir to my land can do whatever he pleases'. Surprisingly Vila Pau'uvale also claimed to have written that letter for Viliami. She also said that Viliami later showed her a letter from the Ministry cancelling the lease. I do not accept her evidence on either matter. 'Ana Ma'ufualu was quite certain that she wrote the letter of 27 July 2015 and she confirmed that the letter was in her handwriting. It seems much more likely that Viliami would seek assistance in writing such a letter from someone at the Ministry than from someone who, at least on the evidence before me, had no experience in such matters. It is also clear, and I find, that the Minister did not cancel the lease.

[14] On 15 September 2015 'Amanaki met with the Minister. 'Ana Ma'ufualu attended the meeting and took the minutes but they are very brief and clearly are not a complete record of what was discussed. I am satisfied that at this meeting 'Amanaki expressed concern both about the lease and the surrender of lots in Viliami's tax allotment.

[15] In November or early December 2015 Viliami returned to New Zealand. He died there on 27 December 2015. 'Amanaki claimed Viliami's town and tax allotments which were granted to him on 3 March 2016. 'Amanaki has forced Solomone off the town allotment and he has been living there and collecting the rents.

[16] On 18 February 2016 the Ministry wrote to 'Amanaki advising him that the Minister had decided that there was no good reason to cancel the lease.

The tax allotment

[17] Viliami had a tax allotment called Honolulu at Nualei, Kolofo'ou. It fronted Taufa'ahau Road and was 8a 0r 1.9p in Deed of Grant 8/1. In 2000 Viliami

subdivided his tax allotment into 36 lots and he progressively made requests to the Minister to surrender lots in favour of nominated persons.

The letters of surrender

[18] Many letters of surrender have been produced into evidence but this action is concerned only with the surrenders of Lot 12 in favor of Sinamoni (but later granted to Taniela), Lot 13 in favour of Taniela, and Lots 23 and 24 in favour of Heimuli. I will not set out the full text of each surrender letter that is in issue. They all share common features in that they:

(a) Were written by ‘Amanaki;

(b) Are dated;

(c) Are addressed to the Minister of Lands;

(d) Contain a request to surrender a stated lot which is a reference to Viliami’s survey plan of the subdivision;

(e) State the name of a person for whom the lot is being surrendered;

(f) State expressly that ‘Amanaki consents to the surrender as heir or that he has joined in the application by signing the letter;

(g) Have been signed by Viliami; and

(h) Except in the case of the surrender letter for Lot 23 have been signed by ‘Amanaki.

[19] As an example I set out the text of the letter given to Taniela in respect of Lot 13 which was in the Tongan language but was translated as follows:

Minister of Lands

Nuku’alofa

Tonga

4.4.2012

I make this letter to you with a humble heart.

The purpose of this plea is in regards to my tax allotment Honolulu that is located in the District of Nualei where a scheme plan is in place, and I wish to surrender no. 13 so that it can become the lawful town allotment of Taniela Vaka.

I place my signature here together with my heir ‘Amanaki Kioa who also agrees to this, and I hope this concern being made falls well with you.

Respectfully

(signed)

Viliami Kioa

(signed)

‘Amanaki Kioa (Heir).

Taniela and Sinamoni

[20] Taniela was approached by Viliami in New Zealand in 2012 and asked if he wanted to buy land for NZD$15,000. Viliami needed money for medical treatment. In the first week of April 2012 Taniela and his wife met Viliami, Pisila and ‘Amanaki and gave Viliami NZD$10,000. Taniela was subsequently given a letter of surrender addressed to the Minister and signed by Viliami and ‘Amanaki in respect of Lot 13. This was submitted to the Minister. A balance of NZD$5,000 was paid to Viliami on about 30 July 2012. Taniela began to build his house on the land in 2012.

[21] Sinamoni is Taniela’s son. On 20 December 2012 Viliami provided him with a surrender letter in respect of Lot 12. Taniela paid NZD$15,000 to Viliami for the surrender letter.

Heimuli

[22] Heimuli learned that Viliami was subdividing his land and met with him on 31 July 2012. He gave Viliami $10,000 in return for a letter of surrender in relation to Lot 24. On 16 August 2012 Heimuli gave Viliami a further $10,000 for a letter of surrender in relation to Lot 24 also.

‘Amanaki’s consent

[23] ‘Amanaki says he did not consent to the surrenders in issue. He said that he only consented to surrender Lots 31 and 34 and no others. The starting point must be that all of the letters of surrender that are presently in issue were written by ‘Amanaki, indicate his agreement to the surrenders and, except in one case, have been signed by him. One can *prima facie* infer that ‘Amanaki did indeed consent to the surrenders in those circumstances.

[24] However, whilst 'Amanaki acknowledged that he did write letters of surrender for Viliami he said that the number of the lots and the names of the person in whose favour the lots were to be surrendered were left blank. He claims that he was to agree to each surrender before the letters were completed and signed. 'Amanaki also says that Viliami was to leave the allotments on Taufa'ahau Road free for him and his children. In re-examination 'Amanaki alleged that Viliami had forged his signatures and that he did not have a plan of the subdivision to know the position of the lots.

[25] 'Amanaki's evidence was not only implausible but plainly incorrect. As an example of many contradictions his evidence contained, 'Amanaki alleged that Viliami forged his signature on a surrender letter in respect of Lot 34, yet Lot 34 was one of only two lots that he acknowledged he had agreed to surrender. I will give just two other examples which relate directly to the surrenders in issue in this action to further illustrate why I do not accept 'Amanaki's evidence.

[26] The first concerns the surrender letter of 4 April 2012 given to Taniela in respect of Lot 13. 'Amanaki wrote the letter and said that he entered Taniela's name and signed the letter but that he did not insert the lot number and was surprised that the letter was for Lot 13 because it was intended for Lot 10. In response to a question from Mr. Tu'utafaiva 'Amanaki said he had thought the surrender was for Lot 10 because there was a building on that lot. A number of important points emerge. First, contrary to his evidence 'Amanaki inserted the lot number in his own handwriting and it appears to me that he also inserted Taniela's name. His evidence that he recognised Viliami's handwriting and that Viliami had written the lot number when he was not present was untrue. 'Amanaki admitted that he had inserted the lot number in response to questions from me and by way of explanation said there were 'a lot of letters that were given to me to write and also some numbers were left blank' suggesting that his recall could not be relied upon. Secondly, the surrender letter was dated and prepared in respect of a specific transaction and the details of the transaction were known to 'Amanaki. Thirdly, the process followed was not the one that 'Amanaki said he had agreed with Viliami. It was not a case of 'Amanaki completing a surrender letter 'in blank' so that it might be used, subject to his later agreement, as and when Viliami found someone who wanted a lot. Fourthly, there was clearly communication between the two men in relation to Viliami's intentions and dealings with his land.

[27] The second example concerns the surrender letter in respect of Lot 12 in favour of Sinamoni. 'Amanaki said that he did not insert the lot number or Sinamoni's name and that he signed the letter before those details were entered (although he also said he could not recall when he signed the letter). In this case

also 'Amanaki's evidence that he did not insert the lot number is incorrect. The word/numeral 'fika 12' are plainly in his handwriting. It also appears to me that Sinamoni's name is inserted in 'Amanaki's handwriting. Once again the process followed was not the one 'Amanaki said that Viliami had agreed to.

[28] I found 'Amanaki's assertion that he did not know what lots were being surrendered because he had no plan of the subdivision to be obtuse. If he was concerned to know exactly where any lot was in the subdivision he only had to ask for the plan and if it was not provided he could then choose not to prepare or sign the surrender letters.

[29] There was no evidence that 'Amanaki ever refused his consent to any surrender and it was established that regardless of what reservations he may have privately harbored 'Amanaki agreed to the surrenders when Viliami asked him to. He said 'I told [*Viliami*] that I would agree to him giving out the land as it was his in any event' and 'I felt obligated to do as [*Viliami*] wished' and 'I felt sorry for my father that's why I signed' and 'I did not want to upset him because of his age nor did I want him to feel as if I was obstructing his wishes for land that was currently his'. When asked by Mr. Tu'utafaiva whether he had lied when he told the Minister in a meeting in September 2015 that he had signed only two surrender letters 'Amanaki said 'I only did that because of what my father had wanted me to do'. In answer to a proposition put to him by Mr. Kefu that he wrote and signed the surrender letters intending to surrender the lots 'Amanaki replied 'Yes because I wanted to obey my father'.

[30] The evidence satisfied me that 'Amanaki knowingly consented to the surrender of Lots 12, 13, 23 and 24. Except in the case of Lot 23 all of the letters of surrender were signed by 'Amanaki. As 'Amanaki wrote that letter including his name at the bottom of the page as heir and, in my judgment, completed all the details contained in the letter his failure to add his signature does not change the fact of his consent.

June 2013 correspondence

[31] In June 2013 there was correspondence from Viliami and 'Amanaki with the Minister and others expressing concern that Taniela was building on the land. There was little evidence about the background to the correspondence and its content was confusing. In a letter to the Minister of 14 June 2013 Viliami wrote that he had changed his agreement with Taniela (of which there was no evidence) and requested that there be no more building by Taniela or anyone else on any of the Lots 1-36. This was notwithstanding that he had given letters of surrender of

many of those lots. Nothing came of this correspondence and Viliami shortly resumed issuing surrender letters until April 2015.

Cabinet approval and advertising the surrenders

[32] Cabinet's approval to the surrender of Lots 12, 13, 23 and 24 along with Lots 1 and 25 and an area of 1a 0r 27.3p for a public road was given by decision no. 903 on 7 November 2014.

[33] Notice of the surrender of the land was published only in the Taimi o Tonga newspaper and then only once on 17 March 2015. In this regard there was substantial non-compliance with section 54 of the Land Act which requires the notice to be published in three issues of a weekly newspaper and in the Tonga Government Gazette. The notice also contained errors. It was dated 9 March 2014 (pre-dating Cabinet's approval) and the 12 month period in respect of which claims were to be made was stated to end on 11 March 2015, which was six days before publication of the notice.

Events in September 2015

[34] 'Amanaki met with the Minister on 15 September 2015. 'Ana Ma'ufualu took the minutes of the meeting. The minutes record that 'Amanaki told the Minister that he had written in 2012 to express his disagreement with the surrender of land by Viliami and that he had signed only two letters of surrender. There was no evidence of such correspondence in 2012 and, as noted above, 'Amanaki consented to the surrender of many lots. During this meeting 'Amanaki also told the Minister that 'there is forgery and unlawful work being done here'. It is sufficient for present purposes if I say that this allegation is entirely unsubstantiated in any respect which might have a bearing on this action. The minutes record that the Minister advised 'Amanaki that all works would be put on hold.

[35] Following the meeting 'Amanaki wrote to the Minister on 21 September 2015 with a list of lots that he claimed were surrendered without his knowledge which included Lots 12, 13, 23 and 24. As I have noted 'Amanaki did consent to the surrender of each of those lots contrary to his advice to the Minister at the meeting and in his letter.

Applications for grants

[36] On 6 January 2016 Sinamoni agreed that Taniela could apply for both Lot 12 and 13 as his town allotment. On 21 March 2016 Taniela applied to be granted

both lots and they were granted to him. The date that the grant was made is not clear but there is a Savingram signed by the Minister dated 2 March 2016 which confirms the grant. Taniela has not been issued with a Deed of Grant.

[37] On 18 February 2016 Heimuli applied for the grant of Lots 23 and 24 as his town allotment. They were granted to him on 23 February 2016 but he too has yet to receive a Deed of Grant. Heimuli has built a house on the land but intends to build another house when he has received his Deed of Grant.

[38] As noted earlier, Viliami died in New Zealand on 27 December 2015. On 25 February 2016 'Amanaki applied for Viliami's town and tax allotments as heir. On the same day he wrote to the Minister again denying that he had signed letters of surrender and referring to his letter of 18 September 2015 which he described as a 'letter of cancellation of all allotments allocated but not yet registered'. Viliami's town and tax allotment were granted to 'Amanaki on 3 March 2016 but he inherited only 2a 2r 36p of the original 8a 1r 1.9p of Viliami's tax allotment.

THE SUBMISSIONS

The lease and the town allotment

[39] Mrs. Tupou argued that Viliami expressed a clear in intention to cancel the lease and advances the bold proposition 'Surely, if a landholder is free to lease his land without limitation, he should also be free to cancel should he choose'.

[40] Mrs. Tupou then argued that the Minister had a duty to alert 'Amanaki to the application for the lease and to make reasonable enquires as to the facts of the case so as to ensure that the grant of the lease was appropriate, fair and reasonable. Mrs. Tupou submitted that the grant of the lease (and sublease) was not appropriate, fair or reasonable due to Viliami's age, the prejudice to 'Amanaki's interests as heir and because Solomone (and also Joshaiah in the case of the sublease) were living overseas. Mrs. Tupou contends that if leases can be granted without an heir's consent the laws of succession are undermined. She said:

> It is incomprehensible to envisage a norm for heirs to be deprived of their hereditary rights and be subjected to having to apply to lease an allotment on which to reside until a lease expired (which in this case would probably not be in his lifetime) because his hereditary rights have been leased on a long-term basis to another.

[41] Finally, Mrs. Tupou argues that the lease and sublease should be cancelled because of the breach of a covenant in the lease that the land would be used only for residential purposes. She submitted that the evidence established that neither Solomone nor Joshaiah had lived on the land and that it is being rented out commercially.

[42] In his submissions Mr. Tu'utafaiva argued that the Minister owed no duty to 'Amanaki as it is incompatible with the provisions of the Land Act. He submits that an heir cannot by refusing his consent deprive a landholder from exercising his right to grant a lease. He made the point that if the heir has a right to be consulted before a lease is granted then so would all others in the line of succession and that this cannot ever have been the Legislative Assembly's intention. He also argued that the submission that 'Amanaki has been deprived of his hereditary rights is not correct. He has inherited the land upon Viliami's death in accordance with the Land Act and with the benefit of the lease. Mr. Tu'utafaiva submits that there has not been any breach of the lease as the land is being used only for residential purposes. Furthermore, Joshaiah cannot be in breach of his sublease when it has not yet been registered and no interest under the sublease has passed to him.

[43] Mr. Kefu argued that the grant of the lease was lawful because the requirements of the Land Act were complied with and the Minister had no obligation to inform or consider the interests of 'Amanaki before granting the lease. He also submits that 'Amanaki has not been deprived of the land, rather he has inherited the land and is entitled to the benefit of the lease.

The surrenders and the tax allotment

[44] Mrs. Tupou submitted that the Minister was required to advertise the surrenders in accordance with section 54 of the Land Act and failed to do so. She argued that the effect of the Minister's failure is that the grants to Taniela and Heimuli are null and void and ineffective against 'Amanaki. She also argues that the fact that 'Amanaki signed three of the four surrender letters does not change anything as a landholder has no right to place conditions upon a surrender of land and so even if 'Amanaki had claimed the land and then chosen to allocate it to persons other than Taniela and Heimuli they would have no rights against him.

[45] Mrs. Tupou' second argument is that the grants to Taniela and Heimuli should be set aside as 'Amanaki had a reasonable expectation following his meeting with the Minister that dealings with Viliami's land would be put on hold.

[46] Mr. Tu'utafaiva argued that 'Amanaki is bound by the letters of surrender that he prepared and that he cannot rely on non-compliance with section 54 nor could he have any reasonable expectation that dealings were on hold.

[47] Likewise, Mr. Kefu argued that 'Amanaki cannot rely on non-compliance with section 54 when he was fully aware of the surrenders and wrote the letters of surrender himself. 'Amanaki had waived his rights both in relation to section 54 and to claim the land. Mr. Kefu also submitted that 'Amanaki cannot complain that the Minister made grants to Taniela and Heimuli after putting dealings with Viliami's land on hold as the allotments had already been surrendered and had reverted to the Crown and they were available for grant.

DISCUSSION

The lease

Viliami's cancellation

[48] The submission that if Viliami was free to lease his land he must also have been free to cancel the lease is unorthodox and I do not accept it. A registered holder's right to grant a lease of his town or tax allotment is conferred by statute (section 56 of the Land Act). He cannot unilaterally cancel a registered lease. A registered lease can only be cancelled in a manner contemplated by the Land Act or by Order of the Court.

The Minister's duty

[49] There is nothing in the Land Act which expressly required the Minister to seek 'Amanaki's consent to the lease. There is no basis for argument that such an obligation can be implied as a matter of statutory construction either and Mrs. Tupou did not attempt to advance one. To the contrary Mrs. Tupou acknowledged in her submissions 'It is accepted that Viliami Kioa was free to lease his town allotment and did not require the consent of ['*Amanaki*]'.

[50] Mrs. Tupou contends however that the Minister was required to both alert 'Amanaki to the fact of the lease application and to ensure that the lease was appropriate, reasonable and fair. She did not refer me to any authority in support of her submission but I understand her to be relying on the case law that has held that the Minister must take reasonable steps to acquaint himself with relevant information before making grants. The leading case on the Ministerial obligations is *Tafa v Viau* [2006] Tonga LR 287 (CA) which was recently discussed and followed in *Naulu v Tupou* [2016] Tonga LR 163.

[51] In *Tafa* the Court noted that the Land Act repeatedly made reference to whether a piece of land was 'available' to be granted as an allotment and the scheme of the Act as a whole was to make availability an essential requirement before a grant could be made. The Court went on to hold that the Minister had a duty to take reasonable steps to ascertain whether land that was subject to an application for grant was subject to some other claim that might be an impediment to the grant or make it unavailable. This requirement arose because of two specific aspects of the Minister's function when making grants namely (at [12]):

> In the first place, he cannot properly sign a declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient inquiry. In the second place, the administrative decision to make the particular grant cannot properly be made in the absence of the same enquiry in a case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved.

[52] In *Tafa* it was found that the Minister did not take reasonable steps to acquaint himself with the relevant information about the land as a most material factor, the occupation of the land and the building of a house on the land, was not taken into account in determining whether the land was available. In *Naulu* it was held the Minister failed to take into account when making a grant the relevant factor that crops were being grown on the land.

[53] *Tafa* and the cases that have followed and applied it have been concerned with the exercise by the Minister of his administrative power to make grants. It is because the Minister is the repository of a discretionary administrative power to make grants that he is obliged to adopt a reasonable and fair procedure (*Kioa v West* (1985) 159 CLR 550, 627 referred to in *Tafa* at 294).

[54] The purpose of the Minister's enquires before making a grant is to determine if there is some claim which might be an impediment to the grant or make the land unavailable. In the usual case the 'claim' might be a competing application for the land or occupation/use of the land. The interest of an heir is not such a claim. Until the landholder dies or surrenders his land the heir has no right to apply for the land or occupy/use the land without the holder's consent nor is he able to impose conditions on the holder's dealings with the land. It is significant that just as the Land Act does not require an heir's consent to the grant a lease there is no requirement for his consent should the registered holder wish to grant a mortgage over his allotments.

[55] Furthermore, *Tafa* is distinguishable as the two specific aspects of the Minister's function which combined to require the Minister to make reasonable enquires when making a grant of a tax or town allotment are not present in this case. In the first place it is not the Minister but the registered holder that is required to provide a declaration that there is no impediment to a lease granted under section 56. Section 56 provides that the 'registered holder of a town or tax allotment may grant a lease over the whole or part of his town allotment'. Under section 24 the form of application for a lease is as prescribed in Schedule IX of the Act. The prescribed form requires the grantor to declare that there is no impediment to prejudice the lease. In the second place, it is not the Minister who exercises the administrative decision to grant the lease. It is the registered holder that grants a lease under section 56. Broadly in such a case the Minister's duties are to receive and process the application, to obtain Cabinet's consent and ensure compliance with the other conditions in section 56, to survey the land that is to be subject to the lease and to prepare and register the lease.

[56] The short response to Mrs. Tupou's primary submission, that it is 'incomprehensible' that an heir can be deprived of his hereditary rights because the deceased holder has granted a long-term lease, is that the heir is not deprived of his rights at all. First, the Land Act protects the interests of successors by limiting the term for which both tax and town allotments can be leased (see section 56(iv) and 60 of the Land Act). This reflects a balance between the future interest of heirs and a registered holder's right to make economic use of the land. Secondly, the heir's rights are defined by the Land Act. The heir has no absolute right to succeed to a tax or town allotment free of any encumbrance. Section 58 provides that should a registered holder who has granted a lease die before the expiry of the lease the heir shall be bound by the lease. There is nothing incomprehensible about this.

[57] It follows that there was no requirement for the Minister to alert 'Amanaki to the application for the lease or consider his interests as heir as he now contends.

Breach of covenant

[58] Mrs. Tupou argues that the lease should be cancelled because neither Solomone nor Joshaiah have lived on the land and it has been rented out commercially. She relies upon the term of the lease which provides:

> and furthermore, the Lessee covenants...that in respect of the land hereunder leased, he will not .....(b) use or permit any persons to use it for any purpose other than that upon which application and approval have hitherto been made.

> If any of the above covenants is not complied with by the lessee, his heir or representative, then Cabinet may at its discretion terminate this lease.

[59] I do not accept the argument. First, the power to cancel the lease is discretionary and is vested in Cabinet not the Court. No application has been made to Cabinet to cancel the lease. Secondly, Amanaki has failed to prove any breach of covenant. It does not follow that Solomone or Joshaiah must live on the land for it to be used for residential purposes. The land is and has always been used for residential purposes. The houses on the land are domestic dwellings and used as such. That residential use does not become commercial use simply because rent is charged. Thirdly, Amanaki cannot seek to cancel the lease for breach when he has chased Solomone from the land in fundamental breach of his obligations as lessor.

The surrenders

[60] It is the case that the Minister failed to comply with the requirements of section 54 when advertising the surrender of the lots. Mrs. Tupou argues that as a consequence the surrenders are null and void. She referred me to *Fatafehi anor v Kuea* (Unreported Land Court, LA 30 of 2008, 10 January 2011, Scott CJ) and quoted the following from paragraph [35] of the judgment:

> In the Court's view the precise terms of Section 54 must be strictly complied with. Defective compliance will not be effective against a person having a right to assert a claim to be the legal successor to the surrendered land.

[61] That statement of principle is undoubtedly correct but the important words are 'a person having a right to assert a claim to be the legal successor'. Relevantly in the present context the Chief Justice went on to find that the plaintiff (who was the heir) was not such a person as he had renounced in writing his claim to the land in favour of his brother. The words immediately following those quoted to me by Mrs. Tupou were:

> In this case, however, the court has determined that the First Plaintiff by surrendering his right to the land in 1995 surrendered his right subsequently to claim the land. Accordingly the defects in the Section 54 procedure cannot avail him.

[62] It is not uncommon for landholders to surrender land with the intention that it be granted by the Minister to a person they nominate. Often they will, as in this case, require substantial payments to be made to them in return for providing a letter of surrender and nomination. Such nominations of course do not bind the

Minister (*Sakalia v Vailea & Ors* [1995] Tonga LR 130, 135) who is required to give notice of the pending reversion of a surrendered allotment thereby giving an opportunity to claimants to the legal succession to claim the land which, if upheld, prevents reversion occurring (*Tu'akoi v Tu'akoi* [2016] TOLC 5 at [26] and [27] referred to in *Nuku v Luani & ors* (Unreported, Court of Appeal, 6 September 2017 AC 6 & 7 of 2017). It is for that reason that surrender letters are often accompanied by the heir's written consent to the surrender. As *Fatafehi* demonstrates a claimant to the legal succession may renounce their rights to claim the land.

[63] By the letters of surrender 'Amanaki unconditionally renounced his rights to claim the lots in issue following their surrender. Taniela and Heimuli made substantial payments in return for the surrender letters. 'Amanaki was aware that payments were being made and that the letters of surrender were to be submitted to the Minister. Both Taniela and Heimuli relied upon the surrender letters by submitting them to the Minister, applying for grants and building houses on the land. Whether one considers 'Amanaki has waived his right to claim the land or is estopped from doing so does not matter. He was not a person having a right to assert a claim to those lots once they had been surrendered and, as was the case of the plaintiff in *Fatafehi*, the defects in the section 54 procedure do not avail him.

The Minister's assurance

[64] 'Amanaki cannot rely either on the Minister's statement in September 2015 that everything would be put on hold at least in so far as the lots in issue are concerned. The surrender of the four lots in issue had already occurred. 'Amanaki had renounced his claim to those lots and has no basis to complain about the grants to Taniela and Heimuli.

Joshaiah and Sinamoni

[65] For completeness I should record the position in respect of Joshaiah and Sinamoni. 'Amanaki has failed in his challenge to Solomone's lease and he has no independent basis to challenge Joshaiah's sublease. In the case of Sinamoni, he gave up his claim to Lot 12 in favour of Taniela and has no interest in this action and 'Amanaki has no claim against him either.

RESULT

[66] For the reasons set out above Amanaki's claims are dismissed in their entirety.

[67] The defendants are entitled to their costs to be fixed by the Registrar if not agreed.

ANZ Bank v Mclean and Wallace

Land Court, Nuku'alofa
President Paulsen
LA 38/2017

27 November 2017

Practice and Procedure — costs of action — caveat lodged to stop mortgagee exercising power of sale — no basis for caveat — indemnity costs

Costs — indemnity costs

Creditors lodged a caveat to prevent dealings with land, including the bank exercising its power of sale under a mortgage. The solicitors for the bank demanded the withdrawal of the caveat and after refusal on acceptable terms the bank brought proceedings asking the court to order the removal of the caveat. The caveat was withdrawn and the only issue was costs of the bank.

Held

1. There was no basis for a caveat and the caveators must pay the costs of the bank in seeking to remove it;
2. Indemnity costs were refused in the circumstances;
3. A mere contractual right, such as the right to receive payment of a debt, does not create a caveatable interest;
4. Law practitioners should not lodge a caveat for an improper purpose or where they have not made reasonable enquires and been satisfied that a proper basis for lodging the caveat does in fact exist.

Cases considered

Fund Management Limited anor v 'Uta'atu [2011] Tonga LR 80
Fonua v MBf Bank Ltd [1999] Tonga LR 4

Rules considered

The Rules of Professional Conduct for Law Practitioners

RULING

[1] This ruling concerns an opposed application for costs by the applicant, Australian and New Zealand Banking Group Limited (ANZ), against the respondents, Graeme McLean Wallace and Valerie Isobel Wallace (the Wallaces).

[2] The ANZ has a registered mortgage of Lease no. 6314 held by Lucy Ana Ilaiu. On 8 September 20 the Wallaces lodged a caveat against the lease. The caveat alleges, rather cryptically, that the Wallaces were:

> claiming as lender of funds borrowed by LUCY ANNAILAIU against the guarantor of that loan, H.R.H PRINCESS SALOTE MAFILE'O PILOLEVU TUITA (the said borrower having defaulted) the funds lent, interests and costs and fees in respect thereof from the said Guarantor, and until payment of the same be made to us, having a lawful interest in the lease no. 6314 ...

[3] ANZ is intending to exercise its power of sale as mortgagee of the lease. When alerted to the fact that the caveat was lodged its lawyer, Mr. Stephenson, entered into correspondence with the Wallaces' lawyer, Mr. Niu, pointing out that it did not appear that the Wallaces had a caveatable interest and requesting that the caveat be withdrawn. He also requested a copy of the documents evidencing the alleged loan and guarantee referred to in the caveat to consider whether that might have any impact on the ANZ's position.

[4] The Wallaces refused to disclose the documents and in a letter of 14 November 2017 Mr. Niu advised that the Wallaces would withdraw the caveat only subject to conditions which were as follows:

> I have discussed the matter with my clients and advise that they will agree to withdraw the caveat registered over Lease 6314 (Halalaeva, Kolofo'ou) on the following terms:
>
> ANZ Bank to sell the property as first mortgagee to a third party bona fide purchaser:
>
> I am to receive and approve the terms of any sale and purchase agreement prior to acceptance. I am to receive details of the amount owing under the mortgage together with the daily penalty rates:
>
> Prior to settlement of any sale I am to receive and approve all settlement statements: and

> You confirm that following the repayment of the monies owing under the mortgage to ANZ Bank and deduction of the usual costs associated with the sale of the property, any balance of the sale proceeds be disbursed to my clients.
>
> Any approval required as above will not be unreasonably withheld.

[5] In a lengthy email of 17 November 2017 Mr. Stephenson responded to Mr. Niu's letter setting out reasons why the conditions that the Wallaces wished to impose on the Bank were unreasonable. He asked them to reconsider their position to avoid legal action being taken to remove the caveat. He also put Mr. Niu (and thus the Wallaces) on notice that the Bank would be seeking costs on an indemnity basis if forced to issue proceedings.

[6] The caveat was not withdrawn (at that stage at least) and on 20 November 2017 the ANZ filed this action for an order under section 137(5) of the Land Act that the Wallaces show cause why the caveat should not be withdrawn.

[7] I issued a summons that the Wallaces appear before the Court on 28 November 2018 and show cause. When the matter was called before me today Mr. Niu advised me that the caveat had been withdrawn last Friday (24 November 2017) and that the only issue outstanding was whether the ANZ was entitled to costs.

The position of the parties.

[8] The ANZ's position is that the Wallaces never had any interest in the lease which would support a caveat and that they did not withdraw the caveat notwithstanding that they were made aware that it could not be sustained. As a consequence the ANZ was forced to issue this proceeding to remove the caveat and is entitled to its costs.

[9] As far as the Wallaces' conditional offer to withdraw the caveat is concerned the ANZ argues that the Wallaces were not entitled to impose any conditions upon the ANZ and that the ANZ was never able to agree to those conditions in any event, not least because in some respects they would have put it in breach of statutory confidentially requirements under the Financial Institutions Act.

[10] The ANZ submits that the circumstances of this case justify the imposition of indemnity costs against the Wallaces which will send a message that the Court will not condone the improper use of the caveat procedures.

[11] For the Wallaces, Mr. Niu argues that costs should not be awarded against the Wallaces. First, he contends that it was quite proper for the Wallaces to lodge the caveat as all that section 137 of the Land Act requires is that they be persons 'claiming to be interested' in the lease. He referred me to section 110 of the Land Act which provides that a mortgage deed is effective as between the parties to it but it does not, Mr. Niu argues, prevent a creditor claiming to be interested in leasehold land from using the caveat procedures under the Act to secure payment of what is owed to him.

[12] Mr. Niu also argued that the conditions that the Wallaces sought to impose upon the ANZ for providing a withdrawal of the caveat were reasonable. He submitted that all they were intended to ensure was that the ANZ took reasonable steps to obtain the best price for the lease and that the Wallaces were paid what was owed to them. He also submitted that the caveat would have been withdrawn by the Wallaces in time in any event and there was no need for the ANZ to issue proceedings.

Discussion

[13] I do not accept any of the submissions advanced by Mr. Niu. The starting point must be that the caveat was withdrawn by the Wallaces in response to ANZ's application. Contrary to what Mr. Niu has said about the matter, the Wallaces did not have a caveatable interest in the lease. On the information before the Court the Wallaces are owed a debt by Ms. Ilaiu but that alone gave them no right to lodge a caveat. A mere contractual right, such as the right to receive payment of a debt, does not create a caveatable interest (Fund Management Limited anor v 'Uta'atu [2011] Tonga LR 80 at [11] and [12]).

[14] I reject Mr. Niu's submission that the Wallaces can avoid a costs award because they were entitled to lodge the caveat as persons 'claiming to be interested' in the lease. If Mr. Niu was correct in his submission any person who brings or defends proceedings 'claiming' to have a good claim or defence would be immune from costs regardless of how unreasonable, unreasoned or misguided their view. That is clearly not the law. Secondly, Mr. Niu's submission presumes that the Wallaces had a reasonable basis for lodging the caveat. On the evidence· before me I cannot see that they (or the lawyers who were advising them) could possibly have thought that any such basis existed. What is absent in the correspondence that

passed between Mr. Stephenson and Mr. Niu is any reasonable justification for the lodging of the caveat on legal grounds. In addition, the Wallaces refused to disclose the loan agreement and guarantee that they relied upon, which I cannot believe they would have done had they genuinely believed that those documents justified the caveat. Thirdly, even if the Wallaces had initially considered that they had an interest in the lease justifying the lodging of a caveat they could not have reasonably continued in that belief after Mr. Stephenson so carefully corresponded with Mr. Niu setting out in detail why they had no such interest. This proceeding was a direct response to the Wallaces' failure to withdraw the caveat despite being given plenty of opportunity to review their position.

[15] I do not agree either that the Wallaces would have withdrawn the caveat in time. Nothing in the correspondence suggests to me that they would do so unless the ANZ agreed to conditions that it could not be expected to accept.

[16] It is not open to persons to use legal processes, such as the procedure for lodging caveats, unreasonably or for improper purposes. In other jurisdictions there are statutory provisions rendering a person who lodges a caveat without reasonable cause liable in damages for losses suffered as a result. I do not rule out the possibility that such an award could be made under section 137(5).

[17] Law practitioners must realise that they cannot be party to the improper use of legal processes either. A law practitioner should not lodge a caveat for an improper purpose or where he or she has not made reasonable enquires and satisfied him or herself that a proper basis for lodging the caveat does in fact exist. If authority is needed for this proposition it is to be found in Rule 6.04 of The Rules of Professional Conduct for Law Practitioners which provides:

> A practitioner shall make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another persons' reputation, interests or occupation.

[18] A law practitioner who fails to observe his or her obligations in this regard may find themselves the subject of a complaint or even an application for costs or damages.

[19] In relation to Mr. Niu1s submission that the Wallaces had agreed to withdraw the caveat subject to reasonable conditions, in my view the conditions were not ones that the Wallaces were entitled to impose nor were they reasonable. The Wallaces had no legal interest in the lease or in the proceeds of sale of the

lease. Furthermore, the ANZ could never have been expected to agree to conditions which would render the exercise of its power of sale subject to the agreement of the Wallaces and even if only potentially, put it in breach of its statutory obligations.

[20] In my view the only real issue that arises in this case is whether the ANZ should be awarded indemnity costs. I consider that there is clearly an arguable case for indemnity costs (see for instance Fonua v MBf Bank Ltd [1999] Tonga LR 4). On refection and by a close margin I am not minded to make such an award because whilst the proceeding was justifiably filed the Wallaces did withdraw the caveat promptly once that had occurred. I also believe that the obligations that I have referred to in paragraphs [16]-[18] above are not widely understood. In future the Court cannot be expected to take such a lenient approach.

Result

[21] As the caveat has been withdrawn there is no requirement for me to make any orders except in relation to costs.

[22] The ANZ is awarded its reasonable costs on the usual basis which are to be fixed by the Registrar if not agreed.

Tauheluhelu v ‘Aloua

Supreme Court, Nuku’alofa
Paulsen LCJ
AM 6/2017

5 December 2017

Appeal — when Judge on appeal is able to decide facts

The parties each had herds of cattle in close proximity. The Defendant shot a bull for a funeral and the plaintiff claims it was his bull and he sued for the cost of the bull. The question was whether the Magistrate was correct on the evidence in finding that the plaintiff had proved that the bull belonged to him.

Held

1. It is the duty of the Court on appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.
2. The Plaintiff failed to prove the bull was his and his case fails and the appeal is allowed.

Case considered

Mersey Docks & Harbour Board v Procter [1923] A.C. 2531

R U L I N G

The issue

[1] This is a civil appeal from a decision of the Magistrate at Vava’u. The Magistrate awarded the respondent damages against the appellant of $1,500 (along with legal and court fees) as a result of the destruction of a bull on the instructions of the appellant. The principal issue in dispute between the parties was whether the bull was owned by the respondent (who was the plaintiff in the action) or the appellant (who was the defendant). The Magistrate found that the respondent had satisfied the onus upon him to establish on the balance of probabilities that he was the owner of the bull. It is from that finding that the appellant now appeals.

The approach on appeal

[2] There is a general right of appeal from a judgment of the Magistrate's Court in both civil and criminal matters under section 74(1) Magistrates Courts Act.

[3] The appellant challenges the Magistrate's finding of fact as to the respondent's ownership of the bull. I caution myself that an appellate Court should be slow to differ from a finding of fact which was made by the judge at first instance who had the opportunity to see and hear the witnesses. This is particularly so when the finding of fact turned solely on the credibility of the witnesses. However, when there is no real question of the credibility or reliability of the witnesses or in cases where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position as the judge of first instance to evaluate the evidence.

[4] In Benmax v Austin Motor Co Ltd [1955] 1All ER 326, 327 Viscount Simonds cited with approval what Viscount Cave L.C. had said in Mersey Docks & Harbour Board v Procter [1923] A.C. 2531 258:

> The procedure on appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.

[5] In Riekmann v Thierry (1896) 14 R.P.C. 105 Lord Halsbury L.C. said at 116:

> Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision.

The dispute

[6] The events that gave rise to the action before the Magistrate can be stated briefly. Both the appellant and the respondent own herds of cattle (including bulls).

The herds are kept on properties that are close to each other. In around October 2016 the appellant asked one Nani Falekakala to shoot some cattle including the bull. The bull was required for a funeral. The bull was with the appellant's herd on land belonging to a man called Siamu which is where he took them. After being destroyed the bull was removed. The respondent was overseas at the time but his son, who did not give evidence, contacted him and told him that the appellant had shot his bull. The respondent returned to Tonga and made a complaint to the Police and brought this claim for $1,500 which was said to be the value of the bull.

The Magistrate's ruling

[7] The Magistrate's ruling is in three parts. In the first part he summarises the evidence. In the second part he states his findings. In the third part he gives his ruling.

[8] When I consider the Magistrate's summary of the evidence (part 1 of the judgment) I am struck by three matters. First, the Magistrate has failed to mention a good deal of the evidence; particularly evidence given by the appellant and his witness. The appellant's evidence has been summarised in two brief lines which does not do it justice. The evidence of the appellant's son fares little better and is treated perfunctorily. Secondly, there is no analysis of the evidence with regard to the weight or value that the Magistrate intended to place upon it. To illustrate the point, a good deal of the respondent's case was based on hearsay evidence but there is no acknowledgment of this or that it might have a bearing upon the weight to be attached to the evidence. Thirdly, the Magistrate has not mentioned a number of important matters which bear directly upon the question of the disputed ownership of the bull (of which I will say more).

[9] Turning to the Magistrate's findings (part 2), he appears to have correctly directed himself that the onus of proof was upon the respondent to establish his ownership of the bull to the civil standard of on the balance of probabilities. He then goes on to find that the respondent had satisfied that onus because he had called four witnesses who stated that the bull belonged to him whereas 'it is only the defendant and his son who states that the bull is theirs'. In this the Magistrate fell into error.

[10] The probative value of evidence does not necessarily turn upon the number of witnesses that a party is able to call. A fact in issue is not proven because a plaintiff calls four witnesses to assert it and the defence only two witnesses to deny it. Certainly a judge is entitled to take into account the fact that a number of witnesses all testify to the existence of some fact in issue but that is only

if he has reviewed the evidence, evaluated it and determined that the evidence of those witnesses is reliable. In this instance the Magistrate clearly reached a decision based on the weight of numbers. That is not a proper approach.

[11] Having concluded that the bull belonged to the respondent 1 in part 3 of his judgment the Magistrate entered judgment for the respondent for the value of the bull (which value does not appear to have been disputed).

[12] It is clear that the Magistrate took a wrong approach for the reason I have stated above. That does not necessarily mean of course that he reached the wrong result. If I had been of the view that on the weight of the evidence the matter was finely balanced I might not have been inclined to interfere but I am not of that view. On my review of the evidence I am satisfied that the Magistrate could only have ever reasonably concluded that the respondent had failed to prove on the balance of probabilities that the bull was owned by him. My reasons are the following.

[13] First, when one analyses the evidence of the respondent’s four witnesses there is little (and indeed insufficient) probative evidence of the respondent’s ownership of the bull. The respondent’s evidence could not take matters very far as he was not present when the bull was shot. The shooting was reported to him by his son and he could not know which animal was destroyed. There was a dispute as to which bull was shot with the respondent (and some of his witnesses) saying the bull had small horns and the appellant saying it did not. The respondent did say that his bull had gone missing but he also noted that the bull in question had been shot in the area where the appellant kept his bulls and that a lot of bulls had gone missing.

[14] The second witness was the respondent’s nephew, Pesa Latu. He had moved the respondent’s bulls and said that the bull had been born in 2013 and that he saw it shot and that it was the respondent’s bull. This was really the high watermark of the respondent’s case but the weight that one can attach to Pesa Latu’s evidence is much reduced because he also said that the bull was with the appellant’s bulls and he did not object to the shooting of the bull. Pesa Latu said he did not say anything because Nani Falekakala and the appellant had moved to a different area to shoot the bull but this is not an adequate explanation because he did not tell them that the bull belonged to the respondent after it was shot either. Importantly, Pesa Latu accepted in cross-examination that the bull in fact belonged to the appellant.

[15] The third witness was Nani Falekakala who shot the bull and said that he had been told by the respondent that he had a black bull that he was saving for a 21st birthday but he was not shown the bull. The fact that Nani Falekakala shot the bull without raising any concern would suggest to me that he believed that the bull belonged to the appellant. He did say that 'the closest I can get is that bull that I shot belonged to [the respondent]' which I am told by Counsel means (in the Tongan language) that he was guessing that that respondent owned the bull.

[16] Finally, Tevite Filipe recounted an event when the appellant, the respondent and he were present and the bull in question fed off its mother and the respondent had said that it was his bull. This evidence is hearsay. Importantly, Tevite did not say that the appellant had acknowledged the respondent's ownership of the bull. The appellant said that Tevite was lying.

[17] Against that, the appellant and his son both appear to have given cogent and detailed evidence which covered such matters as that the bull belonged to the appellant, that it was in their herd, that they had taken care of it and that no one objected when it was shot. There is nothing in the Magistrate's ruling which suggests that any reasons exist to believe that their evidence was unreliable and should not be accepted.

[18] Going beyond the parties' assertions of ownership, importantly in my assessment are the following factors of which the Magistrate failed to make any mention in his ruling. They all to my mind bear on the issue he had to decide. First, there does not appear to have been any evidence that that the bull had markings of ownership. What is not disputed is that the bull was within in the appellant 1s herd and in his possession. That is evidence of the appellant's ownership of the bull. Secondly, no one present when the bull was shot raised any objection or questioned whether the bull belonged to the respondent as one would expect had they thought that was the case. The failure of Pesa Latu to do so is particularly surprising given his familiarity with the respondent's herd and his familial relationship with the respondent. Thirdly, there was disagreement between the parties as to the identity of the bull and whether it was a bull with horns or without horns. Related to this, more than one witness acknowledged that many animals had gone missing in the area raising the possibility that the respondent's bull was lost by other means.

[19] I have arrived at the clear view that the respondent failed to discharge his onus to prove that the bull that was destroyed on the instructions of the appellant was his bull. In those circumstances the Magistrate was wrong to find that his claim was proved and he should have dismissed the respondent's claim and entered judgment for the appellant.

Result

[20] The appeal is allowed. The decision of the Magistrate is quashed and judgment is entered for the appellant who is entitled to costs in this Court and the Magistrates Court.

Pouvalu Application for Guardianship

Supreme Court, Nuku'alofa
Paulsen LCJ
FA 114/2017

5 December 2017

Family law — guardianship application — single overseas relative

The application for guardianship is by a single, related 50 year old US based Tongan man. The application is supported by the 2 year old child's father, mother and grandparents who have mainly cared for the child. The applicant proposes to stay in the USA, provide support for the child and perhaps in 10-15 years take the child overseas with her grandmother.

Held

Guardianship refused because it is not in child's best interests; the court needs to be cautious if application is by a single man of a girl child; there are already suitable arrangements in place.

Counsel for the applicant	:	Mr. 'A Pouvalu
Counsel for the Guardian ad Litem	:	Miss T. Kafa

R U L I N G

The application

[1] The applicant is a single man seeking legal guardianship of Marina Kineleti Latu, a female child who will turn 2 years old on 19 January 2018.

[2] The application is supported by Marina's natural parents and also by her grandparents, who have cared for her for most of her short life to date.

The facts

[3] The guardian ad litem opposes the application on the grounds that the making of a legal guardianship order is not in Marina's best interests.

[4] Marina was born on 19 January 2015. She is the second child of Veisinia and Sekope Latu. They have another daughter who is 6 years old. Mr. Latu is a

farmer and Mrs. Latu weaves Tongan mats. I am told that they live in their own house on land owned by Mr. Latu's father.

[5] The applicant, Mr. Kineleti Pouvalu, is a 50 year old Tongan man who lives in the United States. He has family in Tonga, owns land here and visits each year. He is related to the natural mother. His sister is the natural mother's mother (i.e. Mrs. Latu is Mr. Pouvalu's niece and Marina is his grandniece). Mr. Pouvalu is not married and has no children.

[6] When Marina was born Mr. Pouvalu was in Tonga to visit his mother. He saw Marina's birth as an opportunity to have a child of his own. He asked Mr. & Mrs. Latu for her and they agreed that he could customarily adopt her. Mr. Pouvalu named Marina. He then took Marina with him and lived with her for about a month at Vava'u before returning to the United States. Mr. Pouvalu did not take Marina with him to the United States. Marina was left with her maternal grandparents, Sisi and Sepa Holi (Mrs. Latu's parents). They have cared for her up to the present time. They are aged 50 and 57 respectively. Mr. Holi is a farmer, mostly for subsistence purposes but he also sells kava from time to time. Mrs. Holi works as a teacher at Feletoa GPS.

[7] I accept that Mr. Pouvalu loves Marina and that his motives in making this application are entirely honorable and genuine. He provides financially for Marina, sending money regularly for her care, and he has visited each year to spend time with Marina and he ships goods to Tonga for her. It is not Mr. Pouvalu's intention to have Marina live with him in the United States at the present time and he does not intend to move back permanently to Tonga to raise her here. He is not a United States citizen but has permanent residency there and intends to apply for citizenship. He accepts that his work obligations and living arrangements are not suitable for Marina's care and she will remain in Tonga with her grandparents for the foreseeable future. He said that in perhaps 10-15 years he might look to take Marina to the United States with her grandmother. He raises the possibility of adopting her in the United States and wants her to obtain the benefits that are available in that country which include a good education.

(8) Mr. Latu believes that the making of a legal guardianship order will benefit Marina because he provides financially for her and will continue to do so and it will make it easier for her to inherit his belongings and other benefits including his life insurance.

The interested parties' positions

[9] Mr. & Mrs. Holi support the application because they acknowledge that Mr. Pouvalu provides financially for Marina and also they are concerned that when they retire that it will be difficult for them to care for her.

[10] Mr. & Mrs. Latu also support the application and say that they have limited financial means and are not able to provide financially for Marina. However, I note that they already provide for one child and that they see Marina when they visit with Mr. & Mrs. Holi. Marina demonstrated that she has an emotional attachment to Mrs. Latu.

[11] The guardian ad litem has opposed the application for essentially four reasons. First, the guardian ad litem notes that Mr. Pouvalu is a single man seeking legal guardianship of a female child and the Court should be cautious about making a legal guardianship order in those circumstances. Secondly, that Mr. Pouvalu has not demonstrated a sufficient bond with Marina as he has spent little time with her since her birth and she has spent almost all of her life living with her grandparents. Thirdly, that the making of a legal guardianship order will not achieve Mr. Latu's long term goal of taking Marina to the United States and it is unlikely he will be able obtain an adoption order in that country, and fourthly that Mr. Pouvalu's living arrangements in the United States are not suitable for Marina's care.

Discussion

[12] I advised Mr. Pouvalu at the hearing that it did not appear to me that it was appropriate to grant this application. Having reviewed all the information before the Court I have not been moved from my original assessment. I consider that the making of a legal guardianship order is not in the best interests of Marina at the present time. My reasons are the following.

[13] First, I agree with the guardian ad litem that the Court should be cautious before granting a single man a legal guardianship order (or an adoption order) in respect of a female child. This is recognised in various jurisdictions throughout the World (see s.4(2) Adoption Act (NZ)). This factor is not determinative of this application which fails for other reasons.

[14] Secondly, there are adequate arrangements already in place for Marina's custody, care and maintenance. Marina is living with her grandparents. She appears to be an outgoing, healthy and happy child. She has contact with her natural parents who she will have some bond with. She is fortunate that she also has the benefit of Mr. Pouvalu's love as well as the financial and other contributions that

he makes to her life. However, Mr. Pouvalu lives in the United States and does not intend (at least for a good number of years) to exercise any of the day to day duties and responsibilities of a legal guardian. Mr. & Mrs. Holi are Marina's custodians and guardians in fact. They are here in Tonga, raising Marina each day and making the important decisions that will affect her life.

[15] Thirdly, I do not see that the making of a legal guardianship order will promote Marina's best interests in any manner suggested by Mr. Pouvalu. It is true that Mr. Pouvalu provides financially for her but he will continue to do so whether or not the legal guardianship order is made. Marina may inherit Mr. Pouvalu's property by will or, in the case of life insurance, by naming Marina as the beneficiary of the policy. As to Mr. Pouvalu's desire that he may one day take Marina to the United States and adopt her, there can be no certainty about that occurring or that it will be promoted by the making of a legal guardianship order.

[16] Fourthly, if I was to grant the legal guardianship order that would confer upon Mr. Pouvalu rights in respect of Marina's custody, care and maintenance which are greater than those of her grandparents. That would be inappropriate as the grandparents are the persons best able to make decisions for Marina at the present time.

[17] Another consideration is that should I grant Mr. Pouvalu a legal guardianship order he could at some stage in the future choose to take Marina to the United States without any further oversight of the Court. That would be entirely inappropriate when at the present time it is accepted that he is not able to properly care for her.

[18] I do not dismiss entirely the possibility that in time circumstances may change both for Marina here in Tonga and for Mr. Pouvalu in the United States to an extent that Mr. Pouvalu may be able to establish that it is in Marina's best interests that the Court make a legal guardianship order. At the present time there is no such justification for doing so.

[19] Mr. Pouvalu's application for a legal guardianship order is dismissed.

Ringo Fa'oliu v Public Service Commission

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 52/2015

7 December 2017

Judicial review — decision not to appoint candidate — bias — waiver of right to object to possible bias — width of power of judicial review — late, oral application for leave to seek judicial review granted

10 The Public Service Commission failed to reappoint the applicant to his role as CEO and cited certain adverse reports about matters within the Ministry for which the applicant cannot avoid responsibility. The applicant claims that the PSC was biased against him. The Chairman of the PSC was a member of the committee that made one of the adverse reports against the applicant. The applicant in an affidavit disputed the findings of that committee.

Counsel for the plaintiff : Mrs. P Tupou
Counsel for the defendant Mrs. E Langi

Held

20 1. The Court's remedial power by way of judicial review is broad and it does not require the making of a decision in the traditional sense;

2. I adopt as the test that a judge/decision maker is disqualified if the circumstances are such that a fair-minded lay observer might reasonably apprehend that the judge/decision maker might not bring an impartial mind to the resolution of the question;

3. A party may waive their rights of objection to a disqualifying interest of a decision maker. That did not occur here;

4. If one member of a decision making body is biased then the tribunal as a whole is disqualified;

30 5. Decision of PSC was unlawful and quashed.

Cases considered

Fifita v Tonga Broadcasting Commission [2017] Tonga LR 248

Royal College of Nursing v Department of Health and Social Security [1981] AC 800
R v Sussex Justices Ex parte McCarthy [1924] 1 KB 256
R v Watson; Ex parte Armstrong (1976) 136 CLR 248
Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 72
S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358, 374
Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1QB 577
McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504
Australian Workers' Union v Bowen (No.2) (1948) 77 CLR 601
Fusitu'a anor v Minister of Public Enterprises [2016] Tonga LR 73

RULING

The issue

[1] The plaintiff (Mr. Fa'oliu) was the Chief Executive Officer (CEO) of the Ministry of Infrastructure, Transport and Tourism (the Ministry). Upon the expiry of his contract the position was advertised and he applied for reappointment. Although being the preferred candidate the Public Service Commission (the Commission) decided not to appoint Mr. Fa'oliu and to re-advertise the position. The Commission relied upon three reports which had found that during Mr. Fa'oliu's term as CEO there had been failures to comply with procurement procedures, significant overpayments to contractors and the inappropriate use of daily paid workers without regard for public service policy or budget allocations.

[2] Relying on a plethora of grounds for review Mr. Fa'oliu applies for a declaration that the decision of the Commission not to appoint him as CEO is unlawful and setting it aside. He also asks the Court to direct the Commission to consult with the Minister and appoint him as the CEO of the Ministry. The Commission argues that the decision not to appoint Mr. Fa'oliu was lawful and reasonable and arrived at after a consideration of all of the information it had before it. The Commission asks the Court to dismiss the action.

[3] For reasons that will follow the case falls to be decided on the ground of bias.

The facts

[4] The Commission is established under the Public Service Act and at the relevant time there were four members of the Commission involved in the events that gave rise to this action. The Chairman of the Commission was Mr. 'Uhilamoelangi Liava'a.

[5] Mr. Fa'oliu was employed as the CEO for the Ministry. His contract expired on 2 July 2015. When Mr. Fa'oliu's contract ended the Commission approved the advertisement of the position. The Commission also approved what was described as a 'Tentative CEO Recruitment Timeline" which involved 19 steps beginning with the forwarding of a job description to the Minister for approval on 28 May 2015 to the closure of the file following appointment of the successful candidate on 20 July 2015.

[6] Mr. Fa'oliu was one of only two applicants. Both were shortlisted to be interviewed by a panel approved by the Commission. The interviews were carried out on 14 July 2015. Mr. Fa'oliu won the interview and on 20 July 2015 the panel recommended him for appointment.

[7] In a memorandum to the Commission dated 20 July 2015, the Acting CEO of the Commission noted the Panel's recommendation and that 'the Commission also made initial discussions regarding this appointment during the meeting on 17 July 2015'. There is nothing before me as to what was discussed on 17 July. It appears that the panel's recommendation was again discussed at a meeting of the Commission on 20 July 2015 but no decision was made to accept the Panel's recommendation.

[8] Mr. Fa'oliu was advised that he had won the interview and that formalisation of his appointment would not be long away. He went to New Zealand on holiday expecting that when he came back to Tonga the appointment would be made and he would commence work. He left on 29 July 2015 and returned on 25 August 2015.

[9] The Commission harboured reservations about Mr. Fa'oliu's suitability for appointment. A letter dated 24 July 2015 was sent from the Commission briefing the Minister on the status of the recruitment of the CEO. The letter was signed by Mr. Liava'a as Chairman. It stated that the Commission was waiting on a report from a Committee of Inquiry regarding 'the non-compliance of Procurement Regulations of the Ministry of Infrastructure' and that once the report was received the Commission 'will fully consider the outcome of the recruitment for the CEO for Infrastructure' . The letter went on to say that the Commission was also aware of a report of the Acting Auditor General dated 19 June 2015 'on their factual

findings relating to the overpayments to Contractors in the Cyclone Iian Project in Ha'apai'.

[10] The Commission received a copy of the Independent Committee of Inquiry Report regarding the alleged non-compliance of certain staff of the Ministry of Infrastructure with the Public Procurement Regulations 2010 dated 19 August 2015 (the Nukunuku report). This Committee had been established by the Commission on 16 January 2015. The Committee had three members including the Chairman of the Commission, Mr. Liava'a.

[11] The Committee found that Mr. Fa'oliu together with another staff member of the Ministry, Mr. Tevita Lavemai, breached the Public Procurement Regulations 2010 in relation to a project for the resealing of a main road a Nukunuku from late October 2012 to April 2014. The consequence of the breach was that the contractor had a long wait for payment and the Ministry had to pay $31,649.10 of interest. As part of its investigation the Committee had conducted interviews with five people including Mr. Fa'oliu. The report was overdue for release and I consider it a reasonable inference that when the Commission delayed its decision to appoint Mr. Fa'oliu in accordance with the panel's recommendation Mr. Liava'a would have been aware that the Nukunuku report was likely to be critical of Mr. Fa'oliu.

[12] The Commission also received a copy of the Audit Report regarding the overpayment of contractors engaged by the Government in the Cyclone Ian Reconstruction Project in Ha'apai (the Ha'apai report). Mr. Fa'oliu together with other staff of the Ministry of Infrastructure and Tourism were implicated in the report for having approved overpayments in the substantial sum of $928,207.95.

[13] The Nukunuku and Ha'apai reports were discussed by the Commission in a meeting on 21 August 2015. The Commission decided that Mr. Fa'oliu would not be appointed to the position of CEO 'in light of the reports.....which has implicated Mr. Fa'oliu performance as a CEO for Government'. The Commission also decided to re-advertise the position, that both applicants were to be informed and that the Minister was to be advised.

[14] The Commission wrote to the Minister on 24 August 2015. The letter is again signed by Mr. Liava'a. In the letter the Commission advised the Minister that having considered the Nukunuku and Ha'apai reports the Commission had decided that Mr. Fa'oliu was 'not suitable for appointment to the CEO for Infrastructure position' and that the position would be re-advertised. The Commission conveyed its decision to Mr. Fa'oliu in a letter dated 25 August 2015 and again by email on 28 August 2015. The Commission's decision did not please the. Minister. On 28

August 2015 the Minister wrote a long letter to the Chairman expressing his disappointment and asking the Commission to reconsider.

[15] Mr. Fa'oliu then commenced this action. He was granted leave to apply for judicial review of the Commission's decision on 1September 2015.

[16] On 9 September 2015 the Commission wrote to the Minister (again the letter is signed by Mr. Liava'a) in reply to the Minister's letter of 28 August 2015. The Commission noted that Court proceedings had been issued by Mr. Fa'oliu and that the Commission had suspended the re- advertisement of the position until the Court made a ruling. The Commission also defended itself against criticism of the Minister that it had acted illegally in not appointing Mr. Fa'oliu.

[17] On 24 September 2015 the Commission gave instructions to the Solicitor General to put a settlement offer to Mr. Fa'oliu. There were two options to be advanced for his consideration. For present purposes the relevant option, and the one that Mr. Fa'oliu accepted, was as follows:

That the Claim be settled by proposing to the plaintiff the following:

> i The recruitment process for the CEO for infrastructure be reconvened by the Commission;
>
> ii The Commission forwards the plaintiff the reports of the Acting Auditor General, and the Commission of Inquiry, and request to provide written comments as to why he should be appointed despite the reports (the comments should be submitted within seven (7) days of receipt);
>
> iii Upon receipt of the plaintiff's comments, the Commission should then consider whether to appoint the plaintiff.

[18] On 25 November 2015 the Solicitor General advised the Commission that Mrs. Tupou had accepted this settlement offer on behalf of Mr. Fa'oliu and that the recruitment process should be reconvened as from 30 November 2015. On 1 December 2015 the Commission wrote to Mr. Fa'oliu providing him with the Nukunuku and the Ha'apai reports and informing him that the recruitment process for th'e CEO would be reconvened. Rather ominously (in the sense that it might indicate a predisposition of the Commission to accept the reports at face value) Mr. Fa'oliu was requested to provide his comments 'on why you should be appointed to the position of Chief Executive Officers for Infrastructure despite the attached reports'.

[19] On 11 December 2015 Mr. Fa'oliu submitted a detailed affidavit in response to the content of the Nukunuku and Ha'apai reports. It is not necessary for me to consider his affidavit in any detail but I must note one matter that he raised. Mr. Fa'oliu noted that Mr. Liava'a was a member of the Committee that prepared the Nukunuku report and that he was also the Chairman of the Commission. Mr. Fa'oliu asserted that Mr. Liava'a had a conflict of interest and questioned his impartiality. This was a serious matter but one that was never, as far as I can see, addressed by the Commission.

[20] On or around 17 December 2015 another report was received by the Commission from the Auditor General. It was a report of a special audit review of daily paid labourers engaged by the Ministry (the daily paid report). The daily paid report was critical of the Ministry and implicated Mr. Fa'oliu directly. The report stated that recruitment of daily paid works was undertaken 'recklessly' without reference to either the approved budget allocations or the Public Service policy on daily paid/casual recruitment and recommended that overpayments made to daily paid workers be recovered from the accountable officers of which Mr. Fa'oliu was one. The daily paid report was not referred to Mr. Fa'oliu for comment at this stage.

[21] The Commission wrote to Mr. Fa'oliu on 21 December 2015, acknowledged receipt of his affidavit and provided him with a further opportunity to submit any new evidence or information relevant to the case for the Commission's final consideration, but without mentioning the daily paid report. Not surprisingly it was not clear to Mr. Fa'oliu what the Commission wanted him to provide when he had already submitted a lengthy response to the Nukunuku and Ha'apai reports. Mrs. Tupou wrote to the Commission on 6 January 2016, requesting the Commission to provide a list of issues it wished Mr. Fa'oliu to address and an opportunity to make an oral presentation to the Commissioners.

[22] The Commission met on 15 January 2016 and discussed Mrs. Tupou's letter. There is a record of the discussion in a memorandum of the Acting CEO of the Commission which notes that Mr. Liava'a had discussed Mr. Fa'oliu's case with the Prime Minister. There is no explanation as to why he would have considered that to have been appropriate. The memorandum records that the Commission had formed the view that as CEO Mr. Fa'oliu was responsible to provide direction to employees and monitor and ensure compliance by the Ministry with relevant regulations. It was 'stressed' that the Nukunuku and Ha'apai reports confirmed that there had been non-compliance with regulations. The Commission had formed the view that its decision not to appoint Mr. Fa'oliu 'still stands' and that the position was to be re- advertised. The Commission resolved to convey that

'decision' to the Solicitor General for his legal advice. From this point in time it certainly appears that the Commission's mind was firmly fixed against Mr. Fa'oliu.

[23] The Commission met again on 10 February 2016. The minutes record that that Mr. Liava'a addressed the meeting on the subject of Mr. Fa'oliu's case and on the advice of the Solicitor General the Commission took the view that Mr. Fa'oliu's affidavit and supporting documents were sufficient for it to make a decision. This seems rather peculiar when it appears that in truth a decision had already been made at the 15 January 2016 meeting to reject Mr. Fa'oliu's appointment.

[24] The Commission wrote to Mrs. Tupou on 11 February 2016 advising that its letter of 21 December 2015 did not raise any further issues for Mr. Fa'oliu to address, but only gave Mr. Fa'oliu a further opportunity to submit any new evidence; or any relevant information which he might consider relevant to his case before making its decision. The Commission advised that there was no need for Mr. Fa'oliu to provide oral representations and that Mr. Fa'oliu would be given a further seven days to submit any new evidence or relevant information.

[25] On 3 March 2016 Mrs. Tupou wrote to the Commission that Mr. Fa'oliu had heard that staff at the Ministry had been advised that Mr. Fa'oliu would not be appointed as the CEO 'regardless of whether the decision of the Public Service Commission was correct, lawful or otherwise'. She stated that her instructions were that if the Commission should make an adverse decision against Mr. Fa'oliu then he should first be given an opportunity to be heard on any and all grounds relied upon.

[26] There was another meeting of the Commission on 11 April 2016. The Commission's Senior Legal Officer was asked to provide a legal opinion 'as to the grounds for refusing the appointment' of Mr. Fa'oliu. Again one cannot but be concerned at the manner in which the request for advice was apparently expressed.

[27] On 15 April 2016 the Commission wrote to Mrs. Tupou advising that the accusation that Mr. Fa'oliu would not be appointed CEO regardless of whether the Commission's decision was correct or not was unfounded. For the first time the Commission furnished Mr. Fa'oliu with a copy of the daily paid report and requested his responses to it within seven days.

[28] The Commission allowed an extension of time for Mr. Fa'oliu to provide his further submissions. On 24 May 2016 Mrs. Tupou wrote to the Commission responding on Mr. Fa'oliu's behalf, inter·alia, to the daily paid report. Whether

intended or not the last paragraph of Mrs. Tupou's letter highlights the concern I have expressed earlier as to the manner in which the Commission was apparently approaching the reconvened recruitment process when she wrote, '..I am instructed to thank the Chairman and the Commissioners for allowing and giving my client this great opportunity ....to provide comments on why he should not be appointed ...despite the provided Audit Reports'.

[29] The Commissioner's Senior Legal Officer subsequently prepared an opinion for the Commission concluding that it was 'only timely, reasonable, fair and just under the principles of administrative law to re- appoint Mr. Fa'oliu as the CEO for the Ministry of Infrastructure'. On 3 June 2016 the Commission met again and did not accept the advice it had received from its Senior Legal Officer, which it regarded as deficient as it 'did not support the Commission's position thus the [Solicitor General] should be requested to provide further legal advice on this before the Commission reconsiders the case.'

[30] The minutes of the meeting record that the Chairman spoke to the Nukunuku report and the findings of the Committee that Mr. Fa'oliu was ultimately responsible for the failure to comply with the procurement procedures. The Ha'apai report was also referred to which it was said implicated Mr. Fa'oliu as he was responsible for signing off payments. The minutes also refer to legal advice the Commission had received that the original decision not to appoint Mr. Fa'oliu did not observe natural justice because he had not been given the opportunity to respond to the Nukunuku and Ha'apai reports. The Commission was of the view that this failing had now been remedied and that the Commission needed to be mindful that '....we only look at the employees' rights but we need to also advocate for the rights of the employer.' The Commission called for the Solicitor General's advice and agreed to convene a special meeting once that advice was received.

[31] The Commission decision not to appoint Mr. Fa'oliu as CEO was conveyed to Mrs. Tupou on 11 July 2016. The letter stated that the Commission was of the opinion that Mr. Fa'oliu should not be appointed based on the Nukunuku report ('This non-compliance occurred whilst Ministry of Infrastructure was under the responsibility of Mr. Fa'oliu as Chief Executive Officer'), the Ha'apai report ('...in which Mr. Fa'oliu was responsible for approving those payments') and the daily paid report ('Mr. Fa'oliu [endorsed] the recruitment of daily paid labourers from 2014-2015 (prior to July 2015) without making proper reference to the Approved Budget Allocations').

[32] In a letter dated 20 July 2016 Mrs. Tupou wrote to the Commission challenging that decision and the reasons set out by the Commission in its letter of

11 July 2016. When by 11 August 2016 no response had been received to that letter Mrs. Tupou wrote again to the Commission. On 24 August 2016 the CEO of the Commission wrote to Mrs. Tupou outlining in detail the reasons for the Commission's final decision not to appoint Mr. Fa'oliu. On 6 October 2016 Mrs. Tupou responded to the Commission's letter expressing the view that the Commission had failed to give proper consideration to the relevant facts and other matters and indicating that Mr. Fa'oliu intended to continue with his Court action against the Commission.

[33] This action had stalled because the Court understood that the parties were working towards settlement. When they did not settle they came back before the Court and timetable directions for the filing of amended pleadings and affidavits were made. There were slippages in the timetables. The action was set down for hearing before Scott. J in July 2017 but could not proceed due to 'substantial breaches of the timetable'. I made further timetabling orders and set the case down for hearing on 23-24 November 2017. My minute of a pre-trial conference on 15 August 2017 notes the further failure by the parties to comply with the timetable and the imposition of a further timetable to ensure that the hearing proceeded. The action was heard on 24 November 2017.

The pleadings and the requirement for leave

[34] The relevant pleadings are Mr. Fa'oliu's amended statement of claim dated 20 February 2017 and the Commission's amended statement of defence of 20 March 2017. In the amended statement of claim Mr. Fa'oliu challenges only the decision of the Commission 'that it will not appoint him as CEO for the Ministry of Infrastructure' of 11 July 2016'. He does not challenge the earlier decision of the Commission to the same effect that was conveyed to him on 25 August 2015. As I raised with Mrs. Tupou at the commencement of the hearing, this poses an immediate problem for Mr. Fa'oliu. He was granted leave to seek judicial review of the earlier but not the latter decision. It is only the latter decision he now seeks to challenge.

[35] Order 39 Rule 2(1) Supreme Court Rules provides that no application for judicial review may be commenced unless leave of the Court has been obtained. Mrs. Tupou appreciated the difficulty and conceded that leave had not been sought or obtained. She made an oral application that leave be granted.

[36] I do not consider that Mr. Fa'oliu's failure to obtain leave is fatal to his action. Order 4 Rule 1 Supreme Court Rules provides that a failure to comply with the Rules is to be treated as an irregularity and 'shall not nullify the proceedings'.

That still leaves the question of whether it is appropriate for me, at this very late stage, to grant Mr. Fa'oliu leave to apply for judicial review and to extend time for the application for leave to be made (0.39 Rule 2(2)). I consider it is appropriate to do so and so order for the following reasons.

[37] First, the Commission has never taken the point that leave was not obtained and did not do so even when I raised it at the hearing. Secondly, the failure to obtain leave was an oversight in the rather unusual circumstances of this case where the parties agreed to reconvene the recruitment process leading to a fresh decision which was also subject to challenge. It is clear neither party considered that leave was necessary for Mr. Fa'oliu to continue with his action. Thirdly, the ultimate aim of the Court is to attain justice between the parties and technical rules of procedure should not supplant or defeat that aim. For the reasons that follow I consider this action raises an important issue that the Court should determine as between Mr. Fa'oliu and the Commission justifying the granting of leave.

The preliminary question of jurisdiction

[38] As noted earlier the Commission is established under the Public Service Act. Its principal functions are set out in section 6·of the Act which include the appointment and dismissal of public service employees. Section 12 provides that all appointments in respect of the Public Service shall be made in accordance with the Act. Section 13 provides that it is the Commission that shall, after consultation with the Minister, appoint the Chief Executive Officer of a Ministry.

[39] In reliance upon Fifita v Tonga Broadcasting Commission (Unreported Supreme Court, CV 22 of 2017, 24 July 2017 Paulsen LCJ) Mrs. Langi submitted that as the Commission has not made any appointment of a CEO under section 13 of the Act there has been no exercise of its discretion that may be subject to review. I do not agree. Fifita turned on the effect of ss.30(1) and (3) of the Public Enterprises Act. Section 30(1) provided that the appointment of a Chief Executive Officer of a Public Enterprise made in contravention of the Act was void. Due to the self-executing nature of section 30(1) Mrs. Fifita's appointment was void independent of any act or decision of the Minister. It was for that reason that there was no right of review. This case does not concern the Public Enterprises Act.

[40] The Court's remedial power by way of judicial review is broad and it does not require the making of a decision in the traditional sense (Royal College of Nursing v Department of Health and Social Security [1981] AC 800). In any event the Commission's power to appoint a CEO to a Ministry necessarily carries with it

the power to refuse to appoint. They are two sides of the same coin. When the Commission refused to appoint Mr. Fa'oliu it exercised a power that gave rise to a real (not hypothetical) controversy between it and Mr. Fa'oliu which affected his livelihood and reputation. That exercise of power is subject to judicial review.

The question of bias

[41] I am going to turn to what I consider is the principal issue that arises in this case which is bias. I should mention immediately that in law the term 'bias' has a number of meanings and a finding of bias can be made without any serious reflection upon a decision maker (J R S Forbes 'Justice in Tribunals' 2014 The Federation Press at [15.15]). The question of bias arises in this case because of Mr. Liava'a's dual roles as both a member of the Committee that prepared the Nukunuku report and Chairman of the Commission.

[42] It is a well understood axiom of the law that justice must not only be done but should manifestly and undoubtedly be seen to be done (R v Sussex Justices Ex parte McCarthy [1924] 1 KB 256 (DC)). Justice will not be done and will not be seen to be done if a decision maker has a predisposition resulting from prejudice or preference towards one of the parties or their case, or from personal interest or relationship material to the case (P A Joseph 'Constitutional and Administrative Law in New Zealand' Thomson Reuters 4th Ed at [25.5]). It has been held that a preconceived idea that neither party to a cause is worthy of belief amounts to bias (R v Watson; Ex parte Armstrong (1976) 136 CLR 248, 265).

[43] A decision which is biased will be set aside and in a case where a decision has not yet been made the Court may restrain the decision maker from proceeding further (Forbes (supra) at [15.3]).

[44] Bias will be 'presumptive' in cases where a decision maker has a direct pecuniary interest in the outcome of a case. That is not what we are dealing with here. This case is concerned with apparent bias. Apparent bias arises where a decision maker has some personal or professional relationship with a party or a witness or a prejudice against or preference towards a particular party or result or a predisposition leading to a pre-determination of the issues (Joseph (supra) at 25.5).

[45] There is no bright line between what is permissible and impermissible partiality of a decision maker. The line shifts with the factual and legal context of a case. A higher standard and more rigorous level of scrutiny can be expected of a Judge or a decision maker acting pursuant to statutory powers (as is the case of the Commission acting pursuant to powers conferred by the Public Service Act) than

say a decision maker in a low level administrative body or an incorporated sporting club.

[46] Whether or not a decision maker is biased does not depend upon that decision maker's personal opinion but is to be assessed objectively. I adopt as the test that a judge/decision maker is disqualified if the circumstances are such that a fair-minded lay observer might reasonably apprehend that the judge/decision maker might not bring an impartial mind to the resolution of the question that the judge or decision maker has to decide (Ebner v Official Trustee in Bankruptcy [2000] HCA 63; Porter v Magill [2001] UKHL 67, O'Neill No.2 v Her Majesty's Advocate [2013] UKSC 36, Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 72 and Joseph (supra) at 25.5(2)). It is the possibility not the probability of bias that is important. But the existence of bias is not to be lightly inferred. The functions of a decision maker cannot depend upon the suspicions of the ultra-sensitive, paranoid or cynical person (S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358, 374). For this reason the examination of an allegation of bias must be rigorous.

[47] The person alleging apparent bias must establish a causal connection between the perceived disqualifying interest of the decision maker and the apprehension of bias. This involves two steps namely (Saxmere (supra) at [81]):

(a) The identification of what it is said might lead a decision maker to decide a case other than on its legal and factual merits; and

(b) An articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.

[48] I now turn to consider the two step test which I have referred to above. The first issue is what is it that might lead Mr. Liava'a to decide not to appoint Mr. Fa'oliu as CEO other than on the merits. The matter advanced is that in addition to being Chairman of the Commission Mr. Liava'a sat on the Committee that wrote the Nukunuku report which was highly critical of Mr. Fa'oliu. It is therefore necessary to say something more about the Nukunuku report and Mr. Fa'oliu's response to it.

[49] The Nukunuku report begins by noting that the Committee was appointed by the Commission to investigate alleged non-compliance of 'certain staff' of the Ministry with the Public Procurement Regulations 2010 relating to the resealing of a main road at Nukunuku. It then describes the scope of its work which included determining whether Mr. Fa'oliu was aware of the actions of the staff involved with that project and to determine the non-compliance with the Public Procurement

Regulations. The scope leaves little doubt that the Committee was concerned with the question of whether Mr. Fa'oliu was personally implicated in any unlawful procurement activities.

[50] The Nukunuku report concluded that the relevant procurement procedures were not followed (paragraph 20(i), (ii)(a) to (d)) and that:

> The Committee finds that both the CEO and Tevita Lavemai were or should have been, aware of these breaches in the proper procurement procedures. (paragraph 20)
>
> In summary the Committee finds that the CEO was aware of the actions by Tevita Lavemai mainly because he (CEO) had to approve those actions first. Furthermore, the CEO was, or should have been aware that the actions by Tevita Lavemai were approved to be taken in clear breaches of the proper procurement procedures. (paragraph 43)
>
> The Committee also finds that the CEO was aware of the actions taken by Kalesita and the stress that she was under due to projects being allowed to commence before the proper procurement procedures are followed. (paragraph 44)
>
> The Committee finds the consequences of the breaches by the CEO and Tevita Lavemai to be:
>
> (a) A very long wait by Malapo Quarry to be paid their money,
>
> (b) The Ministry has to pay 2% interest which the Committee finds to be $31,649.10 for seven months. (paragraph 48).
>
> The Committee recommends that both the CEO and Tevita Lavemai be dealt with pursuant to Regulation 57 which provides:
>
> 'Every officer involved in procurement who breaches any provisions of these Regulations commits a disciplinary offence which shall be dealt with under sections 39 and 40 of the Public Finance Management Act 2002 and the Public Service (Disciplinary Procedure) Regulations 2003.

[51] These findings were of a nature that they reflected badly on Mr. Fa'oliu's suitability to be CEO of a Ministry and were relied upon by the Commission when it decided it would not appoint Mr. Fa'oliu (both when it made its first decision in August 2015 and again in July 2016).

[52] When Mr. Fa'oliu was given an opportunity to respond to the Nukunuku report he did so in a lengthy affidavit of 11 December 2015, referring not only to factors which provided relevant context to the allegations against him but also directly challenging the Committee's findings, including all of the findings that I have set out above.

[53] The second issue is whether there is a logical or causative link between the factor said to disqualify Mr. Liava'a and the feared deviation from deciding upon Mr. Fa'oliu's appointment on the merits.

[54] A classic example of apparent bias is where a decision maker acts in his/her own cause such as where the decision maker is a party in the very litigation he is deciding upon (Sisson v Canterbury District Law Society [2011] NZCA S5 at [20]). As Joseph (supra) notes at [25.5(5)] a decision maker may also trigger the bias disqualification where a plaintiff/prosecutor becomes involved in the decision making (Murdoch v New Zealand Milk Board [1982] 2 NZLR 108 (HC)). Parallels can be drawn between this case and those cases where it has been held that a decision maker should not act in his/her own cause.

[55] In Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1QB 577 Lord Denning said:

> No man can be an advocate for or against a party in one proceeding, and at the same time sit as a Judge of that party in another proceeding. Everyone would agree that a Judge or a barrister or solicitor (when he sits ad hoe as a member of the Tribunal) should not sit on a case to which a near relative or close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased.

[56] Hannam v Bradford City Council [1970] 2 All ER 690 concerned a school teacher at a school maintained by the Council whose employment was terminated at a meeting of the school's governors and he was given notice to that effect. Subsequently a staff sub-committee of the Council met to hold an inquiry as to whether it should exercise a power to prohibit the dismissal of the teacher which existed in the school's articles of governance and the Council's conditions of service for teachers. Three of the ten members of the sub-committee were governors of the school. The staff sub-committee resolved not to prohibit the teacher's dismissal and this was later affirmed by the full Council. It was held that the decision of the sub-committee could not stand because the presence of the three

governors of the school on the sub-committee gave rise to the possibility of bias. Lord Justice Widgery reasoned at 698:

> So far as bias is concerned, I like Sachs LJ, am satisfied that there was a real likelihood of bias in this case....I am much impressed by the fact that when the staff sub-committee sat down to consider what the plaintiff would regard as an appeal, the chairman was a member of the governors against whose decision this so-called appeal was being brought. I think that if it had been disclosed at the outset that no less a person than the chairman of the staff sub- committee was a member of the governors in question, the immediate reaction of everyone would have been that some real likelihood of bias existed. I say that with every respect to the distinguished gentleman who chaired the staff sub-committee on this occasion; but when one is used to working with other people in a group or on a committee, there must be a built-in tendency to support the decision of that committee, although one tries to fight against it, and this is so although the chairman was not sitting on the occasion when the decision complained about was reached.

[57] The Court in Hannam recognised that the appearance of bias might arise as a result of factors such as institutional and personal loyalties but in the present case we are concerned with more than that. When Mr. Liava'a sat on the Committee that prepared the Nukunuku report he made or concurred in findings that reflected upon Mr. Fa'oliu's fitness as the CEO of the Ministry. When Mr. Liava'a then sat on the Commission to consider Mr. Fa'oliu's appointment he was likely to have already formed a view that Mr. Fa'oliu was not a suitable person to be reappointed to that role. Furthermore, it could not be·expected that Mr. Liava'a would impartially assess Mr. Fa'oliu's responses to the Nukunuku report when Mr. Fa'oliu was directly challenging findings that Mr. Liava'a himself had made or concurred in. It is too much to expect that Mr. Liava'a would consider what Mr. Fa'oliu had to say in response to the Nukunuku report open to the possibility that his Committee's conclusions might be incorrect. I think any fair-minded observer would conclude that Mr. Liava'a was likely to have had a biased disposition towards Mr. Fa'oliu.

[58] There are three further points that need to be made. First, a party may waive their rights of objection to a disqualifying interest of a decision maker. That did not occur here. Mr. Fa'oliu asserted his objection to Mr. Liava'a sitting on the Commission.

[59] Secondly, there can be no suggestion that Mr. Liava'a· had to sit on the Commission out of necessity. There were four members of the Commission but the Public Service Act only requires a quorum of three (section 5(11)). Mr. Liava'a could have recused himself and the Commission could still have decided Mr. Fa'oliu's application free from any accusation of bias.

[60] Thirdly, Mrs. Langi submits that because there were three other members of the Commission Mr. Liava'a's presence was not material. I do not accept that. In my view if one member of a decision making body is biased then the tribunal as a whole is disqualified (McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504; R v Suffolk Justices (1852) 18 QBD 416 and Australian Workers' Union v Bowen (No.2) (1948) 77 CLR 601. 631). As Forbes (supra) says at (15.2];

> The law recognises the possibility that other members were affected by their colleague's actual or apparent inability to be fair. One member with a closed mind may have a disproportionate influence on the group and his presence is enough to raise a reasonable suspicion that the others are prejudiced too.

[61] I am fortified in my view on this issue by the fact that Mr. Liava'a had particular influence over the Commission by virtue of the fact that he was the Chairman. I also note that the documents before the Court show that in meetings of the Commission he spoke to the Nukunuku report and the manner in which its conclusions reflected upon Mr. Fa'oliu's fitness for appointment. I have also noted in my summary of the facts my disquiet about what some of the documents reveal may have been a predetermined view towards Mr. Fa'oliu's application.

Other ground that are advanced

[62] Mrs. Tupou advanced a number of other grounds in support of Mr. Fa'oliu's case. I was not impressed with them. Whilst trying to fit her arguments within the traditional chapter headings of review (illegality, irrelevant considerations, mistake, etc) her arguments appeared to me to fall into two broad categories. Firstly Mrs. Tupou challenged processes that the Commission had adopted at arriving at its first decision not to appoint Mr. Fa'oliu. Any criticisms that might have been levelled against the Commission were remedied when the parties agreed to settle and reconvene the recruitment process. Secondly, Mrs. Tupou challenged the Commission's reliance upon the Nukunuku report, the Ha'apai report and the daily paid report. The heft of her argument was that the findings in the reports were wrong or that blame lay with other people or that the reports should not have been considered by the Commission. Mrs. Langi was correct when she submitted that Mr. Fa'oliu attempted to shift blame.

[63] The conclusion I have reached on the issue of bias is sufficient to resolve this case and I am not going to respond to the specific arguments that Mrs. Tupou raises except to say this. In my view the Commission was entitled to have regard to the contents of the three reports. They raise questions as to Mr. Fa'oliu's suitability for appointment as CEO of the Ministry. They are evidence concerning his actual performance in the role. The Commission's obligation was to impartially consider and evaluate the contents and conclusions in those reports having regard to any information and explanation which was presented by Mr. Fa'oliu. The conclusions the Commission reached based on its consideration of the material before it was unlikely, absent any question of bias, to be open to successful challenge unless they were not reasonably open to it.

Remedies

[64] In judicial review remedies are discretionary but the Court should vindicate rights when a plaintiff makes out a substantial ground for relief unless there are good reasons for refusing it (Wendco (NZ) Limited v Auckland City Council [2015] NZCA 617 and Fusitu'a anor v Minister of Public Enterprises [2016] Tonga LR 73.

[65] I consider that Mr. Fa'oliu is entitled to a declaration that the decision of the Commission of 11 July 2016 to not appoint him as CEO was unlawful. He also seeks additional relief requiring the Commission to consult with the Minister and appoint him as the CEO of the Ministry. In the exercise of my discretion I am not prepared to grant further relief. I consider that the granting of a declaration is sufficient vindication of Mr. Fa'oliu's rights.

[66] Whilst I have found that the Commission acted unlawfully it cannot be denied that the information which it had before it cast a shadow over the prospect of Mr. Fa'oliu's appointment. It is an unanswered question whether the Commission would have refused to appoint Mr. Fa'oliu if Mr. Liava'a had not been involved. In light of the findings made against Mr. Fa'oliu in the three reports it is quite possible that it might have done so. Any challenge to that decision in reliance upon the sorts of arguments advanced before me would have faced formidable hurdles.

[67] It would be inappropriate to require the Commission to consult with the Minister for the appointment of Mr. Fa'oliu without some reconsideration of his suitability by the Commission untainted by any appearance of bias. However to refer the matter back to the Commission now would raise the prospect of yet further litigation between these parties. Related to this, the parties have been

dilatory in the pursuant of this action. The position of CEO has been vacant since July 2015. As early as August 2015 the then Minister was expressing concern at the impact the lack of a CEO was having on the Ministry and National Infrastructure projects. Almost two and a half years have gone by since then. The position should be filled in the public interest as soon as possible.

[68] In my view the interests of the parties and the public can be best advanced if the Commission is now free to re-advertise the role of CEO for the Ministry. Mr. Fa'oliu will of course be entitled to apply for the position on an even footing with all other applicants.

10 **Result**

[69] I grant leave to Mr. Fa'oliu to apply for review of the Commission's decision of 11 July 2016 not to appoint him as the CEO of the Ministry of Infrastructure, Transport and Tourism.

[70] I make a declaration that the decision of the Commission of 11 July 2016 to not appoint Mr. Fa'oliu as CEO of the Ministry of Infrastructure, Transport and Tourism was unlawful.

[71] I decline to grant any further relief.

[72] Mr. Fa'oliu is entitled to his costs to be fixed by the Registrar if not agreed.

Prasad v Tu'utafaiva and The Kingdom of Tonga

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 34/2017

19 December 2017

Practice and Procedure — setting aside judgment by default — malicious prosecution

The Plaintiff claims the police maliciously prosecuted him and he spent 48 days in jail in relation to the theft of $200,000 from a car. In the Magistrates Court the police dropped the case against the plaintiff. The plaintiff sued for damages and the police mislaid the papers and no defence was lodged and the plaintiff obtained judgment by default with damages to be assessed. When the Attorney General learned of the Judgment a prompt application was made to set it aside.

Held

1. In deciding if it should set aside a judgment by default, the primary consideration is whether the defence has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.
2. Defendant must reasonably explain the failure to file a defence, and here did so.
3. Judgment by default was set aside.

Cases considered

Apex Insurance Brokers Ltd v Finau [2012] Tonga LR 112
Sevele v Pohiva anor [2008] Tonga LR 37

Rules considered

Rules of Supreme Court, Order 14 Rule 4

Counsel for the plaintiff : Mr. L Niu SC
Counsel for the defendants : Mr. J Lutui

R U L I N G

The application

[1] This ruling is concerned with an application to set aside a default judgment obtained by the plaintiff (Mr. Prasad) against the defendants (referred to as the Kingdom and Acting Inspector Tu'utafaiva respectively) on 13 October 2017.

[2] Mr. Prasad argues that the default judgment should not be set aside because neither the Kingdom nor Acting Inspector Tu'utafaiva have satisfied their burden to show that there was good reason for their failure to file a defence or that they have an arguable defence as required by Order 14 Rule 4 Supreme Court Rules.

The background

[3] Mr. Prasad's action alleges that he was the victim of a malicious prosecution by the defendants in respect of the theft of $200,000 and that he spent 48 days in prison. He seeks damages of more than $60,000. The background in so far as it is relevant to this application follows.

[4] On 22 April 2016, there was a theft of a large sum of money from a vehicle outside Narottam's store. There were two witnesses to the incident namely Sione Halapio and Teisa Pahulu. Sione Halapio made a statement to the Police on 23 April 2016. Teisa Pahulu made a statement on 23 April 2016 and another statement on 12 July 2016.

[5] On 12 July 2016, Acting Inspector Tu'utafaiva arrested and charged Mr. Prasad with the theft. Mr. Prasad was held in custody until the following day when he was taken before the Magistrate's Court and remanded in custody.

[6] On 15 July 2016, Mr. Prasad appeared in the Supreme Court on an unrelated matter and Cato J remanded him in custody until 29 August 2016. I do not know to what extent the fact that Mr. Prasad was already charged with theft influenced Cato J but for present purposes it is not material.

[7] Mr. Prasad alleges (but it is denied) that whilst he was in custody Acting Inspector Tu'utafaiva told him that if he gave him $10,000 he would release him.

[8] On 29 August 2016, Mr. Prasad appeared before Cato J again where he was released on bail. Mr. Prasad had spent 48 days in custody.

[9] On 7 February 2017, the theft charge was struck out in the Magistrate's Court. I understand that the prosecution offered no evidence.

[10] Mr. Prasad alleges (and again it is denied) that in March 2017 Acting Inspector Tu'utafaiva took him food and pleaded with him not to sue him as he would lose his job.

[11] Mr. Prasad commenced this action on 1August 2017. On 3 August 2017 the papers were served on Crown Law for the Kingdom. On 7 August 2017 they were served on Acting Inspector Tu'utafaiva.

[12] The defendants did not ignore the claim. Crown Law sought instructions with a view to filing a defence by 31 August 2017. Acting Inspector Tu'utafaiva searched for the relevant file, which initially could not be found.

In late August 2017 Acting Inspector Tu'utafaiva located the file. He was instructed to hand a copy of it to Superintendent Vailea, whose responsibility it was to send the file and full instructions to Crown Law. Superintendent Vailea did not forward the file or any instructions to Crown Law and the matter was overlooked.

[13] On 12 October 2017, Mr. Prasad applied for judgment by default. On 13 October 2017, judgment was entered as to liability with damages to be assessed by the Court. That matter was set down for hearing on 22 November 2017.

[14] On 10 November 2017, the Acting Attorney General and Director of Public Prosecutions become aware of the default judgment. Instructions were sought from Acting Inspector Tu'utafaiva and the Police. The Police file was reviewed by Mr. Lutui who recommended that an application to set aside the judgment be made.

[15] This application was filed promptly on 22 November 2017.

[16] When the matter came before the Court on 23 November 2017 I adjourned the hearing to assess Mr. Prasad's damages and timetabled the application to set aside the default judgment.

The relevant principles

[17] The claim is brought on the basis that the Kingdom is vicariously liable for the actions of Acting Inspector Tu'utafaiva.

[18] A plaintiff bringing an action for malicious prosecution must establish five elements. Those elements are; (1) the defendant prosecuted the plaintiff on a criminal charge, (2) the criminal proceedings terminated without the plaintiff being incriminated, (3) the defendant had no reasonable and probable cause for bringing the proceedings, (4) the defendant acted maliciously, and (5) the plaintiff suffered damage as a consequence (Todd, Hawes and Cheer 'The Law of Torts in New Zealand' 7th Ed at 1037).

[19] Order 14 Rule 4 provides that the Court may set aside a judgment entered by default if the defendant satisfies the Court that there was good reason for the failure to file a defence in time; and there is an arguable defence; and the plaintiff will not suffer irreparable injury if the judgment is set aside.

[20] Whilst Order 14 Rule 4 permits the setting aside of a judgment in certain circumstances it does not prohibit the setting aside of a judgment in other circumstances in the exercise of the Court's inherent powers (Apex Insurance Brokers Ltd v Finau [2012] Tonga LR 112, 119).

[21] In Apex the Court of Appeal referred with approval to Evans v Bartram [1937] AC 473 as follows:

> [56] In Evans v Bartram [1937] AC 473, 480 Lord Atkin said, in the context of Order XXVII r. 15 which gave the Court a discretion, untrammelled in terms, to set aside default judgments:
>
> "The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that ...there must be an affidavit of merits...It was suggested ...that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default ...I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court has regard. If there was a rigid rule...the two rules [of Court] would be deprived of most of their efficacy ...Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist."
>
> [57] Lord Atkin also said at p. 480
>
> "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits, or by consent, it is to have the power to

revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

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

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

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

This application

[22] Mr. Niu accepts that Mr. Prasad will not suffer irreparable harm should the judgment be set aside. He argues that the defendants have not shown 'good reason' for failing to file a defence or that they have an arguable defence. He submits that the failure to establish any one of the three elements in 0.14 Rule 4 means that the application must fail.

Good reason for failing to file a defence

[23] The obligation to establish 'good reason' in 0.14 Rule 4 does not mean that the failure to file the defence was justified or correct. In most cases such a requirement will never be satisfied because typically applicants will have failed to file a defence through some mistake or a lack of care in some respect. What the applicant must show is that their failure is reasonably explained. Each case must be decided on its own facts (Currie v Tokoroa Earthmovers Ltd [1960] NZLR 611, Paterson v Wellington Free Kindergarten Association Inc [1966] NZLR 975 and Sevele v Pohiva anor [2008] Tonga LR 37). An applicant who has simply ignored the action or made a deliberate choice not to file a defence may not be able to show good reason, but this is not such a case.

[24] Both the Kingdom and Acting Inspector Tu'utafaiva took steps to defend the claim. Crown Law sought instructions with a view to filing a defence. For his part, Acting Inspector Tu'utafaiva searched for and located the file and in accordance with the instructions given to him he handed a copy of the file over to

Superintendent Vailea believing that it would be delivered, along with instructions, to the Attorney General's office to file a defence.

[25] Mr. Niu argues that Acting Inspector Tu'utafaiva cannot 'shirk' the responsibility to file a defence and now blame Crown Law 'because the Crown Lawyer is the lawyer for [the Kingdom] and not his lawyer'. That submission is unfair and incorrect. Acting Inspector Tu'utafaiva was entitled to believe that Crown Law would file a defence and that Crown Law was acting for both him and the Kingdom (as indeed it is).

[26] As far as the Kingdom is concerned, Mr. Niu says it has no good reason for not filing a defence because the Police file was located within the time for the filing of a defence and Crown Law was aware of the need to file the defence by 31 August 2017. What this overlooks is that Superintendent Vailea failed to hand over the file or give instructions to Crown Law. Crown Law could not file a defence in those circumstances.

[27] I am satisfied that the failure to file the defence was the result of a mistake by Superintendant Vailea for which he was responsible. The failure to file a defence by both defendants has been reasonably explained.

An arguable defence

[28] As far as the elements of Mr. Prasad's cause of action are concerned, the contest between the parties is directed at whether the defendants had reasonable grounds to bring the prosecution and whether they acted maliciously in doing so.

[29] Mr. Niu made detailed submissions referring to Police documents and witnesses statements in an effort to convince me that there was no arguable defence. On what is before me he had a very difficult task. The defendants have satisfied me that they do have arguable defences. The defences are that there were reasonable grounds to charge Mr. Prasad and that they did not act maliciously in doing so.

[30] Mr. Niu's arguments are based on; (1) interpretations of documents which I do not accept are necessarily correct; or (2) require me to reject the sworn evidence of Acting Inspector Tu'utafaiva, when I do not have any adequate reason to do so.

[31] Based on my reading of the statements of Teisa Pahulu alone it is plainly arguable that she had a good opportunity to observe the person who committed the

theft (including his full facial features) and that she identified Mr. Prasad as being that person. Her statement as to what happened on the day of the theft and as to the description of the offender is corroborated to an extent by the statement of Mr. Halapio. In my view it is arguable that this was sufficient to charge Mr. Prasad.

[32] As regards the requirement that the prosecution be malicious, Mr. Niu argues that this is established because Acting Inspector Tu'utafaiva told Mr. Prasad that he would release him for $10,000 and later took him food and asked him not to sue him. Both of these matters are denied by Acting Inspector Tu'utafaiva. For the purposes of this application there is nothing before me that I consider reason to disbelieve him.

The discretion

[33] Had I been of the view that the defendants had failed to establish 'good reason' for failing to file a defence, I would still have set this judgment aside in the exercise of my discretion. The allegations that Mr. Prasad makes against Acting Inspector Tu'utafaiva are extremely serious. To put it simply, he alleges that Acting Inspector Tu'utafaiva is a corrupt Police Officer. Any such finding by the Court will have most serious consequences for Acting Inspector Tu'utafaiva. It will also bring the Tonga Police into disrepute. In a case where the allegations are denied and the defendants always intended to defend themselves against them, I believe that they must be allowed to be heard.

Result

[34] The judgment obtained by the plaintiff against the defendants on 13 October 2017 is set aside.

[35] In relation to costs, the plaintiff has unsuccessfully opposed this application but on the other hand the defendants are being granted an indulgence. Costs shall lie where they fall.

[36] The defendants are to file their statements of defence by 19 January 2018.

[38] The action will be listed for mention at 9am on 26 January 2018 for timetabling.