**TONGA**
**LAW REPORTS**
**2013**

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# LAW REPORTS
# 2013

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

**Printed by**
**Tonga Print Limited**
**Kingdom of Tonga**

Court of Appeal

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Hon Justice Peter Salmon
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Hon Justice Kenneth Handley

Supreme Court

Lord Chief Justice MD Scott
Hon Justice Charles Cato

Land Court

Lord Chief Justice MD Scott
Hon Justice Charles Cato

Magistrates' Court

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Magistrates
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MODE OF CITATION

The mode of citation of this volume is [2013] Tonga LR

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# Vakameilalo anor v Tahavalu anors

Supreme Court, Nuku'alofa
Scott P
LA 14/2009

7 January 2013

*Land law – application for possession of land – defendants had no right to remain on the land – possession ordered*

On 25 June 2009 the plaintiff commenced seven sets of proceedings, numbered LA14 to LA20 of 2009, against one group of three defendants (LA14/09) and six other individual defendants, all of whom was said to be trespassing on portions of a tax allotment known as "Fonua'eiki" which was registered in the plaintiff's name on 18 July 2002. All the defendants (with the apparent exception of Paula Kupu Tu'ivai – LA 16/09) filed defences. The defences were not identical and were considered separately, however, a number of common submissions were advanced. These included the claim that the defendants had entered onto the land with permission, that they had lived there for many years and that the land occupied by them had been promised to them. The defendants claimed that the Minister erred in granting the land to the plaintiff since it was not available for grant, first, because the defendants were in lawful occupation and secondly because it had reverted to the estate holder in 1993. Alternatively, the plaintiff was estopped from obtaining vacant possession against him. On 19 March 2010 the plaintiff applied for summary judgment on the grounds that he was the registered holder of the land. The applications for summary judgment were all dismissed on 12 April 2010.

Held:

1. Where it was claimed that the land in question was not available to be registered in the plaintiff's name by reason of it being occupied by the defendants, something more than mere occupation must be pleaded.
2. Where a defendant was accepted as having lawfully come onto the land (so was not a mere trespasser) which had subsequently been registered in the plaintiff's name, then the burden rested on the defendant to show that he had more than a mere revocable license. If it was the defendant's case that the plaintiff was estopped from obtaining vacant possession then it was obviously crucial that the representations which were said to have lead to the creation of the estoppel should precisely be proved. A party should not be estopped on an ambiguity. Where an estoppel was found to have

been established, no form of title was acquired by the defendant, only an equity and a license were conferred.

3. The defendants had not shown that they had any right to remain on the land either on the ground of "unavailability" or by virtue of estoppel. The plaintiff's cause of action arose against the defendants, not on the day they moved into occupation of the land as licensee, but on the day his cousin died. The proceedings were commenced within the limitation period. Although the defendants claimed, alternatively, that they developed the land, there was no evidence presented that this was so. The construction of a house was not developing of the land in Tonga. Although it seemed that sums of money may have been given to the cousin before his death, the defendants had been living rent free on the land since it was inherited by the plaintiff. There was no basis for an award of compensation to them. It was accepted that no representations were made by the defendants to the Minister and no claim to the land was made by them under the provisions of Section 54. In these circumstances it was not shown that the Minister erred in acting on the information supplied to him by the plaintiff and granting the land in his name. The defendants claim against the third party failed.

4. There was judgment for the plaintiff and for the third party. An order for possession was made against the defendants in 42 days. The plaintiff's and the third party's costs were to be taxed if not agreed in January 2014.

Cases considered:

Alofi v Fine [1998] Tonga LR 24
Finau v Minster of Lands LA25/2010
Havea v Tu'i'afitu & Ors [1974-80] Tonga LR 55 (PC)
Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446
Kaufusi v Kaufusi [1998] Tonga LR 173
Kolo v Bank of Tonga [1997] Tonga LR 181
Legione v Hatly [1983] 152 CLR 406
Ma'ake v Lataimu'a [2007] Tonga LR 15
Matavalea v Uatu [1989] Tonga LR 101
Ongolea v Finau [2003] Tonga LR 147
Palu v Bloomfield [1974-80] Tonga LR 105
Schaumkel & Anor v 'Aholelei & Anor LA18/07
Tafa v Viau & Ors [2006] Tonga LR 287
Tafolo v Vete [1998] Tonga LR 164
Veikune v To'a [1981-88] Tonga LR 138

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mr W Edwards
Counsel for the defendant : Mr Tu'utafaiva
Counsel for the third party : Mr A Kefu (Solicitor General)

**Judgment**

1. On 25 June 2009 the Plaintiff commenced seven sets of proceedings, numbered LA14 to LA20 of 2009, against one group of three defendants (LA14/09) and six other individual Defendants, all of whom was said to be trespassing on portions of a tax allotment known as "Fonua'eiki" which was registered in the Plaintiff's name on 18 July 2002.

2. All the Defendants (with the apparent exception of Paula Kupu Tu'ivai – LA 16/09) have filed Defences. These defences are not identical and will have to be considered separately, however, a number of common submissions were advanced. These include the claim that the Defendants had entered onto the land with permission, that they had lived there for many years and that the land occupied by them had been promised to them. In these circumstances, the Minister of Lands erred in registering the land in the Plaintiff's name since it was not available for allocation to him. Alternatively, the Plaintiff was estopped from obtaining vacant possession against him (see *Tafa v Viau & Ors* [2006] Tonga LR 287).

3. The Defendants in LA 14/09 filed an amended defense on 6 October 2009 after leave to join the Minister had been given on 11 September 2009. The Defendants state that the first went on to the land in 1991at the invitation of one Mohulea Latu who was already living there.

"Sometimes in 2000/2001" Tau promised Tupou Mahe, the deceased husband of the Second Defendant, that the portion of the land being occupied then would be registered in Tupou Mahe's name. Unfortunately, both Tau and Tupou Mahe died before that promise was kept. As evidence of the promise they state that the name Tupou Mahe can be found on survey maps prepared for the Ministry in July 2000 and August 2000. By way of alternatives, the Defendants claim to have been in adverse possession of the Land for more than 10 years, since 1991 and accordingly the Plaintiff's action is statue barred by virtue of Section 170 of the Act. In further alternative the Defendants counter-claimed T$180,000 "for developing and looking after the allotment for about almost 18 years" and to cover the cost of finding an alternative place to live.

4. A third party notice DPM was filed on 19 April 2010. The Defendants claim that the Minister erred in granting the land to the Plaintiff since it was not available for grant, first, because the Defendants were in lawful occupation and secondly because it had reverted to the estate holder in 1993. Similar third party notices were filed in LA 15, 17, 18 & 19/09. No notice was issued in LA 20/09 (or LA 16/09).

5. On 19 March 2010 the Plaintiff applied for Summary Judgment. In his supporting affidavit he averred that he was the registered holder of the land. A copy of the deed of grant was Exhibit B to the affidavit. This deed records that the previous holder of the land was Filimone Afu'alo Katoa Vakameilalo (Katoa) who first registered the land on 5 May 1939 and who died on 15 September 1999. On Katoa's death the land (or so much of it as remained after several portions had been surrendered – see Further and Better Particulars filed by the Third party on 6-12-2011) devolved to his son Siaosi Tau Vaka (Tau) by operation of Section 82(c) of the Act. Tau died on 28

September 2000 and the Plaintiff then presented his own claim relying on Section 82(e) of the Act.

6. According to paragraph 8 of the affidavit, on 22 January 2002 the Ministry of Lands wrote to the Defendants (addressed as Tupou Mahe – Exhibit D):

> "Before the Hon. Minister of Lands makes a decision to transfer the tax allotment to [the Plaintiff] I am required to advise you all in order that you will know that the allotment presently occupied by you is to be transferred to [the Plaintiff] as the heir in accordance with the law".

7. The Defendants admit receiving this letter and also admit that they did not make any representations to the Minister. On 28 August 2002 the Defendants (again addressed as Tupou Mahe) were given notice to quit. They did not comply. On 1 May 2009 a second notice to quit was served, this time on the First Defendant. The notice was not complied with.

8. In paragraphs 17 to 19 of his affidavit the Plaintiff pointed out that Mohulea Latu was never the holder of the tax allotment but that from 1991 until his death in 1999 the holder was Katoa. It was also pointed out that Tau died in September 2000 and therefore could not possibly have given the Defendants any assurances in 2001.

9. The Second Defendant filed an affidavit in opposition to the application in April 2010 on behalf of herself and her co-defendants. She stated that the Defendants "thought that the land in which we have now occupied was given to us in a lawful manner" by Tau and accordingly was not available to be granted to the Plaintiff.

10. The Plaintiff also filed applications for Summary Judgment in the associated actions LA 15, 17, 18, 19 & 20/09. Each application was supported by an individual affidavit with the exception of LA 20/09 affidavits in answer were filed by each of the Defendants.

11. The applications for Summary Judgment were all dismissed on 12 April 2010 however no reasons for the dismissals appear to have been published. The trial of all seven actions was fixed for December 2010 however it did not take place [*editor's note*: the last part of this sentence was deleted because it was inaccurate].

12. In April 2011 Mr Kefu advised the Court that he had only just been served with the third party notices. A defence to the notice in LA 15/09 was filed on 1 June 2011 and defences to the other notices in the related actions were filed on the same day. In 15/09, the Minister accepted that the Defendants were in fact residing on the land which the Plaintiff was entitled to inherit following Tau's death and also admitted that Tupou Mahe's name was written on the survey plans. This, however, was not evidence of registration in their favour, merely of the fact of their occupation. When the Plaintiff had applied to be registered as the holder of the land the Defendants were written (paragraph 6 above) but they did not take the opportunity to make any claim to the land.

13. On 19 July 2011, the Defendants requested further and better particulars of the Third Party Defence. The Particulars were provided on 6 December 2011. They

concerned details of the land surrendered by Katoa and do not go to the central issues now before the Court.

14. Between December 2011 and May 2012, the parties attempted settlement. On 3rd May, Mr Edwards filed a memorandum suggesting that the matter be dealt with by way of written submissions (together with the documents and affidavits already filed). Both Mr Tu'utafaiva and Mr Kefu agreed that the main question was whether the Plaintiff was bound by any promises found to have been made to the Defendants by his predecessor in title. A bundle of agreed documents 1-15 was filed by Mr Edwards and a second bundle A to E was filed by Mr Kefu. On 3 September 2012 Mr Edwards filed helpful and comprehensive written submissions for which I am grateful. On 5 October 2012 I extended the time for filing by the Defendants to 14 October and by the Minister to 22 October. I also warned that if the submissions were not filed by those dates I would proceed to Judgment without them. By 26 October no further submissions had been filed and none have been filed since. In view of the complexity of the matters before me, I record my regret that the further assistance promised by counsel was not forthcoming.

15. Before considering the individual actions it may be helpful to be reminded of a number of fundamental legal and procedural propositions which apply to Land cases of this kind.

16. In *Ma'ake v Lataimu'a* [2007] Tonga LR 15, 26 the Court explained that:

> "The legal position in relation to any challenge to a registered deed of grant has often been stated. 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 fraud, mistake, breach of promise made by the Minister or estate holder or breach of the principles of natural justice. If land is "unavailable" to be granted because it is the subject of some other claim, then there might be an impediment which would make registration contrary to the Act and, hence, liable to be set aside".

In *Havea v Tu'i'afitu & Ors* [1974-80] Tonga LR 55 the Privy Council held that the burden of proof rests upon the person challenging the grant to produce sufficient evidence to rebut the presumption referred to in *Ma'ake*.

17. Where, as in this case, it is claimed that the land in question was not available to be registered in the Plaintiff's name by reason of it being occupied by the Defendants, something more than mere occupation must be pleaded. In *Finau v Minster of Lands* LA25/2010 I endeavoured to explain that the fact of legal occupation does not *ipso facto* confer upon the occupant a right to continue that occupation and in *Schaumkel & Anor v 'Aholelei & Anor* LA18/07 I express the view that *Tafa v Viau* (above) is not authority for the proposition that land which is lawfully occupied is, by virtue of that fact alone, unavailable for grant; rather it is authority for the proposition that before granting land, the Minister is obliged to investigate the circumstances on the land in question and, in particular, when there is found to be on the land a person living in a house who claims to have been living there lawfully for some time, the Minister must fully inquire into the basis of the resident's claim to be allowed to continue to reside on the land (but note paragraph [16] of *Tafa v Viau* p294).

18. Where a Defendant is accepted as having lawfully come onto the land (ie is not a mere trespasser) which has subsequently been registered in the Plaintiff's name, then, applying *Havea* (above) the burden rests on the Defendant to show that he has more than a mere revocable license (see *Palu v Bloomfield* [1974-80] Tonga LR 105). If it is the Defendant's case that the Plaintiff is estopped from obtaining vacant possession then it is obviously crucial that the representations which are said to have lead to the creation of the estoppel should precisely be proved. A party should not be estopped on an ambiguity (*Legione v Hatly* [1983] 152 CLR 406). Where an estoppel is found to have been established, no form of title is acquired by the Defendant, only an Equity and an License are conferred (*Matavalea v Uatu* [1989] Tonga LR 101).

19. As already noted, the only evidence for the Defendants was the affidavit of the Second Defendant 'Ofa Tahavalu filed on 9 April 2010. In her affidavit the Second Defendant avers that:

> "The land in which we are now occupied was given to us in a lawful manner by Siaosi Tau Vakameilalo in 2000".

And that the Ministry knew that it was still being occupied by the Second Defendant in 2000. In these circumstances it was unavailable for grant to the Plaintiff.

20. It is unfortunate that that this affidavit is even less detailed than the Statement of Defence filed on 6 October 2009 but even regarding the Statement of Defence as having somehow being incorporated into the Second Defendant's evidence, a number of difficulties are immediately apparent. In the first place, there is nothing to explain the status or right of occupation of the First and Third named Defendants. Secondly, even assuming that Mohulea Latu invited the Defendants onto the land in 1991, the right of Mohulea Latu to extend such invitation is nowhere explained and neither is it claimed that the invitation was agreed to by the registered land owner at the time, Katoa. The "promise" pleaded in paragraph 1 (b) and (d), 6 and 17 (a) of the Statement of Defence is not the same as the gift averred in paragraph 3 of the affidavit. The holder of an allotment is only allowed to part with possession of any part of the land as permitted by the Act. Unlawful agreements are prohibited by Section 13. No lease is alleged. No Section 54 surrendered was applied for or took place. A person promising to surrender part of his allotment cannot guarantee that the surrendered land will not immediately devolve upon the heir under the provisions of the Act but instead will be granted by the Minister to the promisee, against the wishes of the heir. The promise said to have been made by Tau in about 2000 or 2001 was a promise which, in law, he was simply unable to honour (see *Kaufusi v Kaufusi* [1998] Tonga LR 173).

21. It seems fairly clear from the Survey plans exhibited to the Third Party notice and from the surrenders detailed in the Third Party Particulars filed on 6 December 2011 that subdivision of the original tax allotment held by Katoa had been both ongoing and in contemplation by Katoa and by Tau for some time. Although Mahulea Latu's status is unknown, there is no reason to doubt the Second Defendants Claim to have lived on the land since 1991. But lawful occupation in the past does not mean that a right to occupy it in the future has been established.

22. In *Veikune v To'a* [1981-88] Tonga LR 138, a case having some similarities to the present, Martin CJ found acquiescence and promissory estoppel proved. Having observed that "the effect of this in Tongan law is difficult to determine" he ruled that the son and heir of the promisor "held the land in exactly the same right as (his father) and he too therefore estopped".

23. In *Ongolea v Finau* [2003] Tonga LR 147, 152 the Court, relying on *Tafolo v Vete* [1998] Tonga LR 164 and *Inwards v Baker* [1965] 2 QB 29; [1965] 1 All ER 446 accepted that an equity in possession is binding on subsequent title holders. With respect, I am not sure that *Tafolo* is authority for that proposition or that *Inwards* can be applied to Tongan land law which is quite different from that in England.

24. Division II of the Land Act makes provision for the lease of allotments and Section 58 provides that the widow and heir are bound by the terms of an unexpired lease following the death of the lessor. There is no similar provision relating to licenses. While I do not exclude the possibility that an heir maybe bound by a promise made by the previous holder, it seems to me that, apart from lease, an heir is entitled to acquire the land free of incumbrance, that the effect of an estoppel, at any rates so far as vacant possession is concerned (compensation is a different matter) is to impose merely a personal restriction on the person estopped, not his heir (see *Alofi v Fine* [1998] Tonga LR 24).

25. In my view the Defendants in the present case have not shown that they have any right to remain on the land either on the ground of "unavailability" or by virtue of estoppel. The Plaintiff's cause of action arose against the Defendants, not on the day they moved into occupation of the land as licensee, but on the day his cousin Tau died. These proceedings were commenced within the limitation period. Although the Defendants claim, alternatively, that they have developed the land, there was no evidence presented that this was in fact the case. The construction of a house is, of course, not developing of the land in Tonga (see *Kolo v Bank of Tonga* [1997] Tonga LR 181). Although it seems that sums of money may have been given to Tau before his death, the Defendants have been living rent free on the land since it was inherited by the Plaintiff. I can find no basis for an award of compensation to them. It is accepted that no representations were made by the Defendants to the Minister and no claim to the land was made by them under the provisions of Section 54. In these circumstances it has not been shown that the Minister erred in acting on the information supplied to him by the Plaintiff and granting the land in his name. The Defendants claim against the Third Party must fail.

**Result:**

There will be Judgment for the Plaintiff and for the Third Party. There will also be an order for possession against the Defendants in 42 days from delivery of this Judgment. The Plaintiff's and the Third Party's costs are to be taxed if not agreed on January 2014.

## R v Tongatu'a anor

Supreme Court, Nuku'alofa
Cato J
CR 102 and 103/ 2012

25 January 2013

*Criminal procedure – unsatisfactory evidence that section 116 of the Police Act had been complied with – court satisfied that the accused had been questioned in breach of the provision*

The voir dire was held at the commencement of the trial of the accused Lisiate and Tahiua Tongatu'a, who were aged 16 and 13 at the time of their arrest on 4 April 2012 for house breaking and theft of a neighbour's residence. The trial was originally set down for a week's hearing before a Judge without a jury. It took four days of hearing evidence before the court ruled that records of interview that the brothers had entered into were inadmissible. As a consequence, the prosecution indicated it would not proceed further and the charges were dismissed. The prosecution claimed that the brothers had been taken before a Magistrate and he had remanded them in custody before they had been interviewed.

Held:

1. It was important that young offenders be granted bail unless there were very good reasons why bail should be declined. Police stations were inadequate for remanding those charged with offences for anything but very short periods.
2. The purpose of sections 115 and 116 of the Police Act were to ensure that persons under arrest were advised as to the reason for it and were not detained for a period longer than was practicable after arrest. The protection of a citizen against excessive and intrusive police action has been an approach consistently followed by Courts since Lord Atkin in *Liversidge v Anderson* stated that an arrested person "must be at once brought before a judicial tribunal".
3. It was very important that records be kept of times when those under arrest enter and leave police stations and of their movements. It was of even greater importance that accurate records be kept where juveniles are taken into custody. It was concerning that no records were kept aside from the cell book record to substantiate the movements of brothers into and out of the Nukunuku police station, on a matter as important as compliance with section 116 of the Police Act.

4. The evidence as to when the accused had been taken before a Magistrate was so disparate and unsatisfactory that the court was not satisfied on any standard that there had been compliance with the provisions of section 116 of the Police Act. It followed that the brothers had been questioned in breach of this provision.

Cases considered:
Fifita & Edwards v Fakafanua [1998] Tonga LR 127
Liversidge v Anderson [1941] 3 All ER 338
R v 'Esala Mafi No 69/200 18th March 2005
Williams v R (1986) 161 CLR 678
Wong-Kam Ming v The Queen [1980] AC 247

Statute considered:
Police Act 2010

Counsel for the Crown : Ms 'Atiola
Counsel for the accused : Mr Tu'utafaiva

**Ruling on the voir dire**

[1] The voir dire was held at the commencement of the trial of the accused Lisiate and Tahiua Tongatu'a, who were aged 16 and 13 at the time of their arrest on the 4th April 2012 for house breaking and theft of a neighbour's residence. The trial was originally set down for a week's hearing before a Judge without a jury. It took four days of hearing evidence before I ruled that records of interview that the brothers had entered into were inadmissible. I had informed counsel that I did not need to hear any further defence evidence before making my rulings. As a consequence, the prosecution indicated it would not proceed further and the charges were dismissed.

[2] The brothers initially stood trial with their mother who had been charged with receiving stolen property namely the proceeds of the alleged theft. When the matter first came before this Court after committal, their father had been also been charged with receiving. Shortly, after appearing before this Court the charges against him were dismissed, the Crown offering no evidence. It is of concern that the Crown did not take the same approach with the mother. It is unsatisfactory that she remained in jeopardy for so long, after it seems plain that proceedings should have been discontinued against her also on the grounds of insufficiency of evidence.

[3] I record also that when this case first came before me, Lisiate had been remanded in custody for a considerable period. A condition of his being granted bail by a Magistrate was that he had a surety. He had been unable to obtain a surety probably because at that stage his parents had also been arrested and all were committed to this Court for trial. When he came before me I expressed my concern that a person of his age had been denied bail because he could not obtain a surety. I immediately granted him bail without a surety.

[4] It is important that young offenders be granted bail unless there are very good reasons why bail should be declined. Police stations are inadequate for remanding those charged with offences for anything but very short periods.

[5] Serious consideration by Magistrates must be given before making bail conditional upon a surety being obtained especially in the case of young offender. Inquiry should be made, in any event, whether a surety is a practical option, rather than, as here, allowing a young person to be remanded in custody until a surety is found. Remanding young persons in custody may expose them to experienced criminals as well as being psychologically injurious. In this case, the practical effect of the remand was that Lisiate spent a lengthy period in custody when it is unlikely that he would have been sentenced to imprisonment as a young offender had he been convicted of the offending.

[6] In this case as the evidence unfolded on the voir dire, I became very concerned that the brothers had not been afforded such protection as the law requires under s 116 of the Police Act 2010 before making incriminating admissions. Various objections had been taken by Mr Tu'utafaiva, a very experienced defence counsel, in his detailed opening statement at the commencement of the voir dire, on the first day of the trial. It was alleged by him that that the brothers had been exposed to interrogation prior to being brought before a Magistrate under section 116 of the Police Act. Further objections were made to the manner and practice of interview and very serious allegations of police brutality and inducements by police officers who he named in his opening.

[7] After four days of evidence, with the Crown evidence on the voir dire concluded and the defence having called the elder brother, Lisiate, I indicated that I did not require hearing further from defence witnesses Tahiua, and his mother. I gave brief oral reasons for my decision that the records of interview on the 21st January 2012 would be excluded but indicated that I would enlarge upon those reasons in a written judgment.

**Sections 115-116 of the Police Act, 2010.**

Section 115 of the Police Act 2010 provides;

> (1) A police officer, without warrant, may arrest a person whom the police officer believes, on reasonable grounds;
>  a. is committing an offence
>  b. is about to commit an offence: or
>  c. has committed an offence.
> (2) The police officer may, without warrant, enter any property, vessel or vehicle to make an arrest.
> (3) The police officer shall inform the person;
>  a. that he is under arrest; and
>  b. of the nature of the offence for which the person is arrested.

Section 116 provides a procedure after Arrest.

> (1) A person who is arrested under section 115 shall be brought before a Magistrate, or if there is no Magistrate in the district, before the officer in charge of the police station, to be charged as soon as practicable after being arrested and no later than 24 hours after being arrested.
> (2) A police officer may, before bringing the arrested person before a Magistrate, ask the person any questions the officer thinks are appropriate in order to determine whether or not the person should be brought before a Magistrate.
> (3) If a person is not brought before a magistrate or the officer in charge of the police station, and charged, in accordance with subsection (1) the person shall be released unless ordered otherwise under the Bail Act by a Magistrate, or if there is no Magistrate in the district by the officer in charge of the police station.

[8] The purpose of sections 115 and 116 is to ensure that persons under arrest are advised as to the reason for it and are not detained for a period longer than is practicable after arrest. The protection of a citizen against excessive and intrusive police action has been an approach consistently followed by Courts here and elsewhere with some modification since Lord Atkin in *Liversidge v Anderson* [1941] 3 All ER 338, at 360 stated that an arrested person "must be at once brought before a judicial tribunal."

[9] Here, the police had certain information which meant that they were not at risk of arresting the wrong suspects and had reasonable grounds it seems for doing so. It was not the prosecution case that the questioning was permitted by s 116(2) in the absence of the brothers being taken before a Magistrate. The prosecution case was that the brothers had been taken before a Magistrate and he had remanded them in custody before they had been interviewed.

[10] Mr Tu'utafaiva referred me to case of *R v 'Esala Mafi* No 69/200 18th March 2005, in which Webster CJ referred to a number of authorities on the earlier provision relating to arrest without warrant under section 22 of an earlier Police Act which had provided that a person arrested had to be brought before a Magistrate without delay. Webster CJ referred to a number of leading authorities of the Tongan Court of Appeal on this point including *Fifita & Edwards v Fakafanua* [1998] Tonga LR 127. The Court of Appeal there considered unnecessary delay meant "as soon as practicable", an expression which had been used in an earlier Police Act, and appears to have been resurrected by its later inclusion in the 2010 Act in preference to "unnecessary delay" although for practical purposes the expressions have been said to be synonymous.

[11] The Court of Appeal, however, stated at p 134 that "there is no warrant for reading the provision as if it referred to the practicability of interrogation." The Court observed;

> "In our opinion, it is not right to say that no questions may be asked by police about the offence of which an arrested person is suspected. A few simple questions may resolve some doubt, and even lead to an immediate release of the suspect. But the safeguard requiring that the arrested person be brought before a magistrate without unnecessary delay is primary and must be fully observed."

[12] In this case, the officer in charge of the case, Lance Corporal Taufa, testified that the two brothers had been brought before a Magistrate who had remanded them in custody on the 4th April, 2012 and it was only after that that they had both been separately interviewed on the 5th April 2012. These interviews commenced at 9.30 in the morning of the 5th April. Later, the younger brother, Tahiua, had been further questioned by LC Taufa essentially repeating the information contained in the record of interview of the 5th April. Both brothers engaged in a demonstration later. In both interviews which took place at the Nukunuku police station a third party acquainted with the brothers was present.

[13] It became apparent towards the close of the first day of the voir dire, after cross-examination of LC Taufa, that the objection raised by Mr Tu'utafaiva that the brothers had not have been taken before a Magistrate before being interviewed on the morning of the 5th April was seriously in issue. LC Taufa had been quite certain in his evidence that summonses had been prepared for them after they had been taken to the Nukunuku police station and, although he did not take them before a Magistrate, he confirmed that they had been taken to the Central Magistrates' Court in Nuku'alofa on the 4th April where orders were made remanding them in custody.

[14] I inquired of the Crown whether there existed a record in the Magistrates' Court of orders that could establish precisely when it was the brothers had been taken before a Magistrate. The next morning, the prosecution indicated that it had not been possible to secure such information from the Magistrates' Court, but that the Nukunuku police station cell book had been produced. Evidence was given by LC Taufa that the handwriting was that of police officer PC Penitani who evidence confirmed was on duty on that date, and in fact that night.

[15] The cell book was brought to the Court although it was not formally produced. The evidence of LC Taufa is as follows;

> "This is the Nukunuku police station cell book, everyone that is submitted to the station by a Magistrate is to be kept in custody is recorded here. The entry number 51 of 2012 of the 4th April 2012, officers who conducted the arrest was LC Taufa and PC Tu'ipulotu; the officer in charge was IP Leone, the arrested individual was Lisiate Tongatu'a from Mapelu, 16 years old reference from the station dairy 16.05 hours the crime that he is arrested for is housebreaking and theft; this here is an order made by Mag Similoni Tu'akalau. Lisiate Tongatu'a is to be kept in custody until the 10th of the 4th 2012, but if all proceedings are completed by tomorrow then he is to be brought with sureties. On the 10th April 2012, Magistrate Salesi Mafi ordered that he be remanded until the 12th April 2012."

[16] LC Taufa, who had been a police officer and member of the Criminal Investigation unit for many years, had said initially that the order had been given by the Magistrate at 16.05 hours. He also referred to entry 52 relating to the younger brother Taihua as being basically the same for Lisiate. Under cross-examination, LC Taufa said that PC Penitani made the entry and was on vacation.

[17] He was then asked whether the reference to the time 1605 hours (which was said by Taufa to apply to both brothers) was the time of the order or when the entry was made. His response was that time 1605 hours was when Tahiua was brought with his order back to the police station. This prompted Mr Tu'utafaiva to observe that the order made by the Magistrate must have been at an earlier time. LC Taufa confirmed that for Tahiua the same time entry of 16.05 was made as for his brother.

[18] Further, he said that the prosecutor who had carriage of this matter and had taken the brothers before the Magistrate was a Sgt Fifita. LC Taufa said he had not taken the brothers to the Magistrate but that another officer Inspector Leone who was in charge of the station had also been involved with Fifita in this matter. Neither Sgt Fifita nor Inspector Leone, (the later against whom some serious allegations of misconduct were raised by Mr Tu'utafaiva) were called to give evidence.

[19] It is unsatisfactory that LC Taufa, as the officer in charge, appears to have made no entry in his investigation diary of the time when the brothers were taken before a Magistrate or when they were returned to the station after the Magistrate had made the order for their remand in custody; nor on his own admission were these important matters recorded by anybody in the station diary which records steps in an investigation.

[20] It is very important that records be kept of times when those under arrest enter and leave police stations and their movements. It is of even greater importance that accurate records be kept where juveniles are taken into custody. I find it concerning that no records appear to have been kept aside from the cell book record to substantiate the movements of brothers into and out of the Nukunuku police station, on a matter as important as compliance with S 116 of the Police Act.

[21] Even more unsatisfactory is the fact that the investigation diary established that it was not until 16.40 hours that Tahiua had been arrested. He had not been arrested at the same time as his brother but some time afterwards. In both cases, LC Taufa was involved with the arrests. The fact he was arrested at 16.40 was confirmed by LC Taufa as entry 11, 16.40 hours. This point was not lost on Mr Tu'utafaiva who asked whether the entry in the cell book was made in relation to Tahuia at a time when he had not yet been arrested. LC Taufa's only response was that both brothers had been processed together at the station for summons and he must have got his time wrong. The witness admitted to the Court the inconsistency in the timing.

[22] Mr Tu'utafaiva then suggested that the entry made by Constable Penitani in the cell book must have been a fabrication. I suggested that that was a serious allegation to make and Mr Tu'utafaiva appeared to withdraw this. However, as the evidence continued, the question seemed appropriate. In this regard, I note that in 'Esala Mafi, Webster CJ considered an entry also in a cell book that purported to confirm that a suspect had been taken before a Magistrate was fictitious.

[23] I asked the prosecution where Constable Penitani was and I was informed he was on vacation in Ha'apai. I asked whether it was the intention of the prosecution to call him. He was not, however, called and I would, in all the circumstances, have expected every effort to have him recalled from Ha'apai. There was plenty of time in the case for him to be called to give evidence, including a weekend, before the case terminated on the following Monday morning. No explanation was provided for his absence aside from the fact he was on vacation in Ha'apai.

[24] The matter became of even greater concern when a second officer Constable Vahafolau Taufa, who had interviewed Tahiua on the 5th April, gave evidence. He had been a police officer for about thirteen years. He had been working in CIU for nine years. He said that he arrived at work on the 5th April 2012 and saw Tahiua outside the prison cells at 8am. He had been kept within the police station after arrest but outside the cells. He said, importantly, that he had been with LC Taufa when Tahiua had been arrested at his home. He said that he arrested him at 16.40 hours. He said that Tahiua was kept in custody to be brought before the Magistrates' Court on the 5th April. He said that he was not brought before the Magistrates' Court on the 4th because it was closed. He said that Tahiua was taken to the Magistrates' Court with his brother, he thought, early the next day. He said he was not present when they were taken before a Court but he believed that it was on the 5th April in the morning. Further questioning of him revealed that his belief was based on the fact that he knew an arrested suspect had to be taken before a Magistrate before "we complete their paper work", and assumed this had been the case. He had, however, no actual knowledge of when the brothers had been brought before a Court.

[25] Lisiate gave evidence that he was arrested by LC Taufa he thought about 2 or 3 pm in the afternoon of the 4th April. He did not see his brother until the morning after. He had spent the night in the cells. He was not taken to see a Magistrate until later that day on the 5th April when he was taken there with Tahiua and seen by Chief Magistrate Mafi. He said he remained in custody for a month. He and Tahiua had been separately interviewed at the Nukunuku police station before being taken before the Magistrate. The time both interviews commenced was confirmed as 9.30 am.

[26] At the time the Court adjourned for the weekend late on the Friday, the Crown case was in severe difficulty on the issue of whether the brothers had been taken before a Magistrate before being interviewed. The evidence of Lisiate that he had not been taken before a Magistrate on the 4th April was supported by the evidence of Constable Vahafolau Taufa who had confirmed that Tahiua had been arrested at 4.40 on the 4th April and that it was too late for him to have been brought before a Magistrate. He said the last time he saw him was at the station on the 4th April was about 5.15.pm. He went home at 6pm. Constable Taufa said he went on duty on the 5th April at about 8.30 am. He gave evidence that he had spoken with LC Taufa before interviewing Tahiua. He had seen Tahiua outside the cells on his arrival at the station. There was no evidence that the brothers were taken to the Magistrate's Court early on the Saturday prior to the interviews commencing at 9.30 on the 5th April. In any event, any such suggestion by Constable Taufa was not only surmise but was in conflict with Constable Penitani's note that they had been remanded by the Magistrate prior to 4.05 pm on the 4th April when they had been returned under order to Nukunuku.

[27] Although Mr Tu'utafaiva indicated that he intended to call both Tahiua and the boys' mother as witnesses on the voir dire, I reflected on the matter over the weekend. By then the Crown had closed its case on the voir dire and Lisiate had given his evidence. After the Crown had indicated it had no further evidence to call on the Monday morning, I indicated to Mr Tu'utifaiva, that unless he wished to call further evidence, there seemed little point in proceeding because the evidence as to when the accused had been taken before a Magistrate was so disparate and so very unsatisfactory that I was not satisfied on any standard that there had been compliance with the provisions of s 116 of the Police Act. It followed that the brothers had been questioned in breach of this provision.

[28] Provisions which authorize the detention of a citizen must be strictly construed. Williams v R (1986) 161 CLR 678, at 297. Still greater is the need for proof of compliance in the case young persons under arrest. It was for these reasons, that I ruled that the admissions in the records of interview of the 5th April 2012 should be ruled inadmissible. The Crown simply had not satisfied me that the brothers had not been illegally detained for interrogation.

[29] I record that I am very concerned about the authenticity of the entries in the cell book made by Constable Penitani, in the face of the evidence I have heard. I am concerned further that no attempt was made it seems to have Penitani called, nor evidence from officers such as Sgt Fifita or Inspector Leone who, as the officer in charge of the station, may have been able to advance the matter. They were not called and nor was any explanation advanced as to why they were not called to give evidence on such a fundamentally important issue.

## Other matters of Objection

[30] I will now deal with certain of the other objections which troubled me. I do not propose here to deal with all the objections raised by Mr Tu'utafaiva, but only those which caused me real concern.

[31] In the case of Lisiate, LC Taufa also admitted that he had questioned Lisiate on the 4th April without any third person present concerning the whereabouts of the property that was stolen. That was prior to his interview on the 5th April where a person known to Lisiate, Sione Taufa was present. He was not related to the officer in charge.

[32] During the course of his evidence, the issue of the presence of a third party at police interrogations where young persons have been arrested and are suspects was considered. The Court was informed that the requirement of a third party, being usually a relative or acquaintance of the suspect, is not a matter regulated by any legislation or formal police instruction but is a practice which has developed, appropriately, in my view, as part of Tongan policing.

[33] In this case, I consider it was also unsatisfactory that LC Taufa had spoken with Lisiate about the alleged crime on the 4th April to obtain information about the whereabouts of stolen property without a third party being present. Further, this discussion with Lisiate was not the subject of any note by LC Taufa. That also was unsatisfactory. Although Lisiate in his evidence denied any discussion on the fourth

with Taufa, I accept there was one. Not only the discussion which LC Taufa said lasted for about 20 minutes should it not have been undertaken before Lisiate had been taken before a Magistrate under s 116 of the Police Act, but it should not have been undertaken without a suitable third party being present. The absence of any note as I have said is a serious omission also.

[34] He also gave evidence that he had conducted a second formal interview with Tahiua without any third party present, during which he wrote out Tahiua's explanation and later asked him to sign the document. This was after Tahiua had made admissions on the 5th April where a third party acquaintance of Tahuia's, a Mr 'Amanaki Manu was present.

[35] I found it unsatisfactory that LC Taufa chose to interview these suspects without offering them the chance to have a third person present when he knew full well that Tongan practice required such a person to be questioned in the presence of a third party with whom the suspect was familiar. I formed the view that LC Taufa adopted an approach to this issue which was convenient and expedient and this was inconsistent with the approach that he knew well he was required to adopt. I could not understand in any event why he chose to interview Tahiua on a second occasion after the latter had made fulsome admissions. I would not have been prepared to admit any admissions secured in such circumstances on the grounds that they breached police practice and in fairness.

[36] It is well accepted today that the police station is an inherently coercive atmosphere for suspects, and particular care has to be taken to ensure that admissions made are reliably recorded and the process has integrity. The presence of a third party known to the suspect removes some of the coercive aspects of interrogation, and enhances transparency in the absence of an interview being electronically recorded. There have been many instances documented of false and unreliable confessions being made by suspects in police custody including young offenders. In my view, legislation and or standing orders or instructions should be promulgated to govern police interviewing practice in Tonga. This will ensure that police officers know clearly what standards they have to meet.

[37] In this case, in regard to the interview of Tahiua on the 5th April, Constable Vahafolau Taufa's evidence was that he had, after recording the questions and answers, simply given the document to Tahiua to sign each question and answer. On the whole, although I found Constable Taufa a forthright witness, I was concerned that he had not satisfied himself that Tahiua aged 13 at the time was able to meaningfully read the questions and answers he had recorded before signing the record in the various places he did. His answers to questions posed of him are instructive of the concerns I had.

> "All right, did you at any stage invite Tahiua to read the question and answer?
>
> When I gave it to him to sign, it was for him to read.
>
> You didn't read it to him?

No

Before you asked him to put his mark or signature against any question and answer which is the procedure to my recollection is that right?

Yes

Did you ask him to read the question and answer before he signed it?

No

Did you take steps to satisfy yourself that this young man of 12 years at the time or 13 years was able to read your handwriting?

No

Did you tell him before he signed the document in any place did you ask him "is what you have written there truthful and accurate account?

No

So really, the true position you were simply insuring that his signature was on that document and in various places without advising him of the importance of placing his signature on the document?

Yes

That's really what you were determining to get was his signature and you didn't bother to tell him or ask him if his statement was truthful and accurate, isn't it.

No

Well, what did you say to him? Have you got a note of what you said to him?

No."

[38] Where a young person is being interviewed more is required of an interviewing officer. Handing a document to a suspect to read does not mean that the suspect can or has in fact read it where the writing is not the suspect's. The fact that the third party gave evidence that Tahiua had the document for some time to read, is not evidence either that he in fact read it or could read it, and the witness accepted that. The interviewing officer must first ascertain that they are able to first read the questions and answers recorded and secondly that the suspect understands the importance of signing the answers.

[39] Lisiate had a very limited education. LC Taufa understood this and read the questions and answers to him because he could not read them himself. I would have excluded the admissions of Tahiua of the 5th April also on the ground that I could not be sure that Tahiua had read the questions and answers or understood the importance of placing his signature against them, and in those circumstances to admit the record of interview would have been unfair.

[40] Both Lisiate and Tahiua complained of serious assaults being perpetrated on them by Inspector Leone at the police station. These amounted to punching Lisiate to the ground after he had been arrested and taken to the station. In relation to Tahiua it is alleged he hit him with a stick. Both incidents are alleged to have occurred before the brothers made records of interview on the 5th April. Both indicated they were told they must tell the truth and I infer from this co-operate.

[41] Lisiate complained also that late on the evening of the 4th April he was burned on the face by constable Penitani, with a cigarette I infer also in an effort to intimidate and impress upon Lisiate the need to co-operate. In the case of Lisiate, I do not overlook the fact that Sione Taufa, the independent witness with whom Lisiate was well acquainted, gave evidence that he did not see any burns. Nor he said was complaint made to him. Lisiate gave evidence that he was scared to say anything and only told his mother later.

[42] I do not think it is a complete answer to the allegation that the burn, if any, went unnoticed by the independent person Sione Taufa, nor is the fact that no complaint was made to him. What concerns me is that neither Inspector Leone nor Constable Penitani were called by the Crown to defend these very serious allegations which had been clearly outlined by Mr Tu'utafaiva in his opening on the Monday morning. As I have said I do not consider the mere fact that Constable Penitani was on vacation in Ha'apai, an hour's flight to Tongatapu, was any excuse for him not to give evidence about such important matters. Every effort in my view should have been made to secure his attendance to give evidence before this Court, and defend such a serious allegation.

[43] Similarly, with Inspector Leone who was at the time in charge of the Police station at Nukunuku. Inspector Leone also should have been called by the Crown on the issue of the assaults. No explanation was provided as to why he was not called. As the officer in charge of the case and an experienced police officer, I would have expected LC Taufa to have taken steps to secure the attendance of both Constable Penitani and Inspector Leone to answer these allegations and also enlighten the Court concerning the issue of the s 116 remand.

[44] Although allegations of brutality against police officers are easily made and may have no substance, courts must always be vigilant to ensure that allegations involving particularly violence on suspects in custody are taken very seriously. In *Wong-Kam Ming v The Queen* [1980] AC 247, at 261, Lord Hailsham said in the Privy Council;

> "... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements but, also, and perhaps mainly because in a civilised

> society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra- judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

[45] It is difficult for a court when the alleged perpetrator is not called to defend the allegations. Even more concerning it is when those allegations have been made by young persons under arrest. I found so unusual the allegation of Lisiate involving the use of a cigarette, that I remain concerned. Nor could I say that I found him plainly unreliable in his evidence. By not calling witnesses such as Constable Penitani or Inspector Leone, the Crown runs a serious risk that adverse inferences will be drawn and that a record of interview will be ruled inadmissible because the Crown has not discharged the onus of proving beyond doubt that the confession was made voluntarily. In view of my earlier rulings I do not have to make a finding of fact in relation to these allegations, but I express my concern that the police officers did not give evidence. Had it been required of me I would for the reason that the allegations have gone unanswered have been inclined to have ruled the records of interview inadmissible on the grounds that the Crown had not discharged the onus of proof.

[46] Both Lisiate and Tahiua made allegations also that the interviewing officers had threatened them at the commencement of their interviews. Tahiua's allegations were made through counsel because the hearing was concluded without his giving evidence. Both interviewing officers denied any improper inducement in the nature of tell the truth or your mother will be arrested, and the third persons did not recall any such a threat or inducement. In view of the other rulings I have made, I do not have to make any finding on this subject. However, I do not necessarily regard as conclusive the fact that the third persons did not recall these matters. An inducement may not have triggered concern in a lay person, and, in any event, over six months has passed since the interviews. A better protection in my view would be to include a question relating expressly to threats or inducements or violence in plain and simple terms at the end of the record of interview. Nor does it come as a surprise that no complaint was made by either brothers of misconduct to a third party when the interviewing officer was present. Neither Mr Taufa nor Mr Manu were invited to confer in private with the brothers; and nor were Lisiate or Tahiua invited to confer in private with Taufa or Manu before the interviews commenced.

[47] Of concern also, was that during the course of his evidence, LC Taufa was asked by me whether there had been any fingerprints taken from the louvers that had been removed from the house to enable allegedly Tahiua to enter. He said that prints had been obtained and that the accused had their prints forwarded for fingerprint analysis. However, he said that the results had not been obtained yet despite several months between arrest and trial. He admitted that he had not advised the Crown of this. That I consider is a serious shortcoming in an officer who is in charge of a case. In this regard, I commend to LC Taufa the observations of Webster CJ who observed in *'Esala Mafi*;

> "I am saddened to have to say yet again in a criminal case that a confession by the accused is not a measure of a sound prosecution case. What makes a good prosecution is good and solid evidence from independent witnesses. A confession can always be challenged and there is no substitute for independent evidence"

[48] For all these reasons, I ruled that the interviews were inadmissible.

It has been my experience in Tonga that these kinds of issues as they often do in other jurisdictions can take a lengthy time to resolve. This case was no exception. It is important that the defence indicate with reasonable precision when a trial date is sought what evidence is challenged and a general outline of the nature of the objection with a reasonably accurate estimate of the required hearing time. Where a lengthy hearing is anticipated, it may be preferable and more convenient for all to resolve these matters by means of a pre-trial hearing rather than proceed to trial.

[49] Where an allegation of misconduct is to be made against a police officer, the Crown should also be alerted to this in a timely way, so that officers may be called to give evidence on the issue. It should be sufficient for the Crown to be told the general nature of the allegation and the identity officer involved, without citing chapter and verse.

[50] I thank both counsels for their assistance. The accused were fortunate to have a counsel of the experience of Mr Tu'utafaiva representing them. So often, those appearing before me have no legal representation, and it causes me concern. Cases such as this one illustrate clearly how important legal representation in criminal cases is. Provision of legal aid and perhaps an office of Public Defender would assist to remedy this deficiency. It is Mr Tu'utafaiva who was counsel in the case of '*Esala Mafi*, in 2005, which was a Ha'apai case, and an authority which I found very helpful.

# R v Malele

Supreme Court, Nuku'alofa
Cato J
CR 9/2012

30 January 2013

*Criminal law – private prosecution – complainant had standing – accused did not act unlawfully – not guilty*

The complainant, Manaloa Taufahema, commenced a private prosecution against the accused, his sister, for her actions in taking steps to demolish a house belonging to his mother in the village of Navutoka on Tongatapu. The Attorney-General declined to prosecute after the case had proceeded through depositions. Manaloa proceeded to privately prosecute the accused under an amendment to the Criminal Offences Act, in 2007, where the person aggrieved could bring a prosecution.

Held:

1. The complainant had standing to commence a private prosecution. The court accepted the complainant's evidence that his mother asked him to restore the house for her to return to when she died so she could lie in it before her funeral in Tonga. The court also accepted that probably she did represent to he and his wife at a meeting in Sydney that one day the house would belong to he and his children because as heir to the allotment, nobody else except him would have any practical enjoyment of the house. This may mean that he could support an action for a proprietary estoppel and derive a measure of equitable relief should his expectation to succeed to the property be denied on the death of his mother. In any event, as the heir to the allotment, quite independently of any representation, he would have had a sufficient interest to commence a prosecution, because, if his mother died intestate, under the Tongan Probate Act he would derive a share of the home.
2. The complainant's sister, Heleni, had written authority from her mother to have the house demolished. Approval for this was given to Heleni by a responsible authority. Heleni secured a contractor who proceeded to demolish the building. Not before substantial destruction had occurred, intervention halted further demolition. Manaloa found out about the actions of his sister and spent further money rectifying the damage. He then laid a complaint with the police. Heleni was said by the police to

show remorse for what she had done. Beyond any reasonable doubt, Heleni intentionally caused damage to the house in question.

3. The court found that the complainant was an honest man and a credible witness who was requested by his mother to improve the home and did so at considerable expense. The court also found that although his motivating factor was to answer his mother's request, his mother did, in his presence, assert that one day the house would belong to he and eventually his children.
4. As a criminal case the prosecution had to negative the fact of the mother's instruction beyond reasonable doubt in order to establish that Heleni damaged or attempted to demolish the house unlawfully. However, the court accepted that the mother gave both written and verbal authority to the accused to demolish the house.
5. The consequence was that the accused was found not guilty on both charges and was discharged.

Cases considered:
Inwards v Baker [1965] 2 QB 29
Pascoe v Turner [1979] 2 All ER 944

Statutes considered:
Criminal Offences Act (Cap 18)
Land Act (Cap 132)
Probate Act

Counsel for the complainant : Mr Laki Niu
Counsel for the defendant : Mr Pouono

## Verdict

[1] This was a private prosecution commenced by the complainant Manaloa Taufahema against the accused who was his sister for her actions in taking steps to demolish a house belonging to his mother in the village of Navutoka on Tongatapu.

[2] The Attorney-General declined to prosecute after the case had proceeded through depositions. Manaloa proceeded to privately prosecute the accused under an amendment to the Criminal Offences Act, in 2007. It was provided;

> "2. Section 197 of the principal Act is repealed and replaced with the following –
>
> "197. All prosecutions under this Act may be brought by the Attorney–General or the person aggrieved. "

[3] Although the Tongan Land Act provides that the eldest son, in this case the complainant, was on the death of his father heir to the allotment on which the family home was situated in Tonga, the house itself was made of fixed structures unlike the old traditional Tonga house which could be easily moved from allotment to allotment.

This belonged to his mother Salome. Salome had outlived her husband and under the provisions of the Tongan Probate Act, she, as widow, inherited the house. Under Tongan law, a house is effectively regarded as a movable item being capable of ownership separate from the land on which the building is situated. She also enjoyed under Tongan law a life interest in the allotment; however the complainant Manaloa was the heir entitled to inherit the allotment on her death under the Tonga law.

[4] For the purposes of this prosecution, I consider that the complainant did have standing to commence a private prosecution. I accept that his evidence that his mother asked him to restore the house for her to return to when she died so she could lie in it before her funeral in Tonga. I also accept that probably she did represent to he and his wife at a meeting in Sydney that one day the house would belong to he and his children because as heir to the allotment, nobody else except Manaloa would have any practical enjoyment of the house. This may mean that he could support an action for a proprietary estoppel and derive a measure of equitable relief should his expectation to succeed to the property be denied on the death of his mother. In *Inwards v Baker* [1965] 2 QB 29, at 37 per Lord Denning MR stated;

> "It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that as the result of the expenditure, he will be allowed to remain there. It is for a court to say in what was the equity is satisfied. I am quite clear in this case; it is to be satisfied by holding that the defendant can remain there as long as he desires to as his home."

See further *Pascoe v Turner* [1979] 2 All ER 944.

[5] In any event, as the heir to the allotment, quite independently of any representation, he would in my view have a sufficient interest to commence a prosecution, because, if his mother died intestate, under the Tongan Probate Act he would derive a share of the home.

In this case the accused was charged that;

**Count one**

> "on or about the 21st day of February, 2001 at Navutoka, Tongatapu, intentionally and unlawfully caused damage of $10,367.00 to a dwelling house by paying for and instructing the driver of a front end loader to demolish and who demolished the west brick wall and part of the south brick wall of the dwelling house, and corrugated iron roof and timbers there at."

**Count two**

> "on or about the 21st February 2011, at Navutoka, Tongatapu, intentionally and unlawfully attempted to cause damage of $50,000.00 to a dwelling house by paying for and instructing the driver of a front end

loader to demolish the whole dwelling house and who began to do so and would have done so but for being stopped by the police."

[6] The charges appear to have been laid not as alternates but I do not propose for reasons which emerge to determine whether it was appropriate to charge two independent offences in the circumstances of this case rather than one count. Not do I propose to concern myself greatly with the amount of damage caused by the actions of the accused in plainly intentionally demolishing part of the house. It is plain she did that and it is also plain that Manaloa had spent a considerable sum of money in restoring what had become a rather derelict house in Navutoka because it had not been lived in for some years.

[7] I find not only did Manaloa at his mother's request restore the home by spending probably at least $30,000T but that he also spent money on reinstating some of the damage that his sister's attempts at demolition caused.

[8] The facts are within a narrow compass. Navutoka is a village on the Eastern side of Tongatapu. It has a charming outlook on to the outer reaches of the lagoon, where pigs can be seen fossicking for morsels in the shallow water, small fishing boats and canoes rest, and children play on the sandy beach under the shade of the tall coconut palms that border along it.

[9] Manaloa was one of several children of Salome and his father, the late Fetu'u Taufahema, who died in 1990. He with his siblings had spent their childhood in the area. He had seven sisters, of whom Litia, Fapiola, Kueni, and Kalisi I heard evidence from in this case. He had one brother. His mother, Salome, had not lived in the home at Navutoka since about 2005 but had resided with her daughters Litia and Kalisi who had been living in Sydney for some years. Manaloa owned another property nearby in Navutoka which he leased out. He also had lived with a large family in Sydney for many years.

[10] Sadly, Manaloa and his family fell out with his Sydney sisters principally Litia and Kalisi. The accused Heleni was close to these sisters and, although she resided in Tonga, she visited Sydney from time to time. At the time of an incident at a fundraiser held at a bowling club in Sydney (which appears to be a trigger for her actions) she was in Sydney.

[11] I do not propose to dwell upon the reasons for the family resentment at any length. Suffice it to say that Manaloa and his wife had a large number of children and there were various allegations made concerning not only certain of Manaloa's sons but the actions of a daughter of Kueni as well. At the function, Manaloa may have been seen by his sisters to support Kueni's daughter.

[12] At this function, Manaloa's own daughter Sandra was subject to certain abuse by either Litia and or Kalisi or both to which she responded also and this led to a fight between the sisters and Sandra. Manaloa intervened and appeared to break this up. However, that was not the end of this unfortunate family dispute, unfortunately.

[13] The flames of resentment burned bright I find in the minds of Litia, Kalisi and Heleni. They reported the incident to their mother and other information may have been received by her concerning Manaloa's sons and their activities, with the

consequence that their mother gave written instructions to Heleni to demolish the house in Navutoka. The only reason for this that I can infer is that the sisters did not want their brother Manaloa succeeding to the house but more probably did not want his sons living there either. As a consequence, Heleni returned to Tonga with a written authority from her mother to have the house demolished. Approval for this was given to Heleni was given by a responsible authority. Heleni secured a contractor who proceeded to demolish the building. Not before substantial destruction had occurred, timely intervention halted further demolition. Manaloa found out about the actions of his sister and spent further money rectifying the damage. He then laid a complaint with the police. Heleni was said by the police to show remorse for what she had done.

[14] Manaloa, his wife, and his daughter Sandra as well as sisters Fapiola whose actions assisted to halt the demolition and Kueni were called for the prosecution. Amongst the defence witnesses, Salome, Litia, and Kalisi were called.

[15] I find the complainant an honest man and a credible witness who contrary to the denials of Litia, and Kalisi, was requested by his mother to improve the home at a family meeting at Kalisi's home, and did so at considerable expense. I also find that although his motivating factor was to answer his mother's request, his mother did, in his presence, probably assert that one day the house would belong to he and eventually his children. Evidence that there was such a meeting was supported by Kueni who was in Sydney at the time. I preferred her evidence to that of Litia and Kalisi. Her mother was, Kueni said, aware that improvements had been effected and was pleased by this news.

[16] I also found Sandra an honest witness who had simply stuck up for her brothers. By contrast, I did not find the sisters Litia or Kalisi reliable witnesses. Indeed, I preferred the evidence of Manola, his wife and Sandra to that of Litia and Kalisi whose evidence on any issues of conflict with that of Manaloa and his family, I found unreliable. I found Kueni as I have said an honest witness who found herself in an unenviable position.

[17] Beyond any reasonable doubt, Heleni intentionally caused damage to the house in question. Mr Pouono argued that it was not sufficient to simply cause intentional damage to a house. He argued that it had to be proven also that the damage was such that exposure to the sea, erosion or inundation was caused under section 178. The section, I consider, is disjunctive and every person who in any manner intentionally and unlawfully causes damage to any building would be guilty of an offence under s 178.

[18] That, however, is not sufficient to found guilt. The prosecution must prove also beyond any reasonable doubt the damage was caused not only intentionally but unlawfully. This immediately brought into focus the terms of the written authority that Heleni acted on.

[19] I considered closely the evidence of her mother Salome. I had some doubt whether she really knew at her advanced years (over 80) what she was doing, but, at the end of her evidence I formed the view that, although a measure of persuasion or influence by her daughters may have influenced her actions, she knew what she was

doing. Indeed, at trial she confirmed that authority had been given to the accused. No medical evidence was called to suggest she did not understand what she was doing.

[20] Her recollection of signing the two documents giving her daughter power to act on her behalf and authority to act as agent in the demolition of her house was poor. It is plain she signed both documents in front of a JP in Sydney. It was not challenged that the documents were read out to her before she signed them. Although she recalled only one letter of authority and said that it was signed in Tonga and not in Sydney plainly the signatures on the documents are the same they are attested to by the same JP. I infer she signed both of them.

[21] In these circumstances, however, wrongheaded her actions might have been, and taking into also her uncertain recollection of events, I accept she gave both written and verbal authority to the accused to demolish the house. I am unable to conclude that she did not know what she was doing when she signed the authorities and instructed Heleni to act as agent in demolishing the house, or that the authority was given without consent. This is not a civil case of undue influence, where the circumstances might lead to an inference that Salome's consent was wrongfully induced and be sufficient to set aside a gift, transfer or demise of property, but a criminal case where the prosecution had to negative the fact of her instruction beyond reasonable doubt in order to establish that Heleni damaged or attempted to demolish the house unlawfully.

[22] It was in my view, however, very foolish and mean spirited of the sisters to allow Salome to act in such a way, and for Heleni to accommodate her. It also is of no credit for her that Heleni allowed herself to be the instrument or agent to effect demolition. In my view, it was vindictive action against a brother who had assisted his mother and carried out her wishes. It has left him considerably out of pocket. It is to be hoped that, in the interests and spirit of family unity, that the sisters Litia, Kalisi and Heleni will effect a decent financial statement with him and attempt a family reconciliation whilst their mother is still able to comprehend.

[23] Mr Nui argued that the terms of the written authorities meant that what he described as the authority to demolish was countermanded by the second document undated which was in terms of giving Heleni a power of management only. I do not, however, read the authorities that way. The first and undated one was of management and the second was an authority to demolish in which Heleni was expressly said to be the agent. I have no doubt that misguided though Salome was she gave written and indeed verbal authority for her daughter to demolish her home, which because the house belonged to her she was able to do.

[24] The consequence is that I find the accused not guilty on both charges and she is discharged.

[25] I thank both counsels for their helpful memoranda. I acknowledge Mr Pouono for agreeing to remain in the case after he had sought leave to withdraw.

# R v Latu

Supreme Court, Nuku'alofa
Cato J
CR 186/2012

21 February 2013

*Criminal procedure – charge of housebreaking and theft – no charge of receiving laid – no evidence of housebreaking or theft – accused acquitted*

The complainant, Mr Tenisi Tu'inukuafe, owned a business Kiwi International which imported meat into Tonga. He came to work to find that the lock on a container of meat had been broken and about 18 cartons of meat containing each between 20-26 kilos of meat had been stolen. These were contained in cartons that with freight documents and other markings and logo were easily identified as being those that he had imported. The complainant was visiting another business later and found the cartons containing meat which he could identify as his. An employee of that business said that the accused had come in to sell the meat and when it was not purchased he asked if he could leave it in the refrigerated storage area for a small fee. The accused was charged with housebreaking, theft, and in the alternative, possession of stolen property.

Held:

1. The court was satisfied beyond any reasonable doubt that the accused was the person who came with the meat probably around the 21st or 22nd March. The court also found that the defendant had the meat in his possession, so it was under his custody and control.
2. The Crown chose not to proceed on the second day of the trial with the housebreaking allegation because there was no evidence at all that the accused had broken into the container. The only basis for such an inference was applying recent possession.
3. There was uncertainty as to how the accused came by the stolen goods, and there was every possibility which the court could not exclude beyond any reasonable doubt, that he received the meat from the thief and burglar rather than stole them himself. Further the evidence was that he was in possession of less than a quarter of the meat stolen which suggested others may well have been involved. The Crown did not lay the alternative charge of receiving stolen property.

4. The court considered the remaining count of possession of stolen property. That count was not triable on indictment. It involves an offence arising by way of summons to a magistrate on apprehension by a police officer because a person was suspected of carrying stolen goods. The section expressly states that proceedings were to be commenced by summons to the Magistrates Court and determined by a magistrate. This offence was not triable in the Supreme Court, and the charge was dismissed.
5. The accused was acquitted on counts one and two. He was discharged from count 3.

Statutes considered:
Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for the Crown : Ms Macomber
The accused appeared in person

## Verdict of the Court

[1] The accused Maka Latu stood indicted that he did commit housebreaking contrary to section 173(1)(b) of the Criminal Offences Act (Cap 18); theft contrary to s 143 and 145 (b) of the Criminal Offences Act (Cap 18) and in the alternative possession of stolen property contrary to s 153 of the Criminal Offences Act (Cap 18).

[2] The evidence was brief consisting of only four Crown witnesses; and the accused, as is his right under Tongan criminal procedure, elected to make an unsworn statement. In that statement, he denied he was the man who had allegedly offered to sell beef in 4 cartons on a date between the 19th and 23rd March 2012.

[3] The evidence was that on the 19th March 2012, the complainant Mr. Tenisi Tu'inukuafe, who owned a business Kiwi International which imported meat into Tonga, came to work to find that the lock on a container of meat had been broken and about 18 cartons of meat containing each between 20-26 kilos of meat had been stolen. These were contained in cartons that with freight documents and other markings and logo were easily identified as being those that he had imported.

[4] About a day or two later, he by chance was visiting another business which sold food and other merchandise when he had reason to enter a refrigerated area and quite by chance saw cartons containing meat which he could identify as his. As a consequence, he contacted police who arrived the next day having received his complaint of theft and burglary earlier. Three full cartons and about 24 kilos of beef which had been taken out of a box and repackaged for sale in kilo lots were found. Also found was packaging and logos which clearly identified the meat as the meat imported by the complainant and stolen from him.

[5] Evidence was given by an employee of the business where the meat was found, that the accused, who the witness said he knew, had come in attempting to sell 4 cartons of meat. The owner of this business who was not present at the time did not give his consent to purchase it. However, because the meat was starting to defrost, the

accused was alleged to have asked if he could leave it in the refrigerated storage for a small fee. He left and no evidence was given of his return. Curiously, it seems that another employee did process some of the meat for sale in smaller lots of a kilo (evidence being that a kilo could sell for about $35 Tongan) so that when the police arrived with search warrants, of which evidence was given, three cartons were located as well as the repackaged meat – 24 packets containing a kilo each.

[6] The defendant suggested in one question only of the identifying witness that he had wrongly identified him but the witness denied this. Given that he said he knew the accused and was not seriously challenged on this, I am satisfied beyond any reasonable doubt that the accused was the person who came with the meat probably around the 21st or 22nd March. I find also that plainly on this occasion the defendant had the meat in his possession that is under his custody and control.

[7] There was no evidence in any way linking the accused with the break in. The Crown relied entirely upon s 40 of the Evidence Act which provides;

> "Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it or to have received it knowing it to have been stolen unless he shall give some satisfactory explanation of the manner in which it came into his possession."

[8] In my view, although nothing turns on this point in this case, the presumption appears one that is absolute that is "shall be presumed"- rather than may be presumed as recent possession at common law is generally understood to mean. For example, in Cross on Evidence, NZ Butterworths, 7th ed, November, 2001, Dr D L Mathieson QC writes of recent possession as "the presumption of guilty knowledge arising from the possession of recently stolen goods", and says that adverse inferences "may" be drawn by the tribunal of fact, but it is not obliged to draw them even if there is no other evidence.

[9] I also asked whether under section 40 if the effect of the presumption was that it was strict, this meant that the obligation of an accused to provide a satisfactory excuse was elevated to that of a reverse onus, rather than under orthodox law, being an evidential burden only. The Crown suggested it could. However, I indicate that I would have been reluctant to have departed from the normal approach had I been required to consider the case on the basis of explanation preferring to regard the obligation to adduce an explanation as a mere evidential burden in the absence of a direction in the statute requiring the accused to bear a legal onus. If the effect is indeed that the presumption is absolute or strict, and then it seems to me an orthodox approach should be taken, with the Crown bearing the ultimate onus and the accused only an evidential burden of advancing a satisfactory explanation.

[10] However, here, the defendant did not give any reason; he merely rather lamely put in issue identification, and for reasons given I find that he was the person who attempted to sell the beef, and had possession of it.

[11] Should I apply the presumption under section 40 to convict him beyond doubt of the only crime alleged and that is theft. This case raises the difficulty that the only

crime alleged is theft and not alternatively receiving which is usually the case where recent possession is important. The danger of the Crown presenting an indictment alleging only theft is that, if the Court feels that the more likely application on the evidence is receiving, then, if that is not alleged as an alternative and the Court feels uneasy applying the presumption to theft, the prosecution will fail.

[12] I am of that state of mind here. The Crown rightly in my view chose not to proceed on the second day of the trial with the housebreaking allegation because there was no evidence at all that the accused had broken into the container. The only basis for such an inference was applying recent possession.

[13] It has been said many times that recent possession is only as aspect of circumstantial evidence. Merely because an accused is found in possession of stolen goods does not mean he necessarily broke into premises or for that matter stole them even if he is mute. The presumption may assist for example if there is other evidence which would put the accused at the scene, but it is in my view a long bow to draw that his recent possession of goods circumstantially means that he must be guilty of housebreaking and or theft, as opposed to receiving from persons unknown. In this case, although I consider there would have been integrity in applying the presumption to a count of receiving had it been laid in the alternative, there is, in this case, uncertainty as to how he came by the stolen goods, and there is every possibility which the court cannot exclude beyond any reasonable doubt, that he received the meat from the thief and burglar rather than stole them himself. Further the evidence here is that he was in possession of less than a quarter of the meat stolen which suggests others may well have been involved.

[14] The danger of not laying the alternative of receiving was emphasised in the well known New Zealand text Adams on Criminal law, 3rd student edition, 2001, where it is written at para CA 220.19;

> "Possession of recently stolen goods may be evidence not only of theft or receiving but of other offences also such as burglary. The prosecution must make a careful choice of alternative charges to lay. If a charge of say burglary alone is laid the prosecution runs the risk that the jury may conclude that the accused is guilty of receiving in which case the accused should be acquitted"

[15] I am in that same mind in relation to the application of the presumption in this case, and to convict of theft would I think be at variance with the effective acquittal on the housebreaking charge. The Crown did not in this case make any application at the commencement of the trial, for an amendment nor at any stage was such an amendment sought.

[16] I turn now to the remaining count that is the alternative of possession of stolen property under s 153 of the Act. I do not think that this is a count that is triable on indictment. Section 153 (1) and (2) of the Criminal Offences Act involves offence arising by way of summons to a magistrate on apprehension by a police officer because a person is suspected of carrying stolen goods. The section expressly says proceedings are to be commenced by summons to the Magistrates Court and

determined by a magistrate. This offence is not triable in this Court, and the charge is dismissed.

[17] The effect is that the accused is acquitted on counts one and two. He is discharged from count 3.

## R v Moala

Supreme Court, Nuku'alofa
Cato J
CR 130/2012

11 March 2013

*Criminal law – attempted armed robbery charge – identity not established beyond reasonable doubt – accused acquitted*
*Evidence – question of procedural integrity of identification process by police – evidence not reliable*

The case against the accused was that he was one of a group of men who entered a building known as Mana Money Transfer and tied up a man working as a security or night watchman, Fala'opako Finau, in the early hours of 4 September 2011. Mr Finau was a witness for the prosecution. Mr Finau said that he went with police four days later and was asked whether he could identify two men he saw at Nukunuku police station. He was unable to do so. The next time he was taken to Mu'a police station and he said there was one person there for him to look at. Another witness, Heamani Lopeti, was produced to give evidence of an incriminating conversation he overheard between the accused and a third party. On 25 February 2013, the accused stood trial on a charge of attempted armed robbery. He elected to be tried before a judge sitting without a jury. The accused denied involvement. He denied being in the area of Mana Money and or having a silver rental car. He gave evidence of having other vehicles.

Held:

1. The main issue was whether it was established beyond reasonable doubt that the accused was one of the men who was involved. There was no evidence of any forensic kind, fingerprints, clothing or masks presented that link the accused with the attempted robbery. There was a search of his residence when he was arrested but no evidence was found there.
2. Mr Finau did not know the accused; however, he gave evidence that he observed him reasonably closely for a period which, whilst it could not be said to be a lengthy time, was more than a fleeting glimpse. His evidence, however, of identifying the accused at the Mu'a police station was so lacking in procedural integrity, that it would be unsafe to place any great weight on it.
3. Mr Lopeti advanced his evidence at a time when the accused, others and himself were being investigated about a Westpac robbery. He was released on the Westpac charge. He agreed to give evidence against the accused on

these charges. He was later granted bail after a magistrate had more recently remanded him in custody after more very serious offending, with no opposition from the police.

4. The court was reluctant to rely on Mr Lopeti and convict another of such a serious offence as attempted robbery with a firearm without strong supporting evidence. He was a man with a proven record for dishonesty and was facing further serious charges. The court was not satisfied that he was telling the truth.

5. That being so it was the verdict that the Crown had not made out the charge beyond a reasonable doubt. The accused was acquitted.

Cases considered:

Pollitt v The Queen [1992] HCA 35; (1992) 174 CLR 558
R v Clune [1982] VR 1
R v Likio [2006] Tonga LR 395
R v Wright (1991) 60 A Crim R 215
Turnbull v DPP [1977] 1 QB 225

Statute considered:

Evidence Act 2006 (New Zealand)

Counsel for the Crown : Mrs Langi
The accused was unrepresented

## Judgment

[1] The accused stood trial on a charge of attempted armed robbery, on the 25th February, 2013. He elected to be tried before a judge sitting without a jury. The evidence and submissions closed on the 6th March 2013. Although the evidence was confined to a very few witnesses and the accused gave evidence, the trial was lengthened because one of the witnesses had difficulty getting to Tongatapu from Ha'apai, and the trial was adjourned to enable this to occur.

## The Evidence

[2] The case against the accused was that he was one of a group of men who entered a building known as Mana Money Transfer, tied up a man working as a security or night watchman, Fala'opako Finau, who was in the building at the time working on some assignments associated with his study in the early hours of the morning of the 4th September 2001. Previously, Mr Finau at about 3am had heard footsteps approaching from outside. He went to the veranda area and saw a person who asked him if a person by the name of Mone was there. He said there was no one by that name. He then saw this person leave and walk to the road intersection approximately adjacent to the Mosiami building.

[3] Mr Finau returned to his assignment and about 5 minutes later two men entered the room with masks, one of whom pointed a gun at him. He was told to lie down or otherwise they would shoot him. They then asked him where the on-off switch was

for the power. They then turned off the lights. One of them gagged Mr Finau with a piece of cloth and used a tee shirt to tie his hands and feet. He said that he could hear one of them say to lie still and he could hear them cutting a chain in the vicinity of the safe area. He said it took them about 5 to 7 minutes to carry out what they were doing. He told them he did not have a key to the safe as only the manager had that. He heard them whispering. He was some distance away from that area where the safe was in what was known as the security room. He heard a dog barking as they left.

[4] He said the man he saw earlier had a black hoody top and the hood came all the way up to the top. It covered he said part of his hair. He said he had shaven hair. He was not able to give any further identification of his clothing. He had seen him for up to a minute. There was nothing covering his face. He described the light in the vicinity of the veranda where he had first seen him as bright. When he spoke to him he was about two to three meters away. He said he did not see him again that night. He said he did not know of any person Mone working there.

[5] Mr Finau said that he went with police four days later and was asked whether he could identify two men he saw at Nukunuku police station. He was unable to do so. The next time he was taken to Mu'a police station and he said there was one person there for him to look at. He was asked to wait outside and look to see if he could identify a person. One of the police officers went inside whilst another officer Tu'utafaiva remained with him. Mr Finau was standing near the door. All of a sudden he said a person came out another door. He said he asked the officer who was with him, "who is that?" The officer said that is the one we came to have a look at.

[6] A Mr Sefanaia Filai gave evidence that he was a police officer and had been working on the morning of the 4th September 2011, in a police patrol vehicle which he was driving. He said he was at the Fatafehi Road across from the entrance of the Mana Money transfer office when he saw a person entering the gate with a long sleeve black hood top with the hood on and in grey coloured pants. He was driving a patrol vehicle. He said this would be approximately 2.00 am. This did not raise concern because he thought it was just one of the residents of the church premises near Mana Money. He said that they continued with the patrol and he came back on the same road and near the front of the Mosimani building a silver coloured car was parked. He did not see the licence plate other than to make out R for rental. He said he saw the person he had seen earlier standing next to the car. He said that the car was parked about 20 meters from the Mana building. He agreed he only had the man under observations for a short time. He agreed that all he could say was that he saw a man similar to one he had seen earlier standing by the silver car.

He said he continued working then got a call about 3.30 concerning the armed robbery at Mana Money and then drove back there. He said he remembered a car being parked near the Mosimani building but after he had spent about ten minutes talking to the victim it was not there anymore.

[7] Another witness Mahe Lasitani lived at Mataika. He said he saw the accused drive by at about 9am on the 5th of September in a small blue car. He said he was wearing a hood. He could not be sure if it was blue or black. He said he would have seen him for under a minute. The accused had lived in the area and he was known to the witness for he said about a year. He said that he ordinarily had a blue coloured car

and a hummer. He said, however, that on the day he was arrested the accused had a silver rental car. He was about three houses down from the house where Moala was arrested on the 6th September, 2011. He knew it was a rental car because it had an R.

[8] There was no evidence given of any forensic evidence located either at the scene or at the residence of the accused which had been searched which linked the accused with the crimes. No fingerprints were located, masks, nor was any evidence adduced that he had in fact hired a silver vehicle over the relevant period, or that one was located by police on the 6th when he was arrested. Police evidence was advanced from Officer Patelesio Tu'itavuki who noted that the safe had not been removed because it was too large to get through the door. He did not find any prints. He made a sketch of the scene that was produced in evidence. Photographs he took could not be produced, he said, because they had become mixed up with other photographs. He said there would be about 7 meters between the area of the safe and the security room.

[9] Police Officer Sateki Tu'utafaiva gave evidence of the identification process at Mu'a. He confirmed the accused had been brought out and it appears he was the only one brought before the witness. He had no notes of the precise instructions given to the witness, nor could he recall precisely what instruction was given to him. He admitted Moala was the only person that was presented at Mu'a because he was a suspect. He said he did not introduce others because his only instruction was that the accused be produced. He admitted he simply went along with what he was instructed to do by an officer by the name of Tukuafu.

[10] Officer Tukuafu gave evidence. He denied he ever gave any instructions in relation to the identification. Another officer, he said, had been in charge of the investigation. He said Mr Moala had declined to answer any questions at interview.

[11] The Crown also produced a witness, Heamani Lopeti, to give evidence of an incriminating conversation he overheard between the accused and a third party in the early hours of the 4th September when travelling past the Mana Money building at about 5am. He said that the accused and a third man, Ta'u, had picked him up earlier and they had gone to look at a vehicle to carry out an armed robbery of the Westpac bank. He said when they came from there the office of the Tongan church (near the Mane Money building) was full of officers and cops. He said that Sefo said to Ta'u maybe Teau did not tie up the guy properly enough. Sefo, he said, also remarked it was a shame the safe could not fit in the van. He said when Sefo picked him up he was wearing a shirt and shorts. He said he had only seen Sefo driving this vehicle which was a rental vehicle that day. He had made a statement to the previous witness officer Tu'utafaiva.

[12] He had said these things about 4 days later when he was being interviewed about the Westpac bank robbery and had written out a statement. He said he was in custody as a suspect for the Westpac robbery when he gave this information and it was incorporated in his statement. He was asked about whether he had struck a deal with Mr Tu'utafaiva. He said that he made his statement and afterwards Tu'utafaiva had said to him that they would release him to become a witness. He said it was important to be released because he was not involved in anything. He also said in evidence that the police dropped the charges so long as he became a witness in this case. He said he

agreed to this. After his release, he was arrested on more recent charges of housebreaking, robbery and assault. He had four earlier housebreakings, four thefts, attempted rape, and indecent assault. He was awaiting trial on armed robbery, housebreaking and assault. He had not been given bail. He had been remanded in custody at Hu'atolitoli prison earlier. He said he got bail on the fresh charges because the police did not oppose his application for bail. This was because he was a witness against Moala. He admitted it was important for him to have bail. He admitted he was facing a charge of housebreaking the next day. He denied any deal with the police over the recent charges.

[13] A number of matters were raised with Mr Lopeti by the accused. He asked the witness whether he had said that Moala had a light blue rental vehicle. Mr Lopeti said he had told Tu'utafaiva it was silver rental car but the officer said it was light blue. Moala also questioned him about his statement that when he had come to Pahu, Moala left and came back to pick him up with Tau. The witness had said Moala was in a blue car and came back in a silver car. Then Mr Lopeti said he made a mistake in his evidence. He said Moala came in a blue car to Pahu, we left in a blue car and exchanged it for a silver car. He admitted he said they drove past the Mana building in a light blue rental car. I did not know until his evidence was led that Officer Tu'utafaiva was the officer who also had been involved with taking this witness's statement. No application was made to recall Mr Tu'utafaiva on the issue as to any arrangement that police may have reached with this witness.

[14] The accused elected to give evidence and denied involvement. He denied being in the area of Mana Money and or having a silver rental car. He gave evidence of having other vehicles.

## Verdict

[15] This is a serious charge. There is no doubt that an attempted robbery was committed on the 4th September, 2011, however, the issue that concerns me in relation to this verdict is whether it is established by the Crown beyond reasonable doubt that the accused was one of the men who was involved. There is no evidence of any forensic kind, fingerprints, clothing or masks presented that link the accused with this attempted robbery. There was a search of his residence when he was arrested but no evidence was found there.

[16] Nor was any evidence adduced that he had hired a silver motor vehicle about the time of the robbery. Though there was evidence given that he was associated with a rental vehicle there was no other evidence of registration aside from the letter R. Nor did witnesses give a description of a particular model.

[17] Evidence was given to suggest that the accused was the man that went into the Mona Money premises on the night in question looking for Mana. The inference the Crown asks me to draw is that the accused must have been the man who soon after was involved in the attempted robbery.

[19] I must, however, be satisfied that the evidence of Mr Finau on identification is safe and reliable. Further, although the robbery took place shortly after he was allegedly seen by Finau, Finau does say he last saw him walking away from the area

of the Mana Money building towards an intersection. Mr Moala may well have returned, and entered the Mana Money premises but, without more, I could not convict him beyond reasonable doubt of this. That means even if I accept the identification of Mr Finau that Mr Moala was the man who approached him shortly before the robbery, in order to find him guilty of this crime, I must be satisfied beyond reasonable doubt that Mr Lopeti's evidence is reliable because it is his evidence that implicates Mr Moala directly as one of the men who carried out the robbery. Nor have I overlooked the timing of Mr Moala allegedly being on the premises but suspicion without more is not sufficient to draw the inference that it was he who shortly after returned and committed the robbery.

[20] I remind myself of the important direction set out in *Turnbull v DPP* [1977] 1 QB 225 on identification to take care because an honest and convincing witness may be mistaken. In this case, Mr Finau did not know Mr Moala; however, he gave evidence that he observed him reasonably closely for a period which, whilst it could not be said to be a lengthy time, was more than a fleeting glimpse. His evidence, however, of identifying Mr Moala at the Mu'a police station, in my view, was so lacking in procedural integrity, that it would be unsafe to place any great weight on it. Mr Moala was not asked whether he would participate in an identification parade which is the safest procedure. Had he agreed the police would had had to have organised a parade in which he would be placed in a line with a number of other persons generally about 8 of similar height and physical characteristics. The witness without any prompting would be invited to see whether he could identify anybody in the line-up as the man he had seen. See *R v Likio* [2006] Tonga LR 395. The witness should be informed that the person may or may not be amongst the persons in the parade. Section 45(3)(d) of the New Zealand Evidence Act 2006, provides that the person making the identification must be informed that the person to be identified may or may not be among the persons in the procedure. Notes should also have been taken of the procedure, the instructions given and the answer given by the witness contemporaneously with any identification. No notes were it seems taken here at least by this witness who suggested that another officer had taken notes. If so, that police officer did not give evidence.

[21] If Mr Moala did not agree to enter into a parade, or for some reason it was not possible to organize a formal line up, then an informal procedure could take place. However, if an informal procedure is used, be it a photo montage or an informal crowd parade, it must be fairly representative. See *R v Clune* [1982] VR 1, for a useful summary of the principles relating to informal parades *R v Wright* (1991) 60 A Crim R 215, at 220-221. In the later case, Slicer J observed;

> "An identification confrontation will have little evidentiary effect if the prospective witness has been shown the accused alone and such a process could be unsafe."

If a photo montage is used, the suspect's photo should be placed amongst those similar in appearance. If, as here, the witness is taken to an area where a known suspect will be, then the suspect should be placed in a situation where there is an opportunity to observe him amongst others of similar appearance. Moala was here informally paraded on his own. Further, when the witness asked, on Moala's

appearance at Mu'a, who he was, Officer Tu'utafaiva replied that he was the one we came to have a look at. This is, at least, suggestive that Moala was at that time a suspect in the case. I consider that this evidence is unsafe because of the procedure used and I would be reluctant to place any great weight on this evidence.

[22] In any event, I am not satisfied either with the evidence of Mr Lopeti. A person of Mr Lopeti's history of dishonesty in particular must be considered with care. Whatever he may say about not having been offered a deal or having some expectation of favourable treatment, always present is the risk that he is attempting to curry favour with the police or prosecution. See the judgment of the High Court of Australia in *Pollitt v The Queen* [1992] HCA 35; (1992) 174 CLR 558 on a related issue, that is alleged admissions made to fellow prisoners or gaol-house confessions, and the need for a strong direction in cases of that kind. Here, it seems Mr Lopeti advanced the information at a time when Moala, others and himself were being investigated about a Westpac robbery. He was released on the Westpac charge. He agreed to give evidence against Moala on these charges. He was later granted bail after a magistrate had more recently remanded him in custody after more very serious offending, with the police not opposing this. I had the opportunity of comparing both men in size and stature. I did not get the impression that Mr Lopeti would be any shrinking violet even if exposed in prison to Mr Moala, but I accept he was anxious to gain bail and one way to do this as he would know was to continue to support the prosecution. Further, he was shortly he said to face the charge of housebreaking. Although he may assert there was no arrangement with the police, I have concern about this. I did not hear from Officer Tu'utafaiva on this point. Nor did I find Mr Lopeti's rather inconsistent evidence concerning the cars satisfactory. What he said was also wrong about the safe. The safe could not be removed from the building because it was too large to get through the door of the room in which it was situated. It was not, as he testified because the safe, could not be put in the vehicle.

[23] I would be most reluctant to rely on Mr Lopeti and convict another of any offence let alone such a serious offence as attempted robbery with a firearm without strong supporting evidence. He is a man with a proven record for dishonesty and is facing further serious charges. I am not satisfied that he is telling the truth. That being so it is my verdict for all the above reasons that the Crown has not made out the charge beyond a reasonable doubt. The accused is acquitted.

## Li v Finefuiaki

Land Court, Nuku'alofa
Cato J
LA 23/2010

12 March 2013

*Land law – dispute over subject land of contract – order sought for eviction – affirmative defence pleaded of estoppel – plaintiff stopped from evicting defendant*

The plaintiff claimed possession of land at Navutoka (which became known as Lots 2 and 3) on a taxation allotment situated in Block 80/97 Navutoka of which the plaintiff was the registered holder. The plaintiff had intended to subdivide in about 2001 because he said he needed finance for his business. The area of the total allotment was 8 acres one rood and the allotment was situated on the estate of Tungi at part of Navutoka in Tongatapu. It was situated on the beach road on the waterfront at the southern end of the village of Navutoka. The area which the defendant was in possession of and upon which a very substantial house has been constructed was about 120 perches. It occupied 2 of 5 allotments that bordered the coast. The house was built over both lots. The plaintiff sought to evict and secure possession of the land on which the defendant had built a substantial house. He contended that, essentially, the defendant had built on the wrong land and had occupied an area double the size he had agreed to sell to him. He offered to refund the sum paid by the defendant towards the purchase. He claimed that, in any event, he had not been paid the contract price fully. He also claimed that the defendant wrongfully used other areas of the allotment for commercial plantation of crops and claimed $80,000 should be paid for the wrongful use of this land as rental or mesne profits. The defendant claimed that the plaintiff had surrendered the portion of the land upon which he had built to the estate holder in order for the registration of the same in exchange for the money paid to the plaintiff. He further denied any conversation with the plaintiff whereby the plaintiff had objected to him building or occupying the said land. He said he had not made any demand for further money prior to his action for possession. As an affirmative defence, he also alleged that in any event, the plaintiff was estopped from bringing the action for possession. A counterclaim was filed repeating the allegations and denials and an order was sought that the plaintiff take immediate steps to register the equivalent of the four apis under the defendant's name to include the land which he occupied.

Held:

1. There was a conflict in evidence on almost every major point which had to be resolved. Much of this could have been avoided had the parties committed their agreement to writing. It was clear that there was an intention on the part of the plaintiff to sell land and by the defendant to acquire land; what was not so clear were the essential terms of price and the area that the plaintiff intended to sell. Was the contract one that was void for uncertainty? If the contract was so vague as to be uncertain it could not be redrawn; the modern approach was to try and uphold contracts despite their lack of clarity.
2. The plaintiff denied selling the defendant two lots but the court found that unlikely in view of his surrender of two lots in May 2002. There was no other evidence proffered by the plaintiff to counter the assertion of the defendant that the plaintiff rang and offered a further lot for a reduced price of $3000 because he was in need of money, other than his denial. The court preferred the evidence of the defendant on this point.
3. The plaintiff was estopped from evicting the defendant from the land on which the house had been built. He signed a surrender of the relevant lots to the defendant and his son on 1 May 2002. Knowing the son, who by invitation had attended the meeting, would communicate this fact to his father amounted to a representation that the land would be theirs and that there was now no impediment to his father proceeding with construction which he plainly knew the defendant was looking to commence on the cleared land. He must have known the defendant and his son would rely on this representation, as the green light to commence building. He should have informed the defendant once he had received notice that Cabinet had deferred the surrender, so that, if the defendant continued with construction, it was at his risk. He proceeded with the surrender to Mr Pousini and Mr Tavake but he did not proceed with the surrender to the defendant and his son even after objection had been resolved. He made no further demand for payment. He simply did nothing until he commenced action to evict the defendant. The plaintiff's actions in attempting to evict the defendant and have his home removed were unconscionable.
4. The plaintiff claimed damages or mesne profits for the defendant unlawfully occupying part of the allotment belonging to the plaintiff, and farming it commercially. The court accepted the admission of the defendant that he used part of the land for cultivation and to the extent he did not get permission of the plaintiff to do so the court found that was wrongful. The parties agreed on the area of cultivation as a figure of two acres over a three year period. The court found that the overall value of the damages by way of menses profits payable to the plaintiff would be $9000 pa'anga.
5. The court made an order that the plaintiff take all steps necessary to surrender the land to the defendant and his son. This was on the basis of the findings that the plaintiff in seeking to have the defendant evicted and his house removed was acting unconscionably. Such an order was required to do "minimum justice". Given that much of the land was surrendered and approved, including the surrenders to Mr Pousini and Mr Tavake, the

plaintiff had no heir, any objection seemed to have been resolved, and the land had a substantial house built on it, it seemed unlikely that there would be any impediment to the defendant and his son being registered.

Cases considered:

Andrews v Assurance Society Ltd [1982] 2 NZLR 556
Crabb v Arun District Council [1976] Ch 179; [1975] 3 All ER 865
Dillwyn v Llewelynn (1862) 4 DeGF & J 517; (1862) 45 ER 1285
Inwards v Baker [1965] 2 QB 29
Matavalea v Uata [1989] Tonga LR 101
Motulikiv Naimoa[1990] Tonga LT 1
O G Sanft and Sons Ltd v Tonga Tourist and Development Co Ltd [1981-1988] Tonga LR 24
Pascoe v Turner [1979] 2 All ER 944
Piukala v Fonohema [2002] Tonga LR 200
Ramsden v Dyson (1866) LR 1 HL 129
S & E Promotions Pty Ltd v Tobin Brothers [1994] FCA 1109; (1994) 122 ALR 637
Taylors Fashions v Liverpool Victoria Trustees Co [1981] 1 All ER 897
Vai v 'Uliafa [1989] Tonga LR 56

Counsel for the plaintiff : Mr Laki Niu
Counsel for the defendant : Mrs Petunia Tupou

## Judgment

[1] The plaintiff claimed possession of land at Navutoka which became known as Lots 2 and 3 on a taxation allotment situated in Block 80/97 Navutoka of which the plaintiff is the registered holder. The plaintiff had intended to subdivide in about 2001 because he said he needed finance for his business. The area of the total allotment is 8 acres one rood and the allotment is situated on the estate of Tungi at part of Navutoka in Tongatapu. It is situated on the beach road on the waterfront at the southern end of the village of Navutoka. Navutoka is a pleasant coastal village adjacent to the upper reaches of the lagoon in the east of the island of Tongatapu. The area which the defendant is in possession of and upon which a very substantial house has been constructed is about 120 perches. It occupies 2 of 5 allotments that border the coast. The house is built over both lots.

[2] The plaintiff, in his statement of claim, sought to evict and secure possession of the land on which the defendant had built a substantial house. He contended that, essentially, the defendant had built on the wrong land and had occupied an area double the size he had agreed to sell to him. He offered to refund the sum paid by the defendant towards the purchase. He claimed that, in any event, he had not been paid the contract price fully. He also claimed that the defendant wrongfully used other areas of the allotment for commercial plantation of crops and claimed $80,000 should be paid for the wrongful use of this land as rental or mesne profits.

[3] The plaintiff since about 1984 had been living in Australia and for some years had resided in Melbourne. He claimed that before the defendant entered into contractual relations with him he had sold three of the five lots to others, the first being a Mr Finau Tavake for $A 15,000 in 2001 and two other lots to a Mr Sione Pousini for $A30,000 also in 2001, those being, the plaintiff said, immediately adjacent to the land of Finau Tavake. Mr Tavake did not give evidence but Mr Pousini did in the case for the plaintiff.

[4] Confusion emerged at trial because the lot numbers referred to by the plaintiff, for which amendment of the statement of claim was sought, did not correspond with the lot numbers on the official subdivision plan submitted to the Minister. The numbering on the official plan corresponds with a simple plan drawn up by a Mr Sione Uele who gave evidence at the trial. Mr Uele was employed by the Minster of Lands as a senior officer and he had numbered the lots as 1-5 with 5 being the northernmost lot closest to Navutoka with Mr Tavake taking lot 1 being the southernmost; whereas, in the amendments to the statement of claim, the plaintiff referred to this as lot 5. The statement of claim was amended at trial to reflect the numbering the plaintiff had used before Mr Uele had drafted his plan of the allotments on or about the 1st May 2002. Mr Uele's plan had formed the basis for later surrenders and registration. I am not satisfied, however, on all the evidence I heard that the plaintiff had before March 2002, ever referred to the parcels of land he sold by lot number for reasons I mention later in para 41.

[5] In his statement of claim as amended, the plaintiff alleged that he had agreed to sell lot 2 (that is Lot 4 on the Uele plan) to the defendant which, like the others, contained 60 perches. In evidence, he said that he had intended to give to one of his two adopted sons the remaining area of land known as lot five on the Uele plan. He said he did not have any heir. The plaintiff claimed that he had agreed to sell lot 2 to the defendant in about January 2002 for $A 15,000.00. Agreement was reached in a single telephone call that the plaintiff said was made to him by the defendant who was living in Honolulu. The defendant also came from the village of Navutoka originally. Not only did the evidence reveal that the plaintiff and the defendant had known each other having lived as neighbours but they had been at school together. The defendant, now 73 years of age, is about ten years the plaintiff's senior.

[6] The defendant is also closely related to Finau Tavake who had earlier purchased one of the lots. Mr Pousini gave evidence that he also had met the defendant in Navutoka where a wedding celebration had been held, and it would seem he was distantly related to him by marriage. There is evidence also that Mr Pousini is related to the plaintiff.

[7] The defendant said that he had lived in Honolulu for many years and he had built up a contracting business. He had prospered and owned two properties in the United States. The house he built on the land in Navutoka had cost him about $1 million pa'anga he said to construct. He also he said had other interests in Tonga including plantations with the land being acquired from estate holders at little or no cost. He leased other land on which he farmed a sizable number of cattle. The lease would seem to be one that could be described as very reasonable. He was a man who by nature appeared very industrious spending time in Honolulu on business and farming

in Tonga. He visited Tonga regularly. I considered he was shrewd, careful with money, and was the kind of person who could be expected to drive and secure an advantageous bargain, if he could.

[8] The plaintiff gave evidence he was presently employed as a lorry driver in Melbourne where he had lived for some years. He said that between the years 2001 and 2003 he had owned a small delivery business involving one vehicle. He had ceased to operate this business in 2003. When asked, he admitted that he had decided to subdivide the allotment in order to obtain finance for his business. After he ceased to operate the business in 2003, he was an employed lorry driver. He gave evidence that the last time he had been in Tonga before commencing proceedings in October 2010 was in May 2002, which, as the evidence unfolded, involved a critical meeting which he attended with Mr Pousini, Mr Tavake, and the defendant's son, Samuela Finefeuiaki, in the absence of the defendant who was in Hawaii. The plaintiff gave evidence that, after the meeting in May 2002, he did not return to Tonga until October 2010, when he gave instructions to his lawyer to commence these proceedings. He said he had only returned since for the trial. During the trial, evidence emerged, however, which cast very real doubt about this.

[9] This meeting was also attended by Mr Sione Uele. He was closely involved in the subdivision particularly on 1st May 2002, when, in the presence of the plaintiff, Mr Finau Tavake, Mr Pousini and the defendant's son, Mr Samuela Finefeuiaki, he drafted a letter of surrender for the plaintiff to sign. The allocations by the plaintiff, which as I have said were evidenced in a plan prepared by Mr Uele, were made after Mr Pousini and the plaintiff had complained to the Minister of Lands in early March 2002 that the defendant had cleared land that was intended for Mr Pousini. This letter, which was signed by the plaintiff and sent to the Minister of Lands, was never annexed as a disclosure in a statement of the plaintiff which was an exhibit, whereas other relevant documents were. The letter of surrender is signed by all those allocated portions of land by the plaintiff, as well as the plaintiff.

[10] The defendant and his son, in the plaintiff's surrender letter, were allocated Lots 2 and 3 (3 and 4 in the Plaintiff's amended statement of claim) whereas the Pousini's were allocated and agreed to take lots 4 and 5 those being the lots closest to Navutoka which were described as Lots 1 and 2 in the statement of claim. The reason why Samuela was allocated a lot was that under Tongan law the defendant was not entitled to take two lots and this was explained to Samuela by Mr Uese at the meeting. It would seem for the same reason the Pousini land is also divided so that land was surrendered to the witness Sione T Pousini and the other to his son, Sione B Pousini.

[11] Mr Pousini gave evidence that he lived in Sydney. He said that he came to Tonga frequently. Not only had he acquired the two lots referred to adjacent to Navatoka, but in 2010, he acquired more land from the plaintiff. This was at the time the plaintiff had surrendered further land in the allotment to others. These surrenders are recorded in a letter dated 7th October 2010. This was very shortly before the plaintiff commenced these proceedings. The surrender of the land, in the plaintiff's letter of the 1st May 2002, was, however, deferred by Cabinet because a relative of the plaintiff, Lesieli Kavaliku, objected to it on the basis that the plaintiff had entered into arrangements with her and others to give land in the allotment to her. The plaintiff

was advised of this by Mr Uele on the 9th January 2003. On the 15th September 2003, the plaintiff wrote to the Minister asserting that he would resolve the issue with the objector. He asked the Minister to allow the surrender to the Pousinis. The Minister approved the surrender to the Pousinis on the 3rd March 2004. In a further letter of surrender dated 24th June 2005, the plaintiff surrendered other land to Lesieli Kaviliku, and lot 1 (known as 5 in his amended statement of claim) to Finau Tavake. No surrender, however, was applied for the defendant or his son. In or about June 2002, the defendant said he commenced construction of the house which took he said about 3 years to complete. There is no evidence that he was ever informed that the surrender had been deferred. I accept that the first he knew of any opposition to his construction and that the surrender had not proceeded was when proceedings were commenced.

[12] I gained the impression that Mr Pousini was much more closely interested in the outcome of these proceedings than had been apparent when the case started. He admitted that he would be interested in acquiring the land on which the defendant had built the house if the land became available. He also admitted that he had assisted the plaintiff in funding the litigation.

[13] The plaintiff claimed that the defendant had proceeded to clear land that he had sold to Mr Pousini without his permission and that he had heard about this from relatives he had in Navutoka in early 2002. Mr Pousini also claimed that this was so. He had visited Navutoka and seen this. The Plaintiff said that he had telephoned the defendant and when he had told him that he was not to proceed building on the land he had been threatened with being killed if he returned to Tonga. The defendant denied any conversation with the plaintiff of this kind, or indeed at all.

[14] The plaintiff said he did not speak with the defendant before issuing the claim in October 2010. He said he was too frightened to take any further action. He said that he did not know either that the defendant had proceeded to complete the construction until after it had been completed. Aside from fear of the defendant, the plaintiff said that he had been unable to contact him on the telephone.

[15] The plaintiff also alleged that the defendant had not paid him for the land he had purchased which he maintained he had sold for $15,000.00. His wife had kept a note of the payments which was admitted in evidence by consent. His wife was not available to give evidence he said because of ill health. The note records that the defendant paid the following sums;

| | |
|---|---|
| 22nd January 2002: | $A 1873.00 |
| 1st February, 2002: | $A 2091.85 |
| 29th March 2002: | $A 1,998.13 |
| 26th April, 2002: | $A 1961.72 |
| 10th May, 2002: | $A 2,349.49 |
| 7th June, 2002: | $A 1684.00 |

[16] There had been a further payment made on the 2nd May 02 of $300.00, making a total of $A12, 258.19. The $300.00 payment was made the defendant and his son Samuela said as a consequence of a request made by the plaintiff after the 1st May

meeting for assistance with a funeral expense. Although the plaintiff questioned this payment suggesting it had been made by somebody else interested in land, I find that it was a payment by the defendant.

[17] The defendant, in his statement of defence, claimed he had paid in full by lump sum, but it was conceded by his counsel Mrs Tupou at trial that he had not. The defendant, in evidence even so, continued to maintain he thought he had paid in a lump sum. Given that the payments were made over ten years ago, and the defendant's age, 73, I consider that this to be a failure of recall rather than any deliberate attempt to mislead.

[18] The defendant maintained that the plaintiff had telephoned him wanting money and that he had agreed to pay him $A 10,000 for two apis. That was in January 2000. Later, he thought in February, the plaintiff had rung wanting more money and he had sold him a further 2 apis of 30 perches each for a further $A3000.00. The defendant claimed he had informed the plaintiff he wanted to commence building and the plaintiff had said he could build where he wanted. The plaintiff denied, however, selling the defendant any further land or asking him for more money. The plaintiff said he informed the defendant he could only build when he had paid the money. He denied saying he could build anywhere the defendant pleased. Curiously, however, he said that he did not discuss any precise area with the defendant even though in his statement of claim he alleged that he sold the defendant lot 2 or lot 4 on the official subdivision plan. The plaintiff in evidence admitted that he was subdividing in order to assist with his financial position, and I consider that he was probably in need of money when he contacted the defendant as the defendant claimed.

[19] He alleged also that the defendant had in 2003 cleared the rest of the tax allotment and had forbidden his relatives from entering or taking anything from the allotment anymore. He claimed the defendant had threatened to chop off their heads with a bush knife if they came again and they did not.

[20] The defendant said that he had not been advised that anybody held interests in any of the land. In his statement of defence he said he had expected that the plaintiff had surrendered the portion of the land upon which he had built (and equivalent to the four apis or 2 lots) to the estate holder in order for the registration of the same in exchange for the money paid to the plaintiff. He further denied any conversation with the plaintiff whereby the plaintiff had objected to him building or occupying the said land. He said he had not made any demand for further money prior to his action for possession.

[21] As an affirmative defence, he also alleged that in any event, the plaintiff was estopped from bringing the action for possession. A counterclaim was filed repeating the allegations and denials and an order was sought that the plaintiff take immediate steps to register the equivalent of the four apis under the defendant's name to include the land which he currently occupies.

[22] The case took nearly eight days of hearing time. Although the parties had spent years in countries other than Tonga and could be taken to know that issues involving the land could be complex there was no written record evidencing the agreement; nor

had either of the parties sought legal advice until proceedings were commenced. Both parties said they trusted each other.

[23] There was a conflict in evidence on almost every major point which I had to resolve. Much of this could have been avoided had the parties committed their agreement to writing. That there was an intention on the part of the plaintiff to sell land and by the defendant to acquire land is clear; what is not so clear were the essential terms of price and the area that the plaintiff intended to sell. Was the contract one that was void for uncertainty? Whilst I cannot redraw the contract if it is so vague as to be uncertain, the modern approach is to try and uphold contracts despite their lack of clarity. (Cheshire and Fifoot, 6th August, 1992, at para 162)

[24] Much of what took place in March 2002 and, indeed earlier between the plaintiff and the defendant is unclear to me. It seems, however, by about the 6th of March 2002, the plaintiff had learned that the defendant had commenced clearing a certain area. Mr Pousini had apparently contacted the plaintiff indicating his concern about this. Mr Pousini had arranged with the plaintiff that in a letter dated the 12th February 2012 addressed to the Minister for Land, the plaintiff would describe the area of land he intended Mr Pousini to have and this was to be accompanied by a plan. The plaintiff gave evidence that though his wife typed the letter the information in it came from Mr Pousini.

[25] A plan was exhibited which the plaintiff said was the plan which he had initialled and was intended to refer to the Pousini lots. It does not, however, refer to any area by number or name. This is to be compared with the plan prepared in or about 1st May 2002 by Mr Uele. The plan alleged to be the plaintiff's, if one accepts the plaintiff's numbering of lots as in his amended statement of claim, records the plaintiff's signature on lots 3 and 4, with lot 5 being the southernmost lot acquired being sold to Mr Tavake. On the Uele plan, the area intended for Pousini would be lots 2 and 3, with Mr Tavake taking Lot 1. I found the different numbering of the lots very confusing, and indeed evidence about the plan said to be the plaintiff's also uncertain.

[26] Further, in the letter to the Minister of the 12th February, 2002, the plaintiff appears to identify the land to be given to Pousini as that adjacent to the village of Navutoka, which is quite different from the area designated by the plaintiff in the plan said to accompany the letter. It is, however consistent with the area that the plaintiff surrendered later to Mr Pousini. Mr Pousini said in evidence that this plan had been prepared by Sione Uele and that he furnished it to the plaintiff together with the information that led to the preparation of the letter to the Minister by the plaintiff of the 12th February. Mr Uele not only gave evidence that no plan was included with the letter of the 12th February from the plaintiff but also said that one was not included with either the plaintiff's letter of complaint to the Minister concerning the defendant's alleged wrongful occupation dated 7th March, 2002, or that of the same date by Mr Pousini to similar effect. These are considered below.

[27] Mr Uele said he had not seen such a plan until much later in 2003 when the letter of the 12th February 2002 was, he said, presented a second time by the plaintiff as a consequence of the complaint by a relative Lesieli Kavaliku on the 13th June, 2002 to the Minister alleging an interest in the allotment. It should be noted that Mr Uele said

this letter and plan had been forwarded later in answer to this objection. The identity of its draftsman remained to my mind unresolved. This, I found unsatisfactory. I accept the evidence of Sione Uele, who I found a careful witness with a well documented departmental file, that no plan was produced with the letters of the 12th February on first presentation or in the correspondence of 7th March 2002 and was not in fact received until the following year. The fact it was not included in the correspondence by Mr Pousini or the plaintiff of the 7th March is confirmed by the letter to the plaintiff from Mr Uele of the 12th March 2002 which records this fact. I accept that Mr Uele did not draft the plan which bore the plaintiff's signature and was said to accompany the letter of the 12th February 2002.

[28] The terms of the letter of the 12th February 2002, evidences the plaintiff's intention to sell land closest to Navutoka to Mr Pousini. In that letter, the plaintiff states his intention to give Mr Pousini two lots and says;

> "The position of these 2 lots is that they be surveyed off so that they each have a road frontage to the beach road as shown in the little diagram which is enclosed with this letter which shows that they both front on to the beach road and adjoin to the village of Navutoka."

[29] In correspondence of the 7th March with the Minister, the plaintiff and Mr Pousini both state that Mr Pousini had acquired lots 3 and 4 with Mr Pousini's purporting to include 'the little draft subdivision" plan. The plaintiff further requested the Minister to stop the defendant taking any steps to clear lots 3 and 4 (2 an 3 on the official plan). The Minister, on the 12th March 2002, responded that there could be no surrender if there was a dispute about land to be registered. He further informed the plaintiff it was his responsibility to advise the defendant not to proceed further and it was suggested this could be affected through a lawyer. This letter was copied to the defendant.

[30] The inference I draw from this is that as at the 12th February the intention of the plaintiff and Mr Pousini was that Mr Pousini would take the parcels of land that came to be known as lots 4 and 5 in the official plan but between the 12th February and the 6th and 7th March, 2002, Mr Pousini changed his mind and indicated a preference for the lots which had been cleared. I have not seen any evidence that established that the plaintiff, prior to this, had indeed agreed to sell lots 2 and 3 on the official plan to Mr Pousini. The earliest evidence of this is the letter by the plaintiff addressed to the Minister dated 7th March 2002.

[31] Mr Uele gave evidence that, about this time, he had gone out to the area and had seen that the land had been cleared and that the foundations had been dug. There were no actual foundations. He agreed it was quite clear that someone was going to build there but no construction had been done. He also said that he had taken a copy of the Minister's letter to the defendant and had informed him of the problem and he had said no one was going to stop him.

[32] The defendant, in evidence, denied either being given the letter or the conversation. On this point, I prefer Mr Uele's evidence as more likely. I also, however, consider that after a decade, the defendant had quite possibly forgotten about that meeting or the conversation.

[33] The plaintiff says that he spoke to the defendant and told him not to proceed it seems before his letter to the Minister seeking assistance in answer to questions from Mr Niu, although, in his statement of claim, he appears to suggest it was after the correspondence he telephoned and was threatened. In evidence by Mr Pousini of a meeting he had with the defendant at a social occasion, Mr Pousini in a similar, rather dramatic in court exhibition, claimed the defendant had made similar threats to him. I viewed with scepticism Mr Pousini's description of this meeting. The defendant agreed he had a conversation with Mr Pousini at a family celebration where he said Mr Pousini was drunk. The defendant said, and I accept his evidence, that he did not threaten either witness. I do not believe that the plaintiff did personally contact the defendant, or that he was threatened. I accept the defendant's evidence that the plaintiff did not make any complaint to him.

[34] I also note that in para 13 of the statement of claim, it is alleged that the defendant threatened a relative in similar terms not to venture on the allotment. The witness called by the plaintiff, Paea Fotu, did not however give evidence to this effect, but gave another version of what occurred which did not include any threat of violence at all.

[35] I consider the plaintiff was attempting to portray the defendant as a violent man to justify his inaction. I do not consider he had any good reason for not making his protest clear to the defendant. If he truly believed that the defendant was not entitled to build on that portion of land, had not purchased two lots, the price for two lots was unsatisfactory, or that he required payment in full prior to the defendant commencing construction, he should have clearly advised the defendant or his son of this before signing the surrender. I find that, after the meeting of the 1st May 2002, he did nothing and allowed the defendant to build a substantial home over a period of three years. I do not accept the plaintiff's evidence that he was unable to contact the defendant or that he did not know that construction was proceeding.

[36] The evidence of Mr Uele was educative and much of the documentary evidence he produced from the file I sensed was unknown to either counsel. Some of the documentation he produced I found very helpful. I consider it unsatisfactory that this correspondence was not included in para 26 of plaintiff's statement of evidence dated 12th August 2011 relating to the plaintiff's dealings with Mr Uele and the Minister on or about the 1st May 2002, and subsequently. I consider it likely that he cannot have fully instructed his counsel of the events of May 1st 2012 and after, concerning surrender letters that he signed the content of which I regard as critical.

[37] Having considered all the evidence, including that of Mr Sione Uele, I consider that by the 1st May 2002 the plaintiff had decided that the defendant should get what he wanted (despite Mr Pousini's desire to have that land) and in my view he would not have proceeded in this way had the agreement with the defendant not been for an area of the size that had been cleared equivalent to two lots each of 60 perches. The fact that he gave Mr Pousini the lots closest to Navutoka persuade me that was the area which Mr Pousini originally was to acquire.

[38] I found both Samuela and Mr Uele reliable witnesses. Later, Samuela, I find, informed his father that the surrender would go ahead. As a consequence, the defendant commenced building he said (and I accept) in June 2002, and his son also

seems to consider that building commenced about that time. That leads me to believe that the defendant may well have known that there was a difficulty over the cleared area as the evidence of Mr Uele would suggest and did not commence any construction until the way was clear for him to do so. I record that I did not accept the evidence of the plaintiff that he saw pillars and more advanced construction when driving past the allotment on or about the 1st May 2002.

[39] At the time of this meeting, the defendant was overseas. Samuela says he was not asked by his father to attend; he did so at the invitation of others. It was at the invitation of the plaintiff that Mr Uele was asked to draft a surrender letter. Prior to signing the surrender letter the plaintiff told Mr Uele that he would not include the defendant and his son because he had not received any money from them. Samuela said his father had given him the money. The plaintiff said he had not and Uele suggested they both contact the defendant by telephone. The next day, they came back and the plaintiff signed the surrender document. I consider he would not have done so had the defendant been substantially in arrears with the purchase price. Likewise, if the price for two rather than one lot had not been settled, I would have expected him to have discussed with Samuela a higher price before proceeding. He made a request for only $300.00 I find for funeral expenses, and no further request was made for further payment at any time after the 1st May 2002. The plaintiff indicated to Uele that he was agreeable to wait for the money and would sign surrender that day.

[40] By the 1st May, the evidence establishes that the defendant had paid by irregular instalments $7925.17. He was thus short by $2074.83, of the $A10,000 he said was the price agreed upon for the first lot and on his account a further $A3000.00 for the second lot was required. The defendant in fact paid further amounts $A2049.00 on the 10th May 2002 and $A1,684.00 on the 7th June, 2002 suggesting he knew there was some urgency for him to pay. This is consistent with the fact that his son had communicated the outcome of the 1st May 2002, meeting at which moneys owing to the plaintiff was discussed. I accept the defendant's evidence on the point of price namely that he agreed to pay $A 10,000 and a reduced price of $A 3000.00 because the plaintiff was said to be in need of money at the time. I have no doubt that the defendant, as a successful businessman, was well capable of driving a firm bargain and it is likely he did so. The plaintiff denied selling him two lots an assertion I find unlikely as I have said in view of his surrender of two lots in May 2002. There is no other evidence proffered by the plaintiff to counter the assertion of the defendant that the plaintiff rang and offered a further lot for a reduced price of $3000.00 because he was in need of money, other than his denial. I prefer the evidence of the defendant on this point.

[41] The defendant said that the plaintiff had told him he could build where he liked. Whilst I had some doubt initially whether this would be so, the fact that the plaintiff never said in his evidence that he referred to a specific area by lot in his telephone conversation may have encouraged the defendant to think he could build where he wanted. He said he visited and chose an area he liked. This was cleared and it appeared some measuring was effected through Mr Sione Uele. As I have said, I consider the surrender letter of the 1st May 2002, giving the defendant the area he had cleared evidences their earlier agreement that the defendant could have two lots or 4

apis of land totalling 120 perches in that general area. Although not defined clearly by the plaintiff at the time of the agreement, the area was defined by lot and designated by the date of the surrender letter. I consider it was not until March 2002 when Pousini raised with the plaintiff the defendant's clearance of the land that there was any reference to area by lot number. I also prefer the evidence of the defendant on the issue of price.

[42] Although he was questioned at some length on his knowledge of the process of registration under Tongan law, it was plain to me that the defendant did not have a very good knowledge of the requirements of Tongan law. He had not known for example that he was not entitled to have both lots registered to him until the meeting his son had with Mr Uele in May. I have little doubt that when his son informed him that the subdivision process had been resolved that was the green light for him to commence building. The plaintiff must have known when he signed the surrender document that the defendant would go ahead and build.

[43] I also find incredible the plaintiff's evidence that he did not know until after the building had been completed that the defendant had constructed a very significant house. The plaintiff had relatives in Navutoka, and indeed the initial surrender was one disputed by a relative Lesieli Kavaliku and had deferred the surrender process. Further, Mr Pousini was a frequent visitor it seems to Tonga and he would not have missed seeing construction on the land for which he had expressed an interest. Just as the plaintiff claimed to have first learned of the land clearance from relatives and, or Pousini, I have no doubt he would have known of the construction of a very substantial dwelling house (7 bedrooms) on his land and its progress. As at 2005, he still owned a good deal of land in the allotment much of which he later surrendered. I record that I asked Mr Niu whether on the evidence I could draw the inference he must have known that building was going ahead and Mr Niu agreed that I could. I have no hesitation in so finding.

[44] On 29th May, 2002, the Chief Secretary to the Cabinet recorded that the surrender had been deferred in a memorandum No 28. It may be that the Plaintiff was not informed of this until the 9th January 2003, when he was written to by Mr Uele stating that his tax allotment had been subdivided in accordance with his requirement but the Minister of Land has not approved it because of the complaint of Lesieli Kavaliku. Essentially, the objector and others alleged that there had been an agreement with the plaintiff on the way the allotment would be divided. On the 15th September, 2003, the plaintiff responded by requesting the surrender to Mr Pousini to go ahead and leave the rest of the land and he would work the issue out with Lesieli Kavaliku on his return to Tonga. He said of Mr Pousini that his request was being made because;

> "Sione Taula Pousini was the one who helped me a lot by paying for my education, in Australia, and maintains my little family, and I did promise him and his son Sione Bradley Pousini that I would give them part of my tax allotment to show my appreciation for their love as I would not be able to repay them in money".

Again he emphasises the areas lot 4 and lot 5 he is surrendering to Mr Pousini.

[45] That request was approved by Cabinet on the 3rd March 2004. On the 23rd June, 2005, the plaintiff wrote to the Minister again. He thanked the Minister for assisting him with the transfer to the Pousini's who he described as his relatives. He said he would come to Tonga and attend to the rest of his family and talk with Lesieli Kavaliku. He said in that letter that he had indeed come for the conference and had reached an understanding with Lesieli Kavaliku. He asked that there be a surrender of land to her, to Finau Tavake, and to two persons named Pua. They were all relatives. That was approved by Cabinet on the 1st December 2005.

[46] This letter states also that he came to Tonga in 2005 for the "conference", which was contrary to his evidence that it was not until 2010 that he came to Tonga after his visit in May 2002, ostensibly because he had been frightened of the defendant. On the 7th October 2010, the plaintiff again wrote to the Minister. Amongst the surrenders he sought were those of lots 10 and 11 to Sione Pousini which may have been leases.

[47] In his correspondence with the Minister, he informed him that he had no heirs. He asked that the surrender be approved. That received approval on the 23rd March 2011. It would seem that, by this date, the plaintiff had probably alienated most of the workable land on the allotment. Evidence had been given that quite an extensive amount of the allotment was swampy land. The statement of claim is dated 25th October 2010 only a few days after the surrender of considerable portion of the allotment and further two leases to Mr Pousini. The plaintiff gave evidence that he had taken the action he did because he wanted to give land to one of his adopted sons. I find it suspicious that he had not made provision to give his adopted son or sons portions of land that were available earlier. More likely is it, I consider, that the plaintiff wanted to secure the land and sell it.

[48] I consider that the plaintiff is estopped from now attempting to evict the defendant from the land on which the house had been built. He signed a surrender of the relevant lots to the defendant and his son on the 1st May 2002. Knowing the son, who by invitation had attended the meeting, would communicate this fact to his father amounted to a representation that the land would be theirs and that there was now no impediment to his father proceeding with construction which he plainly knew the defendant was looking to commence on the cleared land. He must have known the defendant and his son would rely on this representation, as the green light to commence building. He should have informed the defendant once he had received notice that Cabinet had deferred the surrender, so that, if the defendant continued with construction, it was at his risk. He proceeded with the surrender to Mr Pousini and Mr Tavake but he did not proceed with the surrender to the defendant and his son even after objection had been resolved. He made no further demand for payment. He simply did nothing until he commenced action to evict the defendant.

[49] By taking no action, he effectively allowed the defendant, who I accept was not well versed in Tonga land practice and procedure, to think that nothing was wrong and to continue to construct the house. I have said that I do not believe his evidence that he did not know about the construction until after it had been completed. I do not accept any of his evidence about fear or threats either. I have difficulty also, in the light of his surrender of other lots to relatives, in accepting his evidence that he wanted to obtain the defendant's land for his adopted son. In my view, his actions in

attempting to now evict the defendant and have his home removed are unconscionable. This falls, in my view, into the category of unconscionable conduct of the kind for which Oliver J granted equitable relief in *Taylors Fashions v Liverpool Victoria Trustees Co* [1981] 1 All ER 897, 920-921, further *Andrews v Assurance Society Ltd* [1982] 2 NZLR 556, at 569-70; *S & E Promotions Pty Ltd v Tobin Brothers* [1994] FCA 1109; (1994) 122 ALR 637. I also refer to cases in Tongan law where Courts have found estoppels, *Vai v 'Uliafa* [1989] Tonga LR 56; *Matavalea v Uata* [1989] Tonga LR 101; *Motulikiv Naimoa* [1990] Tonga LT 1.

[50] There is one issue where the plaintiff succeeds in some measure. The plaintiff claims damages or mesne profits for the defendant unlawfully occupying part of the allotment belonging to the plaintiff, and farming it commercially. Evidence was led from a relative of the plaintiff who claimed to have been excluded by the defendant from going on land to collect coconuts. He said that the defendant informed him that the land had reverted to the estate holder and he was now the owner of it. In the statement of claim, the plaintiff had alleged that the defendant threatened this person in much the same robust and violent way as he had been threatened. That was not supported by the evidence of the witness and the defendant denied that he had ever warned off anybody apart from those who had come near his building area. As such, I do not accept the plaintiff's allegation or the evidence of the witness that he was prevented from entering the land which he said was his custom to collect coconuts. I do, however, on the admission of the defendant accept that he used part of the land for cultivation and to the extent he did not get permission of the plaintiff to do so I find that was wrongful. I heard evidence that part of the land was too swampy for cultivation. Because the area and extent of cultivation was so uncertain, I invited the parties to see if they could agree on an area. The parties reported that they agreed upon a figure of two acres over a three years period.

[51] Mr Niu later argued, in his closing submissions, that because the defendant had excluded the plaintiff's relatives from the land generally a higher land area should be considered even though the defendant may not have farmed it himself. However, I do not accept that he did this or that allowing a greater sum would be appropriate. I consider that a figure of 2 acres on all the evidence I heard to be a reasonable assessment of the area used and the period, over which it was worked, about three years ending it seems in about 2008. I also heard evidence from a witness experienced in land values for commercial farming whose evidence I accept that today's values would mean a yearly rental per acre of $2000.00 pa'anga per annum. I accept that the defendant ceased farming in about 2008, so I consider a fair value for his use of the land per acre would be $1500.00. That would mean the overall value of the damages by way of menses profits payable to the plaintiff would be $9000.00 pa'anga.

[52] I consider that it is appropriate to accede in the circumstances of this case to Mrs Tupou's request for an order that the plaintiff take all steps necessary to surrender the land to the defendant and his son. I do this on the basis of the findings above that the plaintiff in seeking to have the defendant evicted and his house removed is acting unconscionably. Such an order is required to do "minimum justice" (an expression used by Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179, at 198 [1975] 3 All ER 865, at 880). This approach has a long lineage under the heading of

"proprietary" estoppel, (see *Dillwyn v Llewelynn* ( 1862) 4 DeGF & J 517, (1862) 45 ER 1285 and *Ramsden v Dyson* (1866) LR 1 HL 129, particularly the dissenting judgment of Lord Kingsdown at p 170). In *Dillwyn v Llewelynn*, the Court required a father upon whose representation that he would secure title a son erected a building on his father's land, to fulfil that expectation and secure title for him. More recently, in *Inwards v Baker* [1965] 2 QB 29, Lord Denning MR said;

> "It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that as a result of the expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires as his home."

Similarly, in *Pascoe v Turner* [1979] 2 All ER 944, the Court of Appeal held that a woman, who had remained in the house of her former lover on the assurance that the house would be hers and with his knowledge and encouragement spent part of her savings on improvements, was entitled to the property and could not be evicted. The Court considered that the plaintiff had manipulated a ruthless determination to evict her and her quiet enjoyment could only be assured if title was vested in her rather than her being awarded a mere licence to occupy for the rest of her life.

[53] Although she did not claim any relief expressly based on estoppel, I consider the pleadings in the counterclaim and the averments to be sufficiently wide to enable me to make orders requiring the plaintiff to take all steps necessary to surrender lots 2 and 3 to the defendant as the plaintiff represented he would do in the surrender letter of 1st May 2002. Given that much of the land has now been surrendered and approved, including the surrenders to Mr Pousini and Mr Tavake, the plaintiff has no heir, any objection seems to have been resolved, and the land has a substantial house built on it, it seems unlikely that there will be any impediment to the defendant and his son being registered. Nor, in my view, does such an order violate the principle laid down by the Tongan Privy Council in *O G Sanft and Sons Ltd v Tonga Tourist and Development Co Ltd* [1981-1988] Tonga LR 24 that in Tonga;

> "There is no room for the application of any rule of equity - all claims and titles must be strictly dealt with under the Act. No estate, right, title or interest can be created except in accordance with the provisions of the Act."

All that the order does here is to require the plaintiff to take the necessary steps to surrender as he represented he would do leaving the issue of consent and registration for the Minister of Land to consider. It does not create a proprietary interest in land. That is a matter for Cabinet and the Minister.

[54] Further, because I have found that the plaintiff did agree to sell lots 2 and 3 to the defendant at an overall price of $A 13,000, it is appropriate to order specific performance. As a condition of specific performance, the plaintiff is required to pay the outstanding money owing on the contract being $A 741.81 together with interest from the 1st June 2002, when I accept that construction commenced.

[55] I make the following orders based substantially on the directions given by the Court of Appeal in *Piukala v Fonohema* [2002] Tonga LR 200 at 212;

1. The plaintiff is restrained by this Court from taking any further step (aside from any appeal against this judgment) to evict the defendant from possession or requiring him to remove the home on Lots 2 and 3 on tax allotment Lot 7 BLK 80/97 Navutoka – estate of Tungi;
2. The agreement for the sale of lots 2 and 3 at a price of $A13,000 should be carried into execution and specifically performed;
3. Pursuant to one and two, the plaintiff was and is bound to do whatever may reasonably be required on his part to enable the consent of the Cabinet and the Minister of Land to the surrender of the allotment 2 and 3 to the defendant and his son. He is to give a signed renewal of surrender to his solicitor to file within one month of this judgment, and a copy is to be sent to the defendant' solicitor.
4. On the obtaining of those consents and the making of the grants, the defendant is to pay to the plaintiff the balance of the purchase price of $A 741.84 together with interest at the rate of 10% from the 1st June 2002 to the date of Ministerial consent to registration being granted.
5. Should the said consents not be forthcoming, the parties are given leave to apply to the Land Court to give such relief, if any, to the parties as may appear just.
6. Judgment is given for the plaintiff in the sum of $9000.00 pa'anga as damages (mesne profits) together with interest on this sum at the rate of 10% from the 1st January 2009 to the date of judgment.
7. I award costs to the plaintiff on the mesne profits claim and otherwise the defendant is entitled to costs. If the parties are unable to agree upon costs, they are to be fixed by the Registrar.

## Niu anors v Takealava anor

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 15/2012

8 April 2013; 17 April 2013

*Civil procedure – challenge to jurisdiction of Supreme Court – actions of trespass to land and trespass to goods protect lawful possession, not title – Supreme Court had jurisdiction – application to strike out the proceedings dismissed*

Proceedings in the Supreme Court were commenced on 25 July 2012 to prohibit the appellants from entering or remaining on what was described as the plaintiffs' property, being a town allotment at Taufa'ahau Road, Haveluloto, Tongatapu (the property) and their house on that property occupied by the plaintiffs. On 27 July after hearing counsel for the plaintiffs and the first defendant in person the Lord Chief Justice granted the injunction sought with effect from 2pm that day. The injunction remained in force. On 23 August 2012, without having filed a defence or an affidavit on the merits the defendants/appellants applied for an order striking out the Supreme Court proceedings for lack of jurisdiction. On 6 September the Lord Chief Justice dismissed the application. The appellants appealed that dismissal. The appellants' challenge to the jurisdiction of the Supreme Court was based on certain sections in the Land Act read with the Act of the Constitution, and the Supreme Court Act.

Held:

1. The issue in the appeal depended on whether the proceedings commenced by the respondents on 25 July 2012 concerned "titles to Land." The court decided that they did not. Prior to the events of 24 July the plaintiffs (respondents) had been in long undisturbed possession of the house and the property. The plaintiffs claimed title to the house as their personal property, and their possession was protected against anyone who did not sue within 10 years or who did not have a better title. The plaintiffs' possession was accordingly lawful and entitled them to remain in possession until someone established a better right (which could not be done by a forcible, and therefore unlawful, entry).
2. The actions of trespass to land and trespass to goods protect lawful possession, not title as such. Even if the Land Court ultimately decided that the second defendant had a better title than the plaintiffs, that decision, after the event, would not justify or excuse the second defendant's forcible

entry onto the property and into the house with her lawyer and six male security guards. The defendants would still be liable for those trespasses.

3. The right of a lawful occupier to undisturbed possession until the Land Court made an order requiring him to vacate was another aspect of the right conferred by lawful possession of the property and the house. Since the dispute before the court did not concern titles to land, section 151(2)(b) of the Land Act (which gave the Land Court power to issue injunctions) could not deprive the Supreme Court of jurisdiction either. This power would be exclusive if the dispute concerned "titles to land", but was not expressed to be exclusive in other land cases where title was not in issue.
4. The appeal was therefore dismissed with costs.

Cases considered:

'Ilavalu v Minister of Lands [1974-1980] Tonga LR 29
Tafa v Viau [2006] Tonga LR 125 (LC)
Tafa v Viau [2006] Tonga LR 287 (CA)

Statutes considered:

Constitution of Tonga (Cap 2)
Land Act (Cap 132)
Supreme Court Act (Cap 10)

Rules considered:

Supreme Court Rules 2007

| | | |
|---|---|---|
| Counsel for the appellants | : | Mr L Niu |
| Counsel for the respondents | : | Mrs 'A Taumoepeau SC |

## Judgment

[1] This is an appeal, by leave granted by the Lord Chief Justice on 17 October 2012, from his decision on the jurisdiction of the Supreme Court given on 6 September 2012.

[2] The question of jurisdiction arose in proceedings in the Supreme Court commenced on 25 July 2012 to prohibit the appellants from entering or remaining on what was described as the plaintiffs' property, being a town allotment at Taufa'ahau Road, Haveluloto, Tongatapu (the property) and their house on that property occupied by the plaintiffs.

[3] On 27 July after hearing counsel for the plaintiffs and the first defendant in person the Lord Chief Justice granted the injunction sought with effect from 2pm that day. The injunction remains in force.

[4] The first plaintiff, who claims to be the rightful heir of the last registered holder of the property, in 2011 commenced proceedings against the Minister of Lands (the Minister) in the Land Court challenging the Minister's decision that the original

registration of the property in the name of the first plaintiff's father was null and void, and the property had reverted to the estate holder.

[5] These proceedings remain pending in the Land Court. The present appellants, the defendants below, are not parties to the proceedings in the Land Court, and do not claim under the Minister or the estate holder.

[6] The second appellant's claim to possession of one or two rooms in the house appears to have been based partly on her blood relationship with the second plaintiff, and what could be no more than a licence to occupy that room or rooms, while visiting from Australia, under long standing arrangements of an informal nature.

[7] On 23 August 2012, without having filed a defence or an affidavit on the merits the defendants applied for an order striking out the Supreme Court proceedings for lack of jurisdiction. On 6 September the Lord Chief Justice dismissed the application.

[8] The appellants' challenge to the jurisdiction of the Supreme Court was based on certain sections in the Land Act which must be read with the Act of the Constitution, and the Supreme Court Act.

[9] Section 149 of the Land Act relevantly provides

> "(1) The Court shall have jurisdiction-
> (a) ...
> (b) To hear and determine all disputes, claims and questions of title affecting any land or any interest in land...and in particular all disputes claims and questions of title affecting any...town allotment or any interest therein...
> (c) ...
> (d) ...
> (e) To hear and determine any question or amount of damages, loss, compensation...or claim in respect of any allotment...or interests of any kind in any land."

[10] Section 151 (2) (b) provides:

> "(2) The Court may whenever necessary-
> (a) ...
> (b) grant or issue injunctions affecting lands"

[11] Section 4(1) of the Supreme Court Act provides, so far as relevant:

> "(1) The Supreme Court shall have jurisdiction to hear any proceedings other than proceedings which-
> (a) Are excluded from the jurisdiction of the Supreme Court by the Act of the Constitution; or
> (b) by law, are within the exclusive jurisdiction of another court or tribunal;
> ..."

[12] Section 149 of the Land Act does not make the jurisdiction of the Land Court exclusive, and is strictly irrelevant.

[13] However, s90 of the Act of Constitution of Tonga (the Constitution) provides:

> "The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to Land which shall be determined by a Land Court)..."

[14] The relevant exclusion from the jurisdiction of the Supreme Court flows only from s90 of the Constitution and it relates to "cases concerning titles to land". Accordingly the issue in the appeal depends on whether the proceedings commenced by the respondents on 25 July 2012 concerned "titles to Land."

[15] In our judgment the answer is they did not. Prior to the events of 24 July the plaintiffs (respondents) had been in long undisturbed possession of the house and the property. The plaintiffs claimed title to the house as their personal property under the Law of Tonga, and their possession would be protected against anyone who did not sue within 10 years: Land Act s 170: *'Ilavalu v Minister of Lands* [1974-1980] Tonga LR 29; or who did not have a better title. The plaintiffs' possession was accordingly lawful and entitled them to remain in possession until someone established a better right which certainly cannot be done by a forcible, and therefore unlawful, entry.

[16] The second defendant did not claim before the Lord Chief Justice and has not formally claimed since that she has any title to the house or the land. She has not commenced proceedings in the Land Court, or applied to be joined in the proceedings pending in that Court against the Minister.

[17] During the hearing Mr. Niu outlined the second defendant's claim to the property traced through an ancestor but there is no trace of this claim in the record before us.

[18] He said, apparently relying on Order 7 of the *Rules of the Supreme Court* dealing with objections to the jurisdiction of the Court, that he could not take any step in the action without waiving his objection to the jurisdiction of the Supreme Court.

[19] There are several answers to this explanation. The objection to jurisdiction was based on s90 of the Constitution, which is the supreme law of Tonga, and the objection, if valid, could not be affected by Rules of Court. In any event Order 7 is concerned with the Court's international jurisdiction over defendants who are resident outside Tonga, and not with the Court's domestic jurisdiction under the Constitution.

[20] The actions of trespass to land and trespass to goods protect lawful possession, not title as such. Even if the Land Court ultimately decides that the second defendant had a better title than the plaintiffs, that decision, after the event, would not justify or excuse the second defendant's forcible entry onto the property and into the house with her lawyer and 6 male security guards. The defendants would still be liable for those trespasses.

[21] One of the rights enjoyed by a person in lawful possession of land or personal property is the right to be protected from unlawful disturbance of that possession, a right which can be protected by injunction and vindicated in an action for trespass to

land or goods. This right and these remedies against self-help, taking the law into one's own hands, are essential for the preservation of the King's peace, and the rule of law in Tonga.

160 [22] The rights under the law of Tonga of those in lawful possession of an allotment without a documentary title were recognized in *Tafa v Viau* [2006] Tonga LR 125 (LC) and 287 (CA). At [2] the Court of Appeal said:

> "At the time of an application made by the appellant for the grant of an allotment...the...respondents...were in lawful occupation of the land."

[23] In that case the respondents' "lawful occupation" without a documentary title enabled them to successfully challenge a grant by the Minister to another, leaving it to the Minister to determine who should receive the new grant.

[24] The right of a lawful occupier to undisturbed possession until the Land Court makes an order requiring him to vacate is another aspect of the right conferred by
170 lawful possession of the property and the house.

[25] Since the dispute before the Lord Chief Justice did not concern titles to land, section 151(2)(b) of the Land Act, which gives the Land Court power to issue injunctions, cannot deprive the Supreme Court of jurisdiction either. This power will be exclusive if the dispute concerns "titles to land", but is not expressed to be exclusive in other land cases, such as the present, where title was not in issue.

[26] The appeal is therefore dismissed with costs.

## Saavedra anor v Solicitor General

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 1/2013

9 April 2013; 17 April 2013

*Adoption – appeal against refusal to grant – updated report of guardian ad litem against adoption – appeal dismissed*

The Lord Chief Justice refused to make an adoption order in respect of a six year old Tongan male child. The applicants were United States citizens and residents. At the same time an adoption order was made in favour of the applicants in respect of a one year old half sister of the boy to whom this appeal relates. The children have different fathers. The applicants appealed against the refusal.

Held:

1. Inter-country adoption should be approved only when all other means of caring for a child in Tonga have been exhausted. It was a measure that the Committee on the Rights of the Child described as "a measure of last resort".
2. Since the decision on 14 December 2012, the adoption of the younger child has been implemented. The six year old boy had been living with his natural mother and grandmother in Tonga.
3. The court called for updating information to be made available. This should be expected to be required in all appeals involving the welfare of a child. The further information provided by the guardian ad litem made the case against the adoption of the boy much stronger.
4. In the circumstances where the child was being cared for in a suitable manner by his family in Tonga, the appeal failed and was dismissed. Costs were not sought.

Case considered:

Hatch v Solicitor General [2010] Tonga LR 177

Counsel for the appellants : Mr ST Fakahua
Counsel for the respondent : Mr 'A Kefu

**Judgment**

[1] This appeal is against a decision of the Lord Chief Justice refusing to make an adoption order in respect of a 6 year old Tongan male child. The applicants are United States citizens and residents. An unusual feature of the case is that at the same time an adoption order was made in favour of the applicants in respect of a 1 year old half sister of the boy to whom this appeal relates. (The children have different fathers.)

[2] When the matter was heard in the Supreme Court the position regarding the male child was not as clear as it became at the hearing before us. The position then was that the natural mother, aged 24, was consenting to the adoption of both children which was supported by the guardian ad litem (the Solicitor General). The natural mother had deposed that she was a single mother, unemployed and unable to undertake the upbringing of the two children and it was a "very huge burden" to maintain them. The applicants, who appear to have been entirely suitable adoptive parents (leaving aside their different ethnicity and residency), were a married couple aged 29 and 31. They had no children of their own. They approached the natural mother in Tonga indicating their wish to adopt the female child. She was willing to give her consent. The natural mother is a member of the Roman Catholic Church but had no objection to the fact that the adoptive parents were members of the Church of Jesus Christ of the Latter Day Saints. The report from the guardian ad litem noted that the applicants lived in Utah "which has a huge Tongan community who are members of the Church of Jesus Christ of the Latter Day Saints". Subsequently the natural mother gave her consent to the adoption of the male child.

[3] The Chief Justice recorded that the guardian ad litem had been hesitant to recommend the granting of adoption until the applicants had been in Tonga for 6 months. In *Hatch v Solicitor General*[2010] Tonga LR 177 this Court said that the 6 month requirement is to allow a proper assessment of the relationship between applicants and children. But the Chief Justice observed in this case that it is not an inflexible requirement particularly in the case of very young children who might never have come to know their natural mothers. He said that the requirement that the applicants were sufficiently acquainted with the children they were proposing to adopt was only one aspect of the Court's duty to enquire whether the proposed adoption is in the best interests of the child.

[4] We pause to emphasize that this is indeed the paramount consideration in adoption cases, including inter-country adoptions, and indeed in other cases involving children. Tonga is a party to the United Nations Convention on the Rights of the Child whose guiding principle is that paramount consideration. In particular, as the Chief Justice acknowledged, Article 21, requires State Parties to:

> (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

[5] Consequently, inter-country adoption should be approved only when all other means of caring for a child in Tonga have been exhausted. It is a measure that the

Committee on the Rights of the Child has described as "a measure of last resort": *Concluding Observations: Mexico* (UN Doc. CRC/C/15/Add.13,1994), para. 18 cited in Vité and Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child-Article 21: Adoption* at p.45.

[6] The guardian ad litem submitted to the Chief Justice, inter alia, that:

(i) The applicants and the application were suitable and appropriate;
(ii) The children were by the time of the hearing familiar with the applicants whom they had come to recognize as their parents, having been living with the female applicant for almost 6 months;
(iii) The natural mother had confirmed that there was no other person in the family capable of caring for the children.

[7] The Chief Justice, presciently it now seems, despite this last submission was not prepared to accept that the older male child could not be looked after perfectly acceptably within the natural mother's extended family. He had lived for his first 5 years with his grandmother and was still attached to his mother and did not want to go on an aeroplane with the female applicant. The Chief Justice, rightly in our view, considered the fact that the applicants are non-Tongans and that the child would be taken to an environment quite different from that which he had known all his life, was relevant. He accepted that the applicants were in a position to offer a better standard of living, upbringing and education but said that material well-being is only one of a number of important considerations which must be taken into account before deciding where the child's best interests lie. He concluded that the proposed adoption was not in the best interests of the male child.

[8] In the case of the younger female child, however, he made an adoption order, accepting that the natural mother was not able to look after both children. That would impose an unfair and unacceptable burden on her extended family. No challenge is made to that decision. The younger child has since been taken to the United States.

[9] A direction was given that the natural mother should remain as the sole guardian of the older child who was to be returned to her care. That child has since been living with his mother and grandmother in Tonga.

[10] The decision was given on 14 December last year and, as we have said, the adoption of the younger child has been implemented. The applicants have brought an appeal to this Court against the refusal of an order in respect of the older child. We called for updating information to be made available to us. Counsel should expect that this will be required in all appeals involving the welfare of a child. The further information helpfully placed before the Court at the hearing by the guardian ad litem, who now opposes the adoption of the older child, has made the case against that adoption much stronger.

[11] We have carefully considered the submissions made by Mr. Fakahua for the applicants/appellants, largely repeating those made to the Supreme Court, but his task in this Court was a formidable one. The requirements of the United Nations Convention now plainly cannot be met. The further report of the guardian ad litem and affidavits from the natural mother, who now withdraws her consent to the

adoption, and from the maternal grandmother, establish that the child is living with the natural mother during the week in order to attend primary school and at weekends and school holidays is sent to the grandmother's home. The report states that the grandmother provides for his needs and wants during those times and provides most of his financial support. The child appears to be happy, healthy and cleanly kept by the maternal grandmother. She shows genuine care and love towards him. She conveys that she does not want the child to be adopted and states that she can continue to care and provide for him as she did in the past.

[12] The child has told the guardian ad litem's representative that he does not want to
130 go and live with the applicants and is happy with his grandmother whom he loves. The guardian ad litem now recommends that the child remain with his natural mother.

[13] In these circumstances, where the child is being cared for in a suitable manner by his family in Tonga, the appeal must fail and is dismissed. Costs were not sought.

## 'Uta'Atu anor v Naufahu anor

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 16/2012

9 April 2013; 17 April 2013

*Civil appeal – shareholder of company had no proprietary interest in assets of the company – no cause of action – appeal allowed*

For the full facts, see *Naufahu anor v 'Uta'atu anor* [2012] Tonga LR 80.

The Lord Chief Justice found that the damaged pipeline was the disused coconut oil pipeline, that the damage to that pipeline was worth TOP$300, and not TOP$132,000 and the second plaintiff had not suffered any consequential loss. Judgment was entered for the plaintiffs for TOP$300 against the first defendant and judgment was given for the second defendant. After further argument the first defendant was ordered to pay the plaintiffs' costs of the action and of the application for costs.

The defendants appealed challenging the judgment for the plaintiffs on liability on the ground that their only claim was for the damage to a diesel pipeline, and there was no claim for damage to the disused coconut oil pipeline. It was not clear why the second defendant appealed, or that it had the standing to do so. The defendants also challenged the Judge's order for costs. The defendants' appeal provoked a cross appeal by the plaintiffs who sought judgment for TOP$300 and costs against the second defendant.

Held:

1. A shareholder, even a sole shareholder, did not have a proprietary interest in the assets of a company, nor did its managing director. Since the first plaintiff had no proprietary interest in the pipeline she did not suffer a direct or personal loss when the pipeline was damaged. Any loss she suffered was purely economic, and was a derivative or reflective loss as a result of her shares being reduced in value by the company's loss. This derivative loss did not give the first plaintiff a cause of action against the defendants.
2. The judgment in favour of the first plaintiff was set aside.
3. With respect to the plaintiffs' cross appeal, the Lord Chief Justice gave judgment for the plaintiffs for TOP$300 against the chief executive officer of the second defendant whose acts and omissions gave rise to the tort. In

fact she was the only one implicated on behalf of the second defendant. The liability of a servant or agent who commits a tort in the course of his or her employment did not exclude vicarious liability on the part of his or her employer; indeed it attracted it. The first and second defendants were joint tortfeasors.

4. The cross appeal therefore succeeded and judgment for TOP$300 was entered against the second defendant.

5. The appeal against the costs orders made on 14 September 2012, arose on the defendants' appeal. The orders for costs resulted from an erroneous exercise of discretion and the Court must intervene and re-exercise the discretion. The defendants did not pay into Court, the plaintiffs recovered more than nominal damages, and they succeeded in one of the major issues at the trial but they failed in substance. In these circumstances the Court substituted orders that there be no order as to the costs of the trial and the application for costs before the Lord Chief Justice, but the defendants, the appellants in this Court, would have their costs of the appeal.

6. The following orders were made: the appeal was allowed with costs; orders for costs made on 14 September 2012 were set aside and substituted with an order that there be no order as to the costs of the trial, or of the application for costs; judgment for the first plaintiff was set aside, and substituted judgment for the defendants on her claim. The cross appeal was allowed without costs. Judgment for the second defendant was set aside, and substituted judgment for the second plaintiff against the second defendant.

Cases considered:

Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries [1951] 1 All ER 873

Dering v Uris [1964] 2 QB 669

Elgindata Ltd (No. 2), Re [1992] 1 WLR 1207

Fa'aoa v Tonga Development Bank [2002] Tonga LR 317

Johnson v Gore Wood & Co. [2002] 2 AC 1

Knab v Hoeller [2001] Tonga LR 83

Practice Direction 5/2004 Taxation of Costs

Prasad v Morris Hedstrom (Tonga) Ltd (No. 2) [1993] Tonga LR 69 (CA)

Prudential Assurance Co. Ltd. v Newman Industries Ltd (No.2) [1982] Ch 204

Standard Chartered Bank Ltd v Pakistan National Shipping Corporation [2003] 1 AC 959

Wah Tat Bank Ltd v Chan [1975] AC 507

Rules considered:

Supreme Court Rules 2007

Counsel for the appellants : Mr SV Fa'otusia

Counsel for the respondents : Mr L Niu SC

**Judgment**

[1] The Court has before it an appeal and cross appeal from the judgment of the Lord Chief Justice of 15 June 2012 and his order for costs of 14 September 2012. His findings of fact in the action were not challenged in any way.

[2] The proceedings arose out of the removal by Mr. Peni Vea of part of a disused pipeline owned by the second plaintiff at Vuna Road Touliki, Ma'ufanga in August 2007. This was done, as the Lord Chief Justice found, with the permission of the first defendant, who was the Chief Executive Officer of the second defendant which had sold the pipeline to the second plaintiff in 1999 for TOP$5000.

[3] The issues at the trial centered on the second plaintiff's claim that part of the pipeline had been removed with the permission of the defendants; that it was a diesel pipeline, and not the disused coconut oil pipeline, and the second plaintiff had suffered damage of TOP$872,000 including TOP$132,000 paid to acquire the pipeline.

[4] The issue of authority was resolved in favour of the plaintiffs, but the Lord Chief Justice found that the damaged pipeline was the disused coconut oil pipeline, that the damage to that pipeline was worth TOP$300, and not TOP$132,000 and the second plaintiff had not suffered any consequential loss.

[5] He entered judgment for the plaintiffs for TOP$300 against the first defendant, appears, by necessary implication, to have given judgment for the second defendant, and reserved costs.

[6] On 14 September 2012 after further argument the Lord Chief Justice ordered the first defendant to pay the plaintiffs' costs of the action and of the application for costs.

[7] The defendants appealed challenging the judgment for the plaintiffs on liability on the ground that their only claim was for the damage to a diesel pipeline, and there was no claim for damage to the disused coconut oil pipeline. In their submission, the Lord Chief Justice, having found that the diesel pipeline had disappeared before August 2007, should have dismissed the action. We will refer to this as the pleading point. It is not clear why the second defendant appealed, or that it had the standing to do so.

[8] The defendants also challenged the Judge's order for costs. The Lord Chief Justice held that the plaintiffs had succeeded in the action, and there was no reason for displacing the usual rule that costs should follow the event.

[9] The defendants' appeal provoked a cross appeal by the plaintiffs who sought judgment for TOP$300 and costs against the second defendant.

[10] Mr. Niu for the appellants took the Court through the plaintiffs' statement of claim and established that their only claim was for damage to the diesel pipeline, and there was no claim for the damage to the disused coconut oil pipeline, although it was mentioned. The defendants' case throughout was that it was the coconut oil pipeline that had been damaged.

[11] The plaintiffs did not seek leave to amend, and the Lord Chief Justice did not act to direct an amendment. However the parties litigated the question whether the diesel or coconut oil pipeline had been damaged.

[12] The position in such a case in Tonga, and elsewhere in the common law world, is that the Court is entitled, and indeed bound to give judgment on the issues litigated. In *Prasad v Morris Hedstrom (Tonga) Ltd (No. 2)* [1993] Tonga LR 69, 73 the Court of Appeal said:

> "...if despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings."

[13] This decision was applied by Ford J in *Fa'aoa v Tonga Development Bank* [2002] Tonga LR 317, 327. We have no hesitation in following these decisions, and we reject the pleading point.

[14] The Lord Chief Justice gave judgment for TOP$300, not only in favour of the corporate plaintiff which was the legal owner of the coconut oil pipeline, but also in favour of the first plaintiff who sued as its managing director and shareholder. There was no appeal against the judgment in favour of the first plaintiff but although nothing really turns on it, it should not be allowed to stand.

[15] A shareholder, even a sole shareholder, has no proprietary interest in the assets of a company, nor does its managing director. Since the first plaintiff had no proprietary interest in the pipeline she did not suffer a direct or personal loss when the pipeline was damaged.

[16] Any loss she suffered was purely economic, and was a derivative or reflective loss as a result of her shares being reduced in value by the company's loss. This derivative loss did not give the first plaintiff a cause of action against the defendants: *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No.2)* [1982] Ch 204,223-4 CA, *Johnson v Gore Wood & Co.* [2002] 2 AC 1.

[17] The judgment in favour of the first plaintiff must be set aside.

[18] We deal next with the plaintiffs' cross appeal. The Lord Chief Justice gave judgment for the plaintiffs for TOP$300 against the chief executive officer of the second defendant whose acts and omissions gave rise to the tort. In fact she was the only one implicated on behalf of the second defendant.

[19] The liability of a servant or agent who commits a tort in the course of his or her employment does not exclude vicarious liability on the part of his or her employer; indeed it attracts it: *Wah Tat Bank Ltd v Chan* [1975] AC 507, 514-5; *Standard Chartered Bank Ltd v Pakistan National Shipping Corporation* [2003] 1 AC 959. The first and second defendants were joint tortfeasors.

[20] The cross appeal therefore succeeds and judgment for TOP$300 will be entered against the second defendant.

[21] The remaining issue, the appeal against the costs orders made by the Lord Chief Justice on 14 September 2012, arises on the defendants' appeal. Mr. Niu supported his

application for costs before the Lord Chief Justice by submitting that the plaintiffs' claim for damage to its diesel pipeline was made "most unjustifiably" and "even fraudulently", and that no claim had been made for damage to the coconut oil pipeline. Mr. Fa'otusia for the plaintiffs submitted that negligence had been found and damages awarded and costs should follow the event.

[22] The Lord Chief Justice held, in the absence of relevant local rules, that Order 2 rule 3 of the Supreme Court Rules (Tonga) applied the English rule in RSC Order 62 r(3) which directed the Court to order the costs "to follow the event except where it appears to the Court that in the circumstances of the case some other order should be made."

[23] He referred to the judgment of Nourse LJ in *Re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207 who said:

> "... a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs."

[24] The Lord Chief Justice held that the plaintiffs' claim for damage to the diesel pipeline had not been raised "improperly or unreasonably", or as Mr. Niu had submitted "most unjustifiably or even fraudulently".

[25] He accepted Mr. Fa'otusia's submission that "the central issue in the case" was whether the defendants' negligence had led to *a* pipeline owned by the plaintiffs being interfered with, and that this issue had been resolved in favour of the plaintiffs. He concluded that the usual rule that costs follow the event had not been displaced.

[26] The decision on costs is troubling because the defendants went to Court to defend a claim for TOP$872,000 which they successfully resisted save for TOP$300. The plaintiffs recovered .003% of their original claim, and the defendants succeeded in having 99.997% of the claim rejected. It is not self-evident that the relevant "event" was the judgment for TOP$300.

[27] Moreover the plaintiffs' case that their diesel pipeline had been damaged failed completely. Their limited success for damage to the coconut oil pipeline was based on a claim that had not been pleaded and reflected the defendants' assertion that this was the relevant pipeline.

[28] If the pleading point had been taken at the trial and the plaintiffs had obtained leave to amend, this may have been on terms as to costs which reflected the failure of the case originally pleaded.

[29] Another relevant consideration which could not have been drawn to the attention of the Lord Chief Justice, is that a claim for TOP$300 was within the civil jurisdiction of the Magistrates' Court where a reduced scale of costs applies. In *Knab v Hoeller* [2001] Tonga LR 83 which Mr. Niu supplied to the Court, by leave, after judgment had been reserved, Ward CJ said at p.85:

> "Where the plaintiff succeeds but is only awarded a substantially smaller sum than that claimed, it is unconscionable that the losing party should

> have to pay the costs unnecessarily incurred. In any case where the award is such that it would have fallen within the jurisdiction of a lower court the winning party's costs should be limited to the scale appropriate in that Court. This case could have been brought in the Senior Magistrate's Court."

[30] Practice Direction 5/2004 Taxation of Costs, which the Registrar helpfully made available to us, provides in para.3 that costs in the Magistrate's Courts are to be allowed at half the Supreme Court rate.

[31] The finding that the plaintiffs' claim for damage to the diesel pipeline was "neither improperly nor unreasonably" raised was not challenged. However the statement of principle by Nourse LJ quoted above included "making allegations on which he fails", and this limb appears to have been overlooked.

[32] It is beyond dispute that the plaintiffs made allegations on which they failed, allegations that the diesel pipeline was damaged, that this was a valuable pipeline and they had suffered substantial consequential losses.

[33] There was more than one central issue in the trial. Mr. Fa'otusia's submission that the "central issue" was whether the first defendant's negligence led to the Plaintiffs' suffering damage caused by "interference to a pipeline owned by them" was a considerable understatement.

[34] In his reasons for judgment in the action the Lord Chief Justice [10] identified 4 questions: which pipeline was cut, was it cut after Peni Vea was authorized to do so by the first Defendant, what was the value of the pipeline that was cut, and did this result in consequential loss. The first question described by the Lord Chief Justice, as "crucial to the Plaintiffs' case" [18], was considered by him in paras [11] - [20], the second in paras [21] – [26], and the others in paras [27] – [31].

[35] The second question was resolved in favour of the plaintiffs, the first and fourth in favour of the defendants, and the third substantially so.

[36] What then was "the event" in this action? Cases cited in Halsbury provide helpful guidance. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 the plaintiff sued for £2028 damages for breach of contract alleging that the goods were worthless. It succeeded in receiving rectification costs of £52 following an amendment.

[37] Devlin J referred to the general rule that a successful plaintiff should not be deprived of his costs and continued at p.874:

> "In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful"

[38] Devlin J considered the effect of the plaintiff's limited recovery and the amendment and continued at p.875:

> "If their original pleading had contained the amended claim, while I do not suppose that I could have given [the plaintiff] the costs of the action

> since they recovered only £52 when their main claim was for a much larger sum, I do not think that it would have been right to order them to pay all the costs of the defendants...In this case, if the plaintiffs, in their statement of claim, had claimed as damages only the amount which they have recovered their claim would, I imagine, have been met either by a settlement of the action or by a payment into Court, as it was on the evidence of the defendants that the claim for £52 was ultimately made out and proved."

[39] In *Dering v Uris* [1964] 2 QB 669 a libel case where the jury returned a verdict for one halfpenny against the defendant author, but the costs position was complicated by the position of the other defendants, Lawton J said at p.672:

> "I am now presented with a difficult problem, to make the order on the jury's verdict. In the ordinary way the problem would have been a simple one...Had there not been complications...I should have felt bound to enter judgment for the plaintiff and to make no order as to costs"

[40] In that case the effect of the jury's verdict was that the plaintiff proved that he had been defamed, and that the defence of justification failed, but he did not establish that there had been a significant injury to his reputation. In other words both parties had enjoyed a measure of success, but since the defendant had not paid into Court there would have been no order as to costs. If the defendant had paid into Court he would have been entitled to the costs of the trial.

[41] In our judgment, for the reasons expressed, the orders for costs in this case resulted from an erroneous exercise of discretion and this Court must intervene and re-exercise the discretion.

[42] The defendants did not pay into Court, the plaintiffs recovered more than nominal damages, and they succeeded in one of the major issues at the trial but they failed in substance. In these circumstances we will substitute orders that there be no order as to the costs of the trial and the application for costs before the Lord Chief Justice, but the defendants, the appellants in this Court, will have their costs of the appeal.

[43] The following orders are made:

(1) Appeal allowed with costs;
(2) Orders for costs made on 14 September 2012 set aside;
(3) Substitute an order that there be no order as to the costs of the trial, or of the application for costs;
(4) Judgment for the first plaintiff set aside, and substitute judgment for the defendants on her claim;
(5) Cross appeal allowed without costs;
(6) Judgment for the second defendant set aside, and substitute judgment for the second plaintiff against the second defendant.

# Moehau anor v Westpac Bank of Tonga

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 17/2012

10 April 2013; 17 April 2013

*Civil procedure – summary judgment – held that no defences could possibly succeed – appeal dismissed*

Westpac Bank of Tonga claimed for recovery of an amount lent under a loan agreement entered into on 23 April 2009 (for a loan of $939,925 plus interest and costs) against Mr Moehau (the first appellant). Westpac claimed against Epic International Ltd (the second appellant) under a guarantee given on the same day in respect of that loan but limited under the terms of the guarantee to $921,000 plus interest and costs. At that time Mr Moehau was the sole director and shareholder of Epic and executed the guarantee on its behalf as its director/secretary. The Lord Chief Justice ordered summary judgment against each of them in favour of Westpac Bank of Tonga for sums of TOP$985,077.59 and TOP$929,397.44 respectively together with interest and costs. Mr Moehau and Epic International Ltd appealed against that decision. The appellants submit that summary judgment should not have been entered for several reasons: that in their statement of defence and/or affidavits they had put in issue arguable matters of fact which were not capable of proper resolution in a summary judgment application; that there was an arguable defence that because of certain representations said to have been made by officers of the bank to Mr Moehau the bank was estopped from relying upon Mr Moehau's admitted failure to make repayment of the loan advance in accordance with the terms of the loan agreement; that the bank had acted unconscionably in relation to the restructuring of the loan (contrary to its internal policy manual) and in making demand and seeking to enforce the terms of the loan agreement, in particular by lending recklessly to Mr Moehau and inducing in him a belief that it would not enforce the loan or call on the guarantee without giving reasonable time or allowing a moratorium; and that the bank had been under a duty to the appellants to act in good faith and had breached that duty, in particular by treating some other borrowers more favourably than Mr Moehau. The Supreme Court considered that none of these assertions raised an arguable defence.

Held:

1. It was a term of the new loan agreement that any consolidation of previous borrowings was to be governed by the terms of the new loan. Mr. Moehau also acknowledged in the loan agreement that he relied upon his own

judgment and not on any representation or advice given by the bank. He further acknowledged being advised by the bank to obtain independent advice and agreed to absolve the bank from any liability for any misrepresentations or negligent advice by the bank or its officers.

2. A defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence was so clearly untenable that it must fail. The court must be satisfied that the asserted defence had no prospect of succeeding at trial. In a case in which there was 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 was contended that there was factual dispute the court was not bound to accept uncritically, as raising a dispute of fact which called 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.

3. The appellants' inability to adduce evidence of what they allege Mr. Moehau was told by the bank officers means that the proposed defence of unconscionable conduct on the part of the bank in the negotiation of the restructuring or in calling up the loan and guarantee when default was made, could not possibly succeed. Unconscionability was a doctrine of equity. It involved a party who was suffering from a special disability or was in some special situation of disadvantage, and an unconscionable taking advantage of that disability or disadvantage by another. It did not apply simply because the party had made a poor bargain or just because there was an inequality of bargaining power. The disabling condition or circumstance must seriously affect the ability of the affected party to make a judgment as to his or her best interests.

4. The court was satisfied that none of the proposed defences had any prospect of succeeding at trial. They were clearly untenable. The appeal was dismissed with costs.

Cases considered:

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51

Bacchus Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co Ltd [1919] HCA 18; (1919) 26 CLR 410

Bank of Baroda v Rayarel [1995] 2 FLR 376

Commercial Bank of Australia v Amadio (1983) 151 CLR 477

Eng Mee Yong v Letchumanan [1980] AC 331 (PC)

GE Custodians v Bartle [2011] 2 NZLR 31

Hoyt's Proprietary Ltd v Spencer [1919] HCA 64; (1919) 27 CLR 133

Statute considered:

Evidence Act (Cap 15)

Rules considered:

Supreme Court Rules 2007

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| Counsel for the appellants | : | Mr SJ Stanton SC and Mr O Pouono |
| Counsel for the respondent | : | Mr R Stephenson |

**Judgment**

[1] Mr. Moehau and Epic International Ltd appeal against a decision of the Lord Chief Justice ordering summary judgment against each of them in favour of Westpac Bank of Tonga for sums of TOP$985,077.59 and TOP$929,397.44 respectively together with interest and costs.

[2] Westpac's claim against Mr. Moehau was for recovery of an amount lent to him under a loan agreement entered into on 23 April 2009 (for a loan of TOP$939.925.00 plus interest and costs). Its claim against Epic was under a guarantee given on the same day in respect of that loan but limited under the terms of the guarantee to TOP$921,000 plus interest and costs. At that time Mr. Moehau was the sole director and shareholder of Epic and executed the guarantee on its behalf as its director/secretary.

[3] The relationship between Mr. Moehau and the bank goes back further than April 2009, for in September 2007 the bank had lent him or persons associated with him, a sum in excess of TOP$2 million. Evidently difficulties had arisen in respect of that transaction but by April 2009 a part of the TOP$2 million had been repaid. After negotiation with the bank, during which Mr. Moehau had the advantage of advice from his counsel, Mr. Stanton, it was agreed that the balance outstanding should be restructured as the new advance and guarantee previously described.

[4] It was a term of the new loan agreement that any consolidation of previous borrowings was to be governed by the terms of the new loan. Mr. Moehau also acknowledged in the loan agreement that he relied upon his own judgment and not on any representation or advice given by the bank. He further acknowledged being advised by the bank to obtain independent advice and agreed to absolve the bank from any liability for any misrepresentations or negligent advice by the bank or its officers.

[5] The new loan too fell into arrears and after making several successive demands for payment the bank sued the appellants for the debts said to be respectively owed by them.

[6] The application for summary judgment was resisted in the Supreme Court on several grounds some of which have been raised again in this Court. The bank of course had to satisfy the Supreme Court that Mr. Moehau and Epic had no defence to the claims against them or any part thereof (Order 15 rule 2). The appellants say that summary judgment should not have been entered for several reasons:

(a) That in their statement of defence and/or affidavits they had put in issue arguable matters of fact which were not capable of proper resolution in a summary judgment application.

(b) That there was an arguable defence that because of certain representations said to have been made by officers of the bank to Mr. Moehau the bank was estopped from relying upon Mr. Moehau's admitted failure to make repayment of the loan advance in accordance with the terms of the loan agreement. In summary, it is contended for the appellants that Mr. Moehau was orally assured (before or during the negotiations leading to the restructuring) by bank officers that:

i. In view of the of the difficult financial situation prevailing in Tonga and elsewhere (the so-called global financial crisis) Mr. Moehau would not be held strictly to the repayments required under the loan agreement but could instead pay the bank "only what he can afford to pay";

ii. Mr. Moehau would not be personally sued by the bank which would, instead, take over certain valuable leasehold properties in respect of which security for the restructured loan advance was to be given; and

iii. The guarantee would be treated as limited to a single amount of TOP$500,000 to be recovered only from the proceeds of sale by Epic of its interest as lessee in Lease No. 2934.

(c) That the bank had acted unconscionably in relation to the restructuring of the loan (contrary to its internal policy manual) and in making demand and seeking to enforce the terms of the loan agreement, in particular by lending recklessly to Mr. Moehau and inducing in him a belief that it would not enforce the loan or call on the guarantee without giving reasonable time or allowing a moratorium; and

(d) That the bank had been under a duty to the appellants to act in good faith and had breached that duty, in particular by treating some other borrowers more favourably than Mr. Moehau.

[7] The Lord Chief Justice considered that none of these assertions raised an arguable defence. He observed, as is the case, that Mr. Moehau did not deny entering into the loan agreement of April 2009 or failing to meet his repayment obligations. Mr. Moehau also admitted receiving demands for repayment.

[8] The Chief Justice said that the issues raised of unconscionability and good faith (and an allied allegation that Mr. Moehau had not been afforded a sufficient opportunity of obtaining legal advice on the loan documentation) could be treated together. Dealing with the question of legal advice, the Chief Justice made reference to passages in Mr. Moehau's affidavit in response to the summary judgment application and to certain letters written to the bank by or for Mr. Moehau. He concluded that "Mr. Stanton was intimately and actively concerned in the detailed negotiations between the Bank and the First Defendant [Mr. Moehau] which were taking place with a view to reaching an acceptable restructuring of the First

Defendant's debt to the Plaintiff." He said that it was clear that Epic's position was also under consideration by Mr. Stanton.

[9] The Chief Justice was satisfied that Mr. Moehau was a professional and experienced businessman who employed the services of a competent legal adviser to advise him in connection with his dealings with the bank and that he did not enter into the loan restructuring agreements suffering from any form of bargaining disadvantage.

[10] Having dealt in that way with the unconscionability defence, the Chief Justice shortly rejected the notion that the bank had been under a duty to act in good faith towards the appellants in enforcing the loan agreement. An alleged ill-will of one of the bank's managers towards Mr. Moehau was, he said, irrelevant to the question of whether Mr. Moehau and Epic had any defence to the action against them.

[11] The Chief Justice then dealt with whether it was open to them to claim that the agreements as executed, did not (because of the alleged oral representations on behalf of the bank) correctly state the terms of the restructuring agreement.

[12] He accepted the submission of counsel for the bank that this was precluded by section 79 of the Evidence Act (Cap 15) (corresponding he said with the common law rule) which distinguishes between an oral agreement contradicting, varying, adding or subtracting from written contractual terms (inadmissible) and an oral collateral contract upon the subject of which the written contract is silent and which is not inconsistent with the written terms (generally admissible). The Chief Justice was of the view that in this case Mr. Moehau was suggesting that the parties orally agreed that the written terms, in particular regarding repayment, would not be binding on him. That was wholly inconsistent.

[13] Finally, the Chief Justice succinctly disposed of two further defence contentions raised again on this appeal. He said that any breach of the bank's guidelines in its manual (which was not before the Court) was a matter for the bank only. The global financial crisis in 2008 had no relevance to agreements entered into by the appellants in 2009; events prior to 2009 could not affect the validity of the restructuring agreement subsequently reached. Mr. Moehau's signature on the Business Finance Agreement (incorporated in the loan agreement) was an unconditional acceptance that, despite anything that might have happened beforehand, the debt being restructured was due.

[14] Summary judgment was therefore entered.

[15] Order 15 rule 2 of the Supreme Court Rules 2007 requires that summary judgment can only be given on the ground that the defendant has no defence to the claim, or any part of the claim "save as to the amount of damages". The qualification enables a summary judgment to be given on liability only, with the issue of quantum of damages or further damages to be determined at trial.

[16] An application for summary judgment must be supported by an affidavit, inter alia, verifying the facts on which the claim is based: Order 15 rule 3 (1). It may, unless otherwise ordered by the Court, contain statements of information or belief provided the sources and grounds thereof are stated. The appellants have raised

objections to some of the content of the bank officers' affidavits in this case notwithstanding that they themselves had not complied with Order 27 rule 1. It requires notification to the other party of whether or not consent is given to the use of an affidavit within 7 days of receipt of it, with failure to do so being consent. We have nevertheless considered the admissibility of the bank's affidavits, but take the view that any issue of admissibility relates to passages that are in the result immaterial to our decision. The respondent, for its part, raised no objection to Mr. Moehau's affidavit in answer.

[17] 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 (PC) at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.

[18] In this case, what is in our view a critical component of the appellants' defence, as asserted in its statement of defence and Mr. Moehau's affidavit evidence, is the oral statements or assurances allegedly made by the bank's officers prior to or during the restructuring negotiations in 2009. They are summarized at [6] (b) above. They are denied by the bank officers in their affidavits. We have considerable scepticism about them. How likely is it, for instance, that a bank officer would, contrary to the loan documentation, contemporaneously tell Mr. Moehau that he could pay the bank only what he could afford to pay, or that the bank would agree to restrict itself to the leasehold securities and not sue him personally? And if in fact the bank officers did actually make the statements attributed to them by Mr. Moehau during the negotiations in 2009 it would be surprising if he did not inform Mr. Stanton, and even more surprising that, if he did so, Mr. Stanton would not have sought to have them recorded in a writing to form part of the restructuring documentation. Nothing of this sort appears in the correspondence or is deposed to.

[19] But we put these doubts to one side because, in any event, statements of that kind, which are in the nature of promises that some basic terms of the restructuring were not to be as stated in the loan documentation, fall plainly within the terms of the prohibition on admissibility found in s79 of the Evidence Act (Cap 15). That section puts into a statutory, and therefore mandatory, form the well-known parol evidence rule of the common law whose rationale is the preservation of finality in written instruments which are intended to reflect the bargain reached by the parties. Written words in such instruments are not to be altered or qualified by the "uncertain

testimony of slippery memory": *Bacchus Marsh Concentrated Milk Co. Ltd v Joseph Nathan &* Co. Ltd [1919] HCA 18; (1919) 26 CLR 410 at 451-2.

[20] Subject to certain exceptions, which appear to have been framed so as to capture situations in which the parol evidence rule would not stand in the way of admissibility at common law, s.79 directs that where any transaction (here the restructuring) has been reduced to the form of a document (here the loan agreement and the guarantee), no evidence of any oral agreement or statement is to be admitted as between the parties to the document or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms. That is exactly the appellants' purpose in referring to the alleged statements. It is not suggested that, if made at all, they were deceptively or falsely made at the time or that by mistake they were not recorded in the written documentation and therefore could fall within the exception in paragraph (a) of the proviso to the section which, amongst other things, provides for admissibility in cases of fraud or where it is sought to rectify written terms.

[21] It was Mr. Stanton's submission, nonetheless, that the statements amounted to representations which gave rise to an estoppel preventing the bank from denying that the loan documentation had been qualified by them. He said that in such a situation s79 did not bar his clients' reliance upon them to establish an arguable defence that the appellants were not in default of their (qualified) obligations to the bank, and also to establish an element of an arguable defence that the bank had acted unconscionably or with want of good faith. He argued that a Tongan court in its equitable jurisdiction should not in these circumstances decline to admit evidence of the making of the statements because of the admissibility bar found in s79.

[22] We consider, however, that the purpose of s79 is so obvious and its terms so clearly expressed that it would be wrong for a court to disregard them, or to place upon them the construction which would be necessary if counsel's argument were to be accepted. If, for example, Mr. Moehau were permitted to give evidence that the limit on Epic's guarantee was agreed in the negotiations to be TOP$500,000, that would completely contradict the statement in the guarantee that the limit was TOP$921,000.

[23] The very reason for reducing the transaction to writing, to achieve certainty about its terms, would be defeated and the parties exposed to the uncertainty of litigation to determine what was agreed upon. It would be all too easy for someone repenting of their bargain, or wishing perhaps to delay its enforcement, to claim that there were oral qualifications which displaced or modified terms of the document and created an estoppel preventing denial of the qualifications. The section prohibits this. The further exception in paragraph (d) of the proviso, allowing evidence of a distinct *subsequent* oral agreement to rescind or modify the terms of a document, points to the strength of the prohibition in relation to prior or contemporaneous promises or assurances. Oral agreements or statements can be admitted to contradict a document reducing a transaction to writing only where they are made subsequent to the document (which the alleged promises to Mr. Moehau were not) or where another exception to the rule applies under the proviso.

[24] This operation of the section should come as no surprise, for cases under the parol evidence rule produced the same result. It is sufficient to refer to the leading case of *Hoyt's Proprietary Ltd v Spencer* [1919] HCA 64; (1919) 27 CLR 133, mentioned by the Lord Chief Justice, in which a term in a memorandum of lease gave the lessor a power of termination on 4 weeks' notice. The lessee claimed that the lessor had orally promised at the time when the lease was granted not to exercise that power except when requested to do so by a third party, which request had not been made, and it claimed damages for breach of contract. The High Court of Australia upheld the argument for the lessor that the oral agreement and the term in the lease were inconsistent and that the oral agreement was invalid and unenforceable for that reason.

[25] We add that in the present case the asserted representations could give rise to an estoppel only if there were also present the required elements of inducement, reliance and resulting detriment, which are not pleaded. A further and major difficulty for the appellants are the terms and acknowledgments in the loan agreement of 23 April 2009 to which reference has been made in [4] above.

[26] The appellants' inability to adduce evidence of what they allege Mr. Moehau was told by the bank officers means that the proposed defence of unconscionable conduct on the part of the bank in the negotiation of the restructuring or in calling up the loan and guarantee when default was made, cannot possibly succeed.

[27] Unconscionability is a doctrine of equity. It involves a party who is suffering from a special disability or is in some special situation of disadvantage, and an unconscionable taking advantage of that disability or disadvantage by another. It does not apply simply because the party has made a poor bargain or just because there is an inequality of bargaining power. The disabling condition or circumstance must seriously affect the ability of the affected party to make a judgment as to his or her best interests: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 477 and *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [5]-[14].

[28] The terms of the restructured loan and the guarantee in this case were unexceptional, particularly in circumstances where the bank was not making a new advance but was making part of an existing loan available for a further period after the borrower had encountered some financial difficulty. Mr. Moehau was an experienced businessman who was not suffering from some special disability. Contrary to what is put forward in the statement of defence and in Mr. Moehau's affidavit, he and Epic were throughout the restructuring process assisted by the advice of Mr. Stanton, a senior counsel of Tonga and a member of the New South Wales bar. The correspondence between Mr. Stanton and the bank and its counsel which is in evidence gives the lie to any suggestion that the bank was taking improper advantage of someone in a weaker position. Mr. Stanton negotiated strongly and effectively on behalf of his clients and can be assumed to have advised them competently and dispassionately, pointing out all the risks associated with the transaction. A lender is entitled to so assume. It is not for the lender to question the competence or independence of the legal adviser of the borrower, save in exceptional circumstances

not present in this case: *Bank of Baroda v Rayarel* [1995] 2 FLR 376 (EWCA) and *GE Custodians v Bartle* [2011] 2 NZLR 31 (NZSC) at [48].

[29] On the admissible evidence it is clear that Mr. Moehau and Epic did not suffer from any situation of special disadvantage or disability of which the bank took advantage unconscionably at the time of the restructuring of the loan.

[30] Nor does anything in the evidence of subsequent events support the appellants' argument that such a situation existed when the bank made its final demand and issued the present proceedings. In his written submissions, Mr. Stephenson described the events leading up to those actions. We did not understand Mr. Stanton to question that account. The loan agreement gave the bank the right to call up the loan if the borrower made default in any repayment for 30 days. The bank did not take such a step until 6 April 2011. It had previously granted deferrals of its right to have repayment instalments increased and had tolerated shortfalls in payments throughout 2010. After service of its letter of demand the bank engaged in settlement discussions with Mr. Moehau before making a second demand. It then waited a further period of 37 days before making demand on Epic and legal proceedings followed another 56 days later on 28 November 2011. Far from acting unconscionably, the bank appears to have been cautious and reasonable in exercising its legal rights against the appellants.

[31] By the same token, we find nothing in the admissible evidence supporting the appellants' argument that the bank acted towards them with recklessness or any lack of good faith, whatever role those concepts may play in modern banking or contract law - matters which we leave for another day.

[32] The appellants submitted that the bank's responsibility in law to them was somehow affected by the existence of the global financial crisis which began in 2008. As the Chief Justice said, that had begun well before the restructuring took place. Despite Mr. Stanton's best efforts, we cannot view it as placing upon the bank any additional duty to Mr. Moehau and Epic, who must have been well aware of its effects when they chose to enter into the new arrangements in 2009. It was certainly not something which Westpac inflicted on Mr. Moehau or which could have affected contractual or other duties towards him

[33] The appellants also contended that the bank's lending to Mr. Moehau may have departed from the guidelines for its lending staff in its internal manuals. This is entirely a matter of speculation for the manuals are not in evidence. But even if it were so, that would go nowhere towards showing that the bank acted in breach of duty towards the appellants, particularly as this was not a new loan to an unblemished borrower. It was in substance, if not in form, an extension of the balance of an existing loan which the borrower appears to have been unable to repay in 2009. In that circumstance, the fact that the loan may possibly have been of an amount, or on other terms, not available to a "new" borrower is neither here nor there. Similarly, the equally speculative argument that the bank may have given other customers more advantageous terms or greater leniency, does not even arguably establish some impropriety in the lending or the recovery process. The law does not require that a bank must treat all its customers alike regardless of their differing credit histories and circumstances.

390 [34] In agreement with the Lord Chief Justice, we are satisfied that none of the proposed defences has any prospect of succeeding at trial. They are clearly untenable. The appeal is dismissed with costs.

# Dateline Bookshop (Tonga) Ltd anor v Westpac Bank of Tonga

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 19/2012

12 April 2013; 17 April 2013

*Civil procedure – clerical mistake may be corrected – inherent jurisdiction – correction made and order substituted*

On 22 September 2010 the respondent bank filed a statement of claim for a debt due under a term loan of $30,000 from the first appellant as guarantor, and the second appellant as principal debtor. The appellants did not file a defence and the bank made an ex parte application for the entry of default judgment against the defendants for the amount claimed, interest and costs. On 5 April 2011 default judgment was entered. On 16 May 2012 the defendants applied to have the default judgment set aside, and at the same time filed their defence. The defence admitted the bank's claim in substance but alleged that the relevant loan was for $20,000, not $30,000, and pleaded the five-year limitation period. It alleged that the last payment to the bank was made on 28 March 2003 outside the five years before the action was commenced. In his supplementary decision on 2 November 2012 the Lord Chief Justice found that the wrong agreement had been attached to the first affidavit, that the error had been corrected, and that a payment had been made on 7 November 2005 within the five years and he directed summary judgment for the respondent bank for the amount claimed.

Held:

1. The bank statements filed in support of the bank's application for default judgment recorded a payment of $200 to the Bank on 7 November 2005, within the five-year limitation period. This payment defeated the limitation defence and was not challenged in the affidavit of the second defendant or otherwise.
2. The defendants' appeal from the decisions of 5 July and 2 November 2012 failed and was dismissed with costs.
3. The order of the Supreme Court of 2 November 2012 was rectified under the Court's inherent jurisdiction by substituting an order that the application of 16 May 2012 to set aside the default judgment of 5 April 2011 was dismissed.

Case considered:
Thynne v Thynne [1955] P 272

Statute considered:
Supreme Court Act (Cap 10)

Rules considered:
Supreme Court Rules 2007

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|---|---|---|
| Counsel for the appellants | : | Mr T Fakahua |
| Counsel for the respondent | : | Ms L Tonga |

**Judgment**

[1] The Court has before it an appeal, without leave, from the decision of the Lord Chief Justice on 2 November 2012 which effectively dismissed an application by the present appellants filed on 16 May 2012 to set aside the default judgment for TOP$51,431.38 and interest entered against them by the Lord Chief Justice on 5 April 2011.

[2] The bank's statement of claim filed on 22 September 2010 sought judgment for the debt due under a term loan of TOP$30,000 from the first appellant as guarantor, and the second appellant as principal debtor. According to the certificate of service it was served on the second appellant on 21 December 2010.

[3] The appellants did not file a defence and on 16 March 2011 the bank made an ex parte application under the Rules for the entry of default judgment against the defendants for the amount claimed, interest and costs. On 5 April 2011 the Lord Chief Justice entered default judgment.

[4] On 16 May 2012, as mentioned above, the defendants applied to have the default judgment set aside, and at the same time filed their defence.

[5] The defence admitted the bank's claim in substance but alleged that the relevant loan was for TOP$20,000, not TOP$30,000, and pleaded the 5 year limitation period under s16(1) of the Supreme Court Act. It alleged that the last payment to the bank was made on 28 March 2003 outside the 5 years before the action was commenced.

[6] The defence alleged that the company's premises had been destroyed in the riots on 16 November 2006 and that this was beyond the control of the company but, as the Lord Chief Justice pointed out, this was not a defence, and it was not relied on before us.

[7] The second defendant's affidavit in support of the application sworn 16 May 2012 contained his denial of receiving the writ, statement of claim and directions notice as claimed in the certificate of service on the file.

[8] The second defendant annexed to his affidavit a copy of his letter to the Registrar of the Supreme Court of 29 December 2011 (said in his affidavit to be dated 12 December 2011) referring to his receipt of a copy of the default judgment "I just

received...on 8 December 2011." He did not then deny receiving the writ and statement of claim.

[9] The defendants' application was heard in the absence of their counsel. In his decision of 9 July, the Lord Chief Justice rejected the claim by the second defendant that he had not been served with the writ and statement of claim. He said that since there was nothing more than a denial of receipt "I see no reason to reject the certificate of service filed by the Bank's solicitor on 10 January 2011 stating that service was effected on 21 December 2010."

[10] The certificate of service stated that the writ and statement of claim were served on the second defendant, who was known to the process server, at Nukuhetulu which was where the second defendant lived.

[11] The second defendant did not support his claim that he did not receive the documents by an alibi nor did he claim that he did not know the process server. There was also his admission by silence in his letter to the Registrar. In these circumstances the Lord Chief Justice was entitled to reject the second defendant's denial and hold that there was no triable issue on this question.

[12] The bank statements annexed to the affidavit of James Taumoepeau of 16 March 2011 filed in support of the bank's application for default judgment, included page 5 which recorded a payment of TOP$200 to the Bank on 7 November 2005 within the 5 years. This payment, which defeated the limitation defence, was not challenged in the affidavit of the second defendant or otherwise. Again there was no triable issue.

[13] Mr. Taumoepeau's affidavit of 16 March 2011 failed to annex pages 2-4 inclusive of the bank statements relating to the Term Loan. The omission was unfortunate but immaterial because the pages showing the payment on 7 November 2005 and the balance claimed were annexed.

[14] The Lord Chief Justice concluded his reasons of 9 July 2012 by saying: "The only question which concerns me" was that the statement of claim alleged a loan of TOP$30,000, but the Statement of Defence claimed that it was for TOP$20,000, and this was consistent with Annexure A to the affidavit of James Taumoepeau of 16 March 2011 filed in support of the application for default judgment.

[15] He gave leave for the filing of a supplementary affidavit within 14 days, and adjourned the matter for further hearing.

[16] A further affidavit by Mr. James Taumoepeau was filed on 20 July 2012. The deponent said that the bank granted two facilities to the first defendant on 22 October 2002, an Overdraft Facility for TOP$20,000 and a Term Loan Facility for TOP$30,000. A copy of the wrong loan agreement had been annexed to his earlier affidavit and a copy of the correct agreement for the Term Loan Facility was annexed.

[17] Counsel filed further written submissions. In his supplementary decision on 2 November 2012 the Lord Chief Justice found that the wrong agreement had been attached to the first affidavit, that the error had been corrected, and that a payment

had been made on 7 November 2005 within the 5 years and he directed summary judgment for the Bank for the amount claimed.

[18] This was clearly a slip because the default judgment remained in force, but the intention of the Lord Chief Justice was clear, and he could have corrected his order at any time under the Court's inherent jurisdiction or under the *Supreme Court Rules* Order 28 rule 5.

[19] The defendants' appeal from the decisions of 5 July and 2 November 2012 fails and must be dismissed with costs, but the Court, of its own motion, will exercise the inherent jurisdiction to correct the order of 2 November 2012 by substituting an order that the application to set aside the default judgment is dismissed: *Thynne v Thynne* [1955] P 272, 313-4.

[20] The orders of the Court are:

(1) Appeal dismissed with costs;

(2) The order of the Supreme Court of 2 November 2012 is rectified under the Court's inherent jurisdiction by substituting an order that the application of 16 May 2012 to set aside the default judgment of 5 April 2011 is dismissed.

## Hefa v Crown

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 3/2013

12 April 2013; 17 April 2013

*Appeal against sentence for rape – 13 years imposed with three years suspended – court considered starting point of five years – replaced sentence with six years with three years suspended*

The appellant, who was 27, was found to have held a knife at the victim's throat and raped her. The victim of the rape was the 17 year old sister of the appellant's wife. Afterwards he told the victim that he would kill her if she told anyone what had happened. The offence occurred in the home of his wife's family. The appellant was convicted on 6 March 2012 after a trial before a judge alone. He was sentenced on 16 March to a sentence of 13 years imprisonment. The final three years was suspended. The appeal was against the sentence.

Held:

1. The aggravating factors were the use of the knife, the threat to kill, the relationship of the victim to the appellant and the impact of the offending in a cultural sense. It was prohibited for relatives of opposite sex to view or talk of sex in the same room or proximity. The rape caused a rift between the sisters. The only real mitigating factor so far as the appellant was concerned was that he was a first time offender.
2. The court considered the severe condition of the appellant's two-year old son and the fact that he was totally dependent on his mother. He was immobile, unable to communicate, and his long-term prognosis was poor. The court was prepared to treat this as a special case. However, the seriousness of the offence itself must be reflected in the sentence.
3. The appeal was allowed, the sentence imposed in the Supreme Court was quashed and replaced with a sentence of 6 years imprisonment, the last 3 years to be suspended for 3 years. This would leave the appellant with approximately 2 years to serve.

Cases considered:

Mo'unga v R [1998] Tonga LR 154
Teisina v R [1999] Tonga LR 145
'Uha'one Aisea v R, AC 20/11 (unreported Court of Appeal 27 April 2012)

Counsel for the appellant : Mrs F Vaihu
Counsel for the respondent : Mr 'A Kefu Solicitor General

**Judgment**

[1] This is an appeal against a sentence of 13 years imprisonment imposed by Shuster J after the appellant was found guilty of rape.

[2] The appellant was convicted on 6 March 2012 after a trial before a judge alone. He was sentenced on 16 March. The final three years of the 13 year sentence was suspended.

[3] The appeal was lodged out of time but leave to appeal was granted by the President of this Court on 18 March 2013.

**Brief facts**

[4] The victim of the rape was the 17 year old sister of the appellant's wife. The appellant, who was 27, was found to have held a knife at the victim's throat and raped her. Afterwards he told her he would kill her if she told anyone what had happened. The offence occurred in the home of his wife's family.

**The submission on behalf of the appellant**

[5] Mrs. Vaihu placed very helpful material before us as to the condition of the 2 year old son of the appellant and his wife. This included a letter from Dr. 'Aho a pediatrician specialist with the Ministry of Health. He reports that the child suffers from a very severe condition which makes him totally dependant on his mother for daily living as he is immobile and needs to be bathed, fed and clothed as well as receiving twice daily medications. He is unable to communicate and his long term prognosis is poor.

The 23 year old mother in a statement says the child requires 24 hour care and that her husband's family is only able to provide limited help. She says she cannot handle this alone. On the basis of this and other material Mrs. Vaihu submits that the starting point of 5 years should be reduced to 3 years with the final 2 years suspended.

**The submission on behalf of the respondent**

[6] Mr. Kefu for the respondent said that in Tonga the starting point for sentencing for rape is 5 years imprisonment (see *Teisina v R* [1999] Tonga LR 145 and *'Uha'one Aisea v R*, AC 20/11 (unreported Court of Appeal 27 April 2012)).

[7] He acknowledged that the sentence imposed was manifestly excessive and we note that the sentencing judge made no reference to the starting point referred to above. We accept that Mr. Kefu's acknowledgment is properly made so the question is as to the appropriate sentence in this case.

[8] In his circulated written submissions Mr. Kefu submitted that the proper range for the offence in this case was 6 to 8 years with the final 2 years being suspended for 2

years. After considering the material provided by Mrs. Vaihu he said this should be reduced to a range of 3 to 5 years with part suspended.

## Consideration

[9] As the sentencing judge observed and as Mr. Kefu submitted there are serious aggravating factors in this case. They are the use of the knife, the threat to kill, the relationship of the victim to the appellant and the impact of the offending in a cultural sense. Mr. Kefu told us that it is prohibited for relatives of opposite sex to view or talk of sex in the same room or proximity. It seems that this incident caused a rift between the sisters.

[10] The only real mitigating factor so far as the appellant is concerned is that he is a first offender. Leaving aside the question of his child's condition, we consider that the appropriate sentence is at the higher end of the range originally suggested by Mr. Kefu. As to the question of suspension of the last part of the sentence, the pre-sentence report suggests that the appellant is at a low risk of re-offending. Mr. Kefu submits that a suspended sentence will assist in rehabilitating the appellant and that a suspension of part of the sentence would accord with the principles enunciated in *Mo'unga v R* [1998] Tonga LR 154. We accept that submission.

[11] Having considered the material supplied by Mrs. Vaihu, we are prepared to treat this as a special case. However, the seriousness of the offence itself must be reflected in the sentence. The generous suspension proposed reflects the matters raised by Mrs. Vaihu.

## Result

[12] The appeal is allowed, the sentence imposed in the Supreme Court is quashed and is replaced with a sentence of 6 years imprisonment, the last 3 years to be suspended for 3 years. This will leave the appellant with approximately 2 years to serve.

## Uhi v Crown

Court of Appeal, Nuku'alofa
Salmon, Handley, and Blanchard JJ
AC 6/2012

12 April 2013; 17 April 2013

*Criminal appeal – against conviction and sentencing – rape of 12 year old girl – merciful sentence because of appellant's age – no further reduction – appeal dismissed*

The appellant, a 67 year old, was found guilty of rape of a 12 year old girl after a judge alone trial. He was sentenced to six years imprisonment. An appeal against conviction and sentence was out of time, but leave was granted on the 18 April 2012. The grounds of appeal were that the judge should not have allowed the police to give evidence contrary to pre-circulated briefs, the verdict was inconsistent with the evidence, the judge should not have relied on personal experience or knowledge, the judge misapplied the law as to corroboration, the judge should not have advised the appellant of his legal rights when he had counsel representing him, and the prosecution did not prove that the appellant was not impotent.

Held:

1. The personal experience and knowledge which the judge relied upon was no more than the knowledge that any judge or policeman acquired. It was not improperly used. It was knowledge of life which all judges used in considering issues of credibility.
2. The judge was wrong in saying corroboration was required in rape cases, but otherwise correct in emphasizing the care needed before convicting on uncorroborated allegations. Section 116 of the Evidence Act did not apply as the complainant gave sworn evidence. The judge was clear as to his duty.
3. The appellant was rightly convicted and the appeal against conviction was dismissed.
4. The rape of the 12 year old girl could have justified a longer sentence than that imposed. While the judge's approach to sentencing may be properly criticized, in that he took an inappropriate starting point, the ultimate outcome was a merciful sentence which took into account the appellant's age. The appeal against sentence was also dismissed.

Case considered:
Hurrell v Naufahu [2009] Tonga LR 319

Statute considered:
Evidence Act (Cap 15)

Counsel for the appellant : Mr ST Fifita
Counsel for the respondent : Mr A Kefu SG

## Judgment

[1] This appeal is against the conviction and sentence of the appellant on a charge of rape. The appeal was out of time, but leave was granted by the Chief Justice on the 18 April 2012.

[2] Shuster J found the 67 year old appellant guilty of rape of a 12 year old girl after a judge alone trial. He later sentenced the appellant to 6 years imprisonment.

[3] Although the appeal includes an appeal against conviction the appellant has not sought to provide this Court with a transcript of the evidence given at trial. In a memorandum counsel for the appellant advised that no transcript was required and that the judgment appealed against was sufficient for the purposes of the appeal.

[4] In summary the grounds of appeal are:

1. The judge should not have allowed the police to give evidence contrary to pre-circulated briefs;
2. The verdict was inconsistent with the evidence;
3. The judge should not have relied on personal experience or knowledge;
4. The judge misapplied the law as to corroboration;
5. The judge should not have advised the appellant of his legal rights when he had counsel representing him; and
6. The prosecution did not prove that the appellant (a 67 year old man) was not impotent.

[5] In his submissions Mr. Fifita for the appellant enlarged on the grounds of appeal. We deal below with the issues raised. He submitted the sentence should be reduced to 3 years or less.

[6] The Crown contends that no issue has been raised by the appellant sufficient to overturn the conviction, or to disturb the sentence.

## Consideration

***The appeal against conviction***

[7] The complaint relating to disclosure concerns an apparent mistake in a pre-prepared police brief as to the date of the offence. The indictment contained the correct date and the police officer corrected his mistake in his sworn evidence. The

judge referred to other evidence which supported the indictment date. There was no improper practice on the part of the police in this respect.

[8] The personal experience and knowledge which the judge relied upon was no more than the knowledge that any judge or policeman acquires. It was not improperly used as was the case in *Hurrell v Naufahu* [2009] Tonga L.R. 319. It was knowledge of life which all judges use in considering issues of credibility.

[9] As to corroboration the judge was wrong in saying corroboration was required in rape cases, but otherwise correct in emphasizing the care needed before convicting on uncorroborated allegations. Section 116 of the Evidence Act does not apply as the complainant gave sworn evidence. Mr. Fifita submitted that the judge did not adequately direct himself in this respect. We do not agree. He was clear as to his duty.

[10] The appellant complains that the judge was wrong to advise the appellant of his legal rights when he had counsel acting for him. We reject this contention. It was an entirely proper action on the judge's part. After having given the advice the judge adjourned for ½ hour to give the appellant an opportunity to discuss the advice with his counsel. After this the appellant elected to make an unsworn statement rather than give evidence on oath. The procedure followed by the judge was entirely fair.

[11] A ground of appeal claiming that a 67 year old man should be regarded as impotent until proved otherwise by the Crown was sensibly not pursued in oral submissions.

[12] There were general grounds claiming that the finding of guilt was inconsistent with the evidence and that justice was not done. We agree with the Crown that there was ample evidence on which the judge could convict, including statements (but not admissions) made by the appellant himself. The judge considered the complainant and another witness, who recounted a confession made by the appellant, to be truthful and reliable witnesses. He did not regard the appellant as truthful in relation to his account of what occurred. The appellant complains of reliance on medical evidence. This was just a part of the total evidence relied on by the judge.

[13] We are satisfied that the appellant was rightly convicted and the appeal against conviction is dismissed.

***The appeal against sentence***

[14] In our view the rape of the 12 year old girl could have justified a longer sentence than that imposed. While the judge's approach to sentencing may be properly criticized, in that he took an inappropriate starting point, the ultimate outcome was a merciful sentence which took into account the appellant's age.

[15] The appeal against sentence is also dismissed.

## Latu anor v Pulu anor

Supreme Court, Nuku'alofa
Scott CJ
CV 64/2012

3 May 2013

*Nuisance claim – excessive noise from church buildings – non-pecuniary losses recoverable – court awarded special and general damages*

The first plaintiff was the registered holder and long time resident of an allotment at Pili, Kolofo'ou. He and his wife built three houses on the land between 1994 and 2001. The second plaintiff operated a licensed business renting out part or all of the houses. In about 2010 the second defendant, of which the first defendant was the President, was granted a lease over part of the adjoining allotment. The defendants began constructing a church building on their land and, in about 2011 began holding religious services there. The church was a branch of the Pentecostal Church. The plaintiffs brought an action in nuisance on 28 September 2012 complaining of unbearably loud noise from the church. On 2 October 2012 an interim order was granted ex parte restraining the defendants from conducting church services with unreasonably high volume and restricting services to 1½ hours in the mornings and 1½ hours in the evenings every day of the week. The application for extension of the order was adjourned to 9 October. On 9 October the defendants (though served) did not appear and the order of 2 October was extended indefinitely. In the statement of defence filed on 17 October 2012, the defendants admitted speaking in tongues, singing and clapping. They claimed it was their constitutional right, enshrined in the Constitution, to practice their religion and to worship God as they may deem fit in accordance with the dictates of their own conscience and to assemble for religious services in such places as they may appoint. On 30 October 2012 the plaintiffs filed an ex parte application to apply for an order of committal of the defendants on the ground that they had willfully failed to comply with the orders of the court made on 2 and 9 October. On 7 March 2013 after hearing evidence the court found that the defendants had deliberately disobeyed the orders of 2 and 9 October. The first defendant was fined $1000 with 14 days to pay the fine. In default of payment he was sentenced to 14 days imprisonment. The plaintiffs were granted further injunctive relief until further order. Judgment in the action was reserved. The court gave its reason for finding the first defendant to have been in contempt and gave its judgment in the action proper.

Held:

1. In respect of the law in relation to nuisance, non-pecuniary losses caused by noise resulting in annoyance, inconvenience or illness were recoverable.
2. The court was satisfied that the noise caused by the defendants did in fact cause serious damage to the plaintiff's business and the court was satisfied that they should be adequately compensated for this loss by way of special damages.
3. The plaintiffs proved that they suffered at least loss of half of their business for a period of six months. At a rate of $800 per month this totalled $4800. The plaintiffs had to endure quite unreasonable and unacceptable noise for a similar period of time, albeit not continuously. The court awarded $10,000 general damages for the suffering thereby caused.

Cases considered:

Halsey v Esso Petroleum Co [1961] 1 WLR 683
R v Polei [1999] Tonga LR 110
Stroms Bruks v Hutchinson [1905] AC 515

Statutes considered:

Constitution of Tonga (Cap 2)
Public Health Act 2008

Counsel for the plaintiffs : Mrs Vaihu
Counsel for the defendants : S V Fa'otusia

## Judgment

[1] The First Plaintiff is the registered holder and long time resident of an allotment at Pili, Kolofo'ou. The First Plaintiff and his wife built three houses on the land between 1994 and 2001. The Second Plaintiff operates a licensed business renting out part or all of the houses.

[2] In about 2010 the Second Defendant, of which the First Defendant is the President, was granted a lease over part of the adjoining allotment. The Defendants began constructing a church building on their land and, in about 2011 began holding religious services there.

[3] The Defendants' congregation numbers about 40 to 50. The First Defendant described their church as a branch of the Pentecostal Church. It will not be disputed that characteristics of pentecostal worship are spontaneity, speaking in tongues and the use of contemporary worship music. In the words of St Paul in his first Epistle to the Thessalonians 5 : 19 "Quench not the spirit".

[4] On 28 September 2012 this action in nuisance was commenced. The Plaintiffs complain of unbearably loud noise from the church. It is said that shouting, clapping, screaming, stamping of feet, loud preaching and amplified music tormented them for about 3 hours each weekday evening and for 7 hours or more on Sundays: "The First

Defendant was spoken to on numerous occasions but he just ignored the complaints from the Plaintiffs and everyone else".

[5] As a result of the Defendants' actions it is said that the Plaintiffs have lost all but one of their tenants (he being, apparently, hard of hearing) and, in addition to inconvenience and disturbance, have thereby suffered damage and loss.

[6] On the day that the writ was issued the Plaintiffs also sought an injunction to restrain the Defendants from causing further disturbance. This application was supported by an affidavit from the Plaintiffs repeating their principal complaints and exhibiting a petition addressed to the Minister of Lands complaining of the noise being made by the Defendants, signed by 50 Fasi residents. This petition was also supported by a letter from the District Officer dated 4 September 2012.

[7] Four other affidavits supporting the Plaintiffs were also filed. Two of these were deposed by Australian volunteers who had rented houses from the Plaintiffs. One was by another neighbour while the fourth was by a retired Chief Inspector of Police living two allotments away. All four complained of unreasonably loud and disturbing noise emitted by the Defendants. Jill Hopkins described how she had sought the assistance of the police who were unable to help. She also described members of the Second Defendant as being "unsympathetic" to her attempts to have the noise reduced.

[8] On 2 October 2012 an interim order was granted ex parte restraining the Defendants from conducting church services with unreasonably high volume and restricting services to 1½ hours in the mornings and 1½ hours in the evenings every day of the week. The application for extension of the order was adjourned to 9 October. On 9 October the Defendants (though served) did not appear and the order of 2 October was extended indefinitely. I was told that the situation had not improved.

[9] A Statement of Defence was filed on 17 October. The Defendants admitted speaking in tongues, singing and clapping. They suggested that the noise they made was an "integral part" of their "spiritual awakening" which they "would like to entice the Plaintiffs to experience". They described the melodies made by them as "heavenly" and stated that they had reduced the volume to a "bearable level". Finally, the Defendants submitted:

> "It is their constitutional right which is enshrined in the Constitution to practice their religion and to worship God as they may deem fit in accordance with the dictates of their own conscience and to assemble for religious services in such places as they may appoint".

[10] On 30 October 2012 the Plaintiffs filed an ex parte application to apply for an order of committal of the Defendants on the ground that they had willfully failed to comply with the orders of the Court made on 2 and 9 October. The application was supported by an affidavit of the Second Plaintiff.

[11] On 2 November the matter was adjourned to 14 November after I was told that the parties were attempting to resolve the problem. On 14 November the action was

set down for trial on 23 November with the application for committal to be heard concurrently.

[12] On 7 March 2013 after hearing evidence I found that the Defendants had deliberately disobeyed the orders of 2 and 9 October. The First Defendant was fined $1000 with 14 days to pay the fine. In default of payment he was sentenced to 14 days imprisonment. I also granted the Plaintiffs further injunctive relief until further order. Judgment in the action was reserved. I now give my reason for finding the First Defendant to have been in contempt and I also give my judgment in the action proper.

[13] On 1 March 2012 the Plaintiffs gave evidence. The First Plaintiff's evidence briefly confirmed that of his wife and need not separately be summarized. The Second Plaintiff told me that she had been running a house rental/guest house business for several years. When all the properties were fully let she made $2000 per month. She was one of several similar businesses operating in the area. Prior to the noise from the church, she had both houses let out but since the trouble began she had lost all her tenants, save one, because of the noise.

[14] The Second Plaintiff referred to a notebook which she had compiled contemporaneously. Mr Fa'otusia did not object. The Second Plaintiff told me that she had compiled this record on the days that the noise was emitted. She read out the entries from 7 October 2012 to 27 January 2013. Typically, she recorded loud noise, singing, clapping, screaming on Sunday mornings, again in the afternoon and then once again in the evenings, sometimes up to 8:30pm or even later.

[15] The Second Plaintiff told me that the noise was so loud that it could be heard throughout her house which was made of concrete. Even with all the doors and windows closed the music could clearly be heard; the bass sounds could actually be felt. She could hear the preacher screaming at the congregation but could not make out precisely what he was saying.

[16] According to the Second Plaintiff, she had repeatedly called the police, so often in fact that she became ashamed. It made no difference. Even if the noise was lowered after a police visit it was soon put up again after they left. She and the First Defendant and another pastor discussed the situation but no understanding was reached. She did not want to bring legal proceedings against a church if some other solution could be found. She had paid for and presented two sliding doors to the church in the hope that this would help reduce the noise but in the event that was not successful. Finally, when she and her husband could no longer stand the noise and after she had lost all but one of her tenants, she consulted her Solicitor.

[17] In cross examination the Second Plaintiff conceded that even before the church arrived she did not always have her properties fully tenanted. She also conceded that in the three weeks prior to the trial the volume of noise had been kept significantly lower. Nevertheless, the amplified noise was still far too loud ; if the Defendants stopped using their amplifiers she thought the volume of noise might be bearable.

[18] The only witness for the defence was the First Defendant who told me that he was a pastor and President of the church. He accepted that the style of service is quite

noisy : "We do what the Bible says, to give grace and worship God, the King of Kings".

[19] The Defendant's exact position was not easy to determine. On the one hand he accepted that the noise had been too much, on the other "I don't know what they are complaining about". Some of the noise he blamed on Fijians who, since December 2012 had left the congregation. He explained that sometimes he goes overseas for conferences and it is possible that excessive noise had been made while he was away.

[20] The First Defendant explained that the congregation, which amounted to about 40 or 50 mainly come from beyond Pili. The church had been given the land by the First Plaintiff's brother. Previously they had worshipped in a hall at Fofo'anga without any problem. He told me that he not been aware of the Plaintiff's guest houses when they took the land and began building the Church. During the injunction hearing the Court visited the church and the First Defendant confirmed that little had since changed. The Church has no doors or windows, no floor covering or ceilings, no wall linings and no sound proofing. The First Defendant told the court that they hope to install sound proofing and air conditioning in due course.

[21] The First Defendant accepted that the noise made by the church had resulted in many complaints and visits by the police. On one occasion the First Plaintiff threatened to shoot him if the noise was not reduced. He and some of his colleagues had visited their neighbours "whom we love" and asked for forgiveness. He had tried his best to keep the noise down – his plan for the future was to keep the noise down. If necessary, the Church was prepared to conduct its services without amplification "we can just sing, like other churches".

[22] The Constitution of Tonga, Clause 5, guarantees freedom of religion. It states as follows:

> "All men are free to practice their religion and to worship God as they may deem fit in accordance with the dictates of their own conscience and to assemble for religious service in such places as they may appoint. But it shall not be lawful to use this freedom to commit evil and licentious acts or under the name of worship to do what is contrary to the law and peace of the land".

[23] In a careful and helpful written submission, Mr Fa'otusia with admirable realism accepted that the Defendants could not escape the complaint that the Church had, as alleged by the Plaintiffs, been emitting far too much noise. He suggested that the Defendants be allowed to conduct their services for as long as they please according to the dictates of their conscience but that the use of amplification be prohibited.

[24] So far as damages were concerned, Mr Fa'otusia suggested that the Plaintiffs' loss had not been adequately proved, no documentation had been produced in support. Citing *R v Polei* [1999] To L.R. 110, Mr Fa'otusia suggested that any damages imposed should be commensurate with the Defendants' means which were almost nil. In his submission no damages should be awarded at all and both sides should bear their own costs.

[25] In view of Mr Fa'otusia's concessions it is not necessary to examine the law in relation to nuisance caused by noise in any detail. It is not however to be doubted that non pecuniary losses caused by noise resulting in annoyance, inconvenience or illness are recoverable (see e.g. *Halsey v Esso Petroleum Co.* [1961] 1 W.L.R. 683). A useful commentary on the attitude of the Courts to noise pollution caused by the use of amplification for religious purposes may be found in the Commonwealth Human Rights Law Digest Vol. 6 No.1 Autumn 2007. The power of the Minister to control emissions of noise given by Section 9 of the Public Health Act 2008 may also be noted.

[26] Unfortunately, the Statement of Claim, as is quite commonly the case, claimed a specific amount by way of general damages but did not include a claim for special damages. This type of pleading is defective; whereas general damages should not be quantified but are instead to be left to the Court to evaluate, special damages must be specially claimed and strictly proved (*Stroms Bruks v Hutchinson* [1905] AC 515 and see the White Book 1988 Edn. paragraph 18/12/32). It may however be noted that paragraph (e) of the Plaintiffs' prayer sought "any other Order this Honourable Court may deem just".

[27] Although Mr Fa'otusia correctly pointed out that there was little documentary evidence to support the Second Plaintiff's claim that the Plaintiffs had lost a substantial part of the business, I found the Plaintiffs to be entirely believable witnesses. There were also the two affidavits from tenants to suggesting that the noise was so intolerable that they moved away and would not recommend others to move in. Paragraph 12 of the Statement of Claim pleaded that tenants had been lost and no particulars of this allegation were sought.

[28] Having heard and seen the evidence I am entirely satisfied that the noise caused by the Defendants did in fact cause serious damage to the Plaintiff's business and I am satisfied that they should be adequately compensated for this loss by way of special damages.

[29] The principle referred to by Mr Fa'otusia in *Polei* (above) deals with the imposition of fines on persons unable to pay and has no application to civil awards of damages. It is not the case that awards of damages are reduced because of a Defendant's limited means.

[30] I am satisfied that the Plaintiffs have proved that they suffered at least of loss of half of their business for a period of 6 months. At a rate of $800 per month this equals $4800.

[31] I am also satisfied that the Plaintiffs have had to endure quite unreasonable and unacceptable noise for a similar period of time, albeit not continuously. I award $10000 general damages for the suffering thereby caused.

**Result:**

1. There will be an award of $4800 special damages.
2. $10000 will be awarded by way of general damages.
3. I will hear counsel as to costs.

# R v Talia

Supreme Court, Nuku'alofa
Cato J
CR 69/2012

7 May 2013

*Criminal procedure – continuum of similar offending – general deficiency approach to indictments allowed*

The accused was indicted on four counts of fraudulent conversion of property over various periods. A substantial objection was made to the indictment by the accused who contended that under s 160 of the Criminal Offences Act, the Crown was precluded from proceeding as it had. He contended that counts 1-4 involved many discrete acts of alleged fraudulent conversion. The Crown asserted that there were about 250 individual acts with an average conversion of about $396 with the lowest being $30 and the largest $6-700. The Crown had elected to break the period of alleged offending into four based on a general deficiency count in each period. The accused contended this was wrong and the Crown should have indicted each count separately because the alleged wrongful acts of conversion could all be identified although they were numerous. He also said that it was under section 160 of the Act impermissible for the Crown to proceed to trial on more than five counts, and that by alleging general deficiency, the Crown was essentially avoiding the application of the provisions of section 160 of the Act.

Held:

1. Although in many cases of general deficiency it may not be able to isolate all of the wrongful acts, where there was a continuum of similar unlawful offending or a similar modus operandi or pattern involving many acts generally involving small amounts, the approach of alleging a general deficiency should be permitted. The Crown asserted that between June 2011 and February 2012, very many similar acts of fraudulent conversion of small sums constituted the offending.
2. Accordingly the court ruled that it was appropriate for the Crown to proceed as it did in relation to counts 1 to 4. That being the case, there being only four counts, section 160 did not apply.

Cases considered:

R v Balls (1871) LR 1 CCR 328
R v Funaki [2005] Tonga LR 239

R v Lawson (1952) 36 CLR 80
R v Tangata'iloa [2001] Tonga LR 44
R v Tomlin [1954] 2 All ER 273

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Sisifa
Counsel for the accused : Mr Niu

## Ruling

[1] The accused was indicted of four counts of fraudulent conversion of property over various periods being count 1, between the months of June and July 2011, $22,441.75; count 2, between the months of August and September 2011, 433,489.15; Count 3, between the months of October and November 2011; $26,716.90; count 4, between December 2011, and February 2012; $18,609.80. The counts were all said to arise whilst the accused was employed by Melie Mei Langi Limited. The total amount involved was $99,257.60.

[2] The Crown, at the outset of the trial, sought to amend the indictment to alleged fraudulent conversion under s 162(b) of the Criminal Offences Act rather than s 158 being the offence of embezzlement. Plainly, there was an error in the section cited in the indictment in relation to counts 1-4 and I allow this amendment. There can be no prejudice to the accused.

[3] A substantial objection was made to the indictment by Mr. Niu. He contended that under s 160 of the Criminal Offences Act, the Crown was precluded from proceeding as it had. He contended that counts 1-4 involved many discrete acts of alleged fraudulent conversion. Mr. Sisifa indeed asserted that there were about 250 individual acts with an average conversion of about $396 with the lowest being $30 and the largest $6-700.00. Mr. Sisifa said that he had elected to break the period of alleged offending into four based on a general deficiency count in each period. Mr Niu contended this was wrong and the Crown should have indicted each count separately because the alleged wrongful acts of conversion could all be identified although they were numerous. He also said that it was under section 160 of the Act impermissible for the Crown to proceed to trial on more than five counts, and that by alleging general deficiency, the Crown was essentially avoiding the application of the provisions of section 160 of the Act. Shortly, to allow the Crown to proceed by way of four counts of a general deficiency would be to render the application of the Act nugatory. Section 160 was considered by Ford J in *R v Tangata'iloa* [2001] Tonga LR 44.

[4] I did not proceed further with the trial but allowed counsel time to argue the issues more fully with authority in the afternoon considering my rulings overnight. The issue is important in criminal procedure because if Mr Niu were correct this would mean that proceeding to trial on only five counts involving very modest sums would not reflect the alleged seriousness of the offending in cases where there was a significant general deficit. It would involve the Crown having to proceed to trial on

many more occasions. Mr. Niu contended, however, that this was the effect of two rules, the general principle that each acts of criminality should be alleged in discrete counts so as to avoid allegations of duplicity, and on the plain reading of s 160 which restricts the numbers of counts in trials of embezzlement, falsification of accounts or fraudulent conversion respectively. Mr. Niu also contended that whereas here, the Crown was able to particularize and establish the precise acts, numerous though they were, there was no room for any common law concept of general deficiency to apply.

[5] The issue is practically important in cases of this kind. Research in the adjournment revealed authority that supported the Crown's approach of pleading general deficiency in cases where there was a multiplicity of acts relating to a general deficiency. The relevant cases are *R v Balls* (1871) LR 1 CCR 328 considered and followed by Lynskey J in *R v Lawson* (1952) 36 CLR 80, and further approved by the Court of Criminal Appeal in a judgment given by Pearson J in *R v Tomlin* [1954] 2 All ER 273. Mr Sisifa also drew my attention to the judgment of Ward CJ who in *R v Funaki* [2005] Tonga LR 239 approved the concept of a general deficiency count where there were several acts of theft provided that the activity amounted to continuous offending over a period of time. He referred to the acts forming a single activity. In his view, if the offending could sensibly be viewed in this light "it will not be bad for duplicity, even if a number of distinct criminal acts are implied."

[6] Mr Niu maintained that a general deficiency approach could not be taken where the acts relied upon by the Crown were apparent. However, there were 31 separate identifiable payments in *R v Balls*, as Pearson J pointed out at page 274 of *Tomlin* which would suggest that general deficiency should not be so restricted as Mr Niu suggests. Although in many cases of general deficiency it may not be able to isolate all of the wrongful acts, where there has been a continuum of similar unlawful offending or a similar modus operandi or pattern involving many acts generally involving small amounts, the approach of alleging a general deficiency should in my view be permitted. The Crown asserts that between June 2011 and February 2012, very many similar acts of fraudulent conversion of small sums constituted the offending.

[7] The advantage of approaching the matter in this way is that the totality of alleged offending can be advanced, in one trial so long as there are no more than 5 counts of general deficiency whereas, if the approach contended for by Mr Niu is correct, the Crown case involving only five counts involving modest sums would present a wholly unrealistic picture. It would mean, as I have said, that the Crown would have to proceed with many more trials in order to reveal the true seriousness of the offending. In *R v Tomlin*, at page 275 Pearson J concluded his judgment by stating;

> "We desire to make it plain in conclusion, agreeing therein with Lynskey J that, in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money it is undesirable to include them all in a count alleging general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice."

[8] Accordingly I rule that it was in this case appropriate for reason I have given for the Crown to proceed as it has done in relation to counts 1 to 4. That being the case, there being only four counts section 160 does not apply.

[9] During the course of argument, I mentioned to Mr Sisifa that a fifth count alleging theft alleging of a global sum of $99, 257.60 should be pleased as an alternative and indeed broken down into four alternative counts as alternatives to counts 1-4. That seemed to reflect my reading of section 161 of the Criminal Offences Act which provides for theft as an alternative to embezzlement or fraudulent conversion. Mr
130 Sisifa appeared to accede to this view, and accordingly, I give leave to amend the indictment in this way. There can be no prejudice to the accused.

## Sevele anor v Pohiva anors

Supreme Court, Nuku'alofa
Scott CJ
CV 87/2012

14 May 2013

*Constitutional law – leave for judicial review of Select Committee Report – Court could not intervene if no breach of Constitution – leave refused*

On 26 July 2011 a Special Parliamentary Committee was established to review "all the works that have been carried out" by the Nuku'alofa Development Corporation, a Cabinet Sub-Committee established in 2008 following the Nuku'alofa riots in November 2006. The Select Committee's Report dated 8 June 2012 was presented to Parliament on 3 September 2012 and, according to the applicants, became public knowledge on that day. The applicants sought leave to move for judicial review of the whole, or alternatively, parts of the Report, pursuant to Section 5(1) of the Supreme Court Act and subject to the provisions of Order 39 of the Supreme Court Rules 2007. The question of standing was not in issue; the only question was whether the respondents and their Report were immune from judicial review on the ground of privilege.

Held:

1. The Supreme Court had the power to consider whether what was done in the House was in accordance with the Constitution and statute and that no claim for privilege could remove that power. However, where no breach of the Constitution was involved, common law must be applied.
2. An alleged breach of the rules of natural justice which did not directly result in a breach of a discrete provision of the constitution did not afford a jurisdictional basis upon which the Supreme Court could intervene.
3. The application for leave was refused.

Cases considered:

Attorney General v Leigh [2012] 2 NZLR 713

Bradlaugh v Gossett (1884) 12 QBD 271

British Railways Board & Anr v Pickin [1974] AC 765; [1974] 2 WLR 208; [1974] 1 All ER 609

Church of Scientology of California v Johnson-Smith [1972] 1 QB 522; [1971] 3 WLR 434; [1972] 1 All ER 378

Erebus Royal Commission, Re; Air New Zealand Ltd v Mahon [1993] NZLR 662; [1984] 3 All ER 201; [1984] 3 WLR 884
Fotofili & Ors v Siale [1996] Tonga LR 227
'Ipeni Siale v Fotofili & Ors [1987] SPLR 340
Moala & Ors v Minister of Police (No 3) [1996] Tonga LR 211

Statute considered:
Supreme Court Act (Cap 10)

Rules considered:
Supreme Court Rules 2007

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| Counsel for the applicants | : | CR Pidgeon QC with Mrs P Tupou |
| Counsel for the respondents | : | Neil Adsett SC (Attorney General) with Ms Gloria Pole'o |

**Judgment**

[1] On 26 July 2011 the Legislative Assembly approved Parliament Motion No.1 of 2011 establishing a Special Parliamentary Committee to review "all the works that have been carried out" by the Nuku'alofa Development Corporation, a Cabinet Sub-Committee established in 2008 following the Nuku'alofa riots in November 2006.

[2] The Committee's members as approved by the Assembly were the First and Fourth Respondents, together with the Fifth Respondents as Auditor General and the Sixth Respondent as independent legal counsel.

[3] On 20 December 2011 the Assembly approved the appointments of the Speaker and the Deputy Speaker (Second and Third Respondents) to the Committee and also resolved that the Committee become a Select Committee of the Legislative Assembly.

[4] The Select Committee's Report dated 8 June 2012 was presented to Parliament on 3 September 2012 and, according to the Applicants, became public knowledge on that day.

[5] The Applicants are seeking leave to move for judicial review of the whole, or alternatively, parts of the Report, pursuant to Section 5(1) of the Supreme Court Act and subject to the provisions of Order 39 of the Supreme Court Rules 2007. The question of standing is not in issue; the only question is whether the respondents and their Report are immune from judicial review on the ground of privilege.

[6] The only evidence was the two supporting affidavits filed by the Applicants. Both counsel filed learned and helpful submissions for which I am grateful.

[7] The Applicants say that the Select Committee was invalidly constituted since the Fifth and Sixth Respondents, although held out as members of the Committee, were in fact ineligible for membership by virtue of Rule 160. The Applicants also say that the Committee exceeded its terms of reference. In these circumstances, it is argued,

the Respondents who were invalidly appointed could not be privileged while those findings which were beyond the Committee's terms of reference "were beyond the jurisdiction conferred" on the Committee by the Assembly. The Applicants therefore seek:

(a) A declaration that the Select Committee was in breach of its terms of reference;
(b) An order for "mandamus striking out those portions of the Report which are not authorised by the terms of reference and/or are critical of the Applicants"; and
(c) "An order of certiorari removing the Report to the Supreme Court for it to be quashed".

[8] The Applicants' second submission is that by including two members of the Assembly on the Select Committee who were biased against the Applicants and by failing to comply with Rule 170, the Committee denied the Applicants natural justice. Mr Pidgeon argued that this denial provided sufficient ground for the Court to intervene and for it:

(a) to declare that the Select Committee did not comply with Rule 170;
(b) to declare that "the Committee breached the rules of natural justice by failing to warn the Applicants that findings adverse to them were in contemplation and by failing to give them an opportunity to respond"; and
(c) to declare that the Committee acted in further breach of the rules of natural justice by reason of the First and Fourth Respondents being biased against the Applicants.

[9] It seems that the first time that the important question of the limits imposed on the Supreme Court's powers by the rights and privileges of Parliament was considered was in *'Ipeni Siale v Fotofili & Ors* [1987] SPLR 340. After examining a number of English authorities including *Bradlaugh v Gossett* (1884) 12 QBD 271 and *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522; [1971] 3 WLR 434; [1972] 1 All ER 378, as well as a number of authorities from other Commonwealth jurisdictions, Martin J concluded that the position at common law was clear: what is done in Parliament in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action.

[10] Martin J recognised that in Tonga, which has its own written constitution, the Supreme Court has the power to consider whether what has been done in the House is in accordance with the Constitution and statute and that no claim for privilege can remove that power. He, however, concluded that where no breach of the Constitution is involved common law must be applied. He stated:

> "There is one clear thread running through all these cases. Parliament is entitled to absolute privilege over its internal proceedings. This includes speaking and voting on proposals to make law. It includes bringing matters of concern to the attention of the House. It relates to all things said and done for the purpose of carrying out the duties and functions of

> the House. It includes all decisions made by the House in its collective capacity. On all these matters the Court has no power to intervene. It is highly undesirable that it should. The Court has no more right to interfere with the proper working of the House than the House has to interfere with the proper working of the Court".

[11] This judgment was the subject of appeal to the Privy Council in *Fotofili & Ors v Siale* [1996] To. L.R 227. After again reviewing the authorities, the Privy Council concluded (231, line 194):

> "There is no jurisdiction in the [Supreme] Court to enquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution".

The Privy Council quoted with approval a passage from *British Railways Board & Anr v Pickin* [1974] A.C. 765; [1974] 2 WLR 208; [1974] 1 All ER 609 in which Lord Morris said at 790 (AC):

> "The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which should I think be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attached. It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed".

[12] Some years after *Fotofili* the third of three applications for Habeas Corpus came before Hampton CJ in *Moala & Ors v Minister of Police* (No.3) [1996] To. L.R.211. After considering *Fotofili* Hampton CJ identified the question before him as being (line 340):

> "… whether there has been any breach of the Constitution?"

Hampton CJ answered this question by finding that Clause 70 of the Constitution had been breached since the applicants, who had been convicted of contempt of Parliament, had not been advised in advance of the charges against them, had been given no opportunity to defend themselves at a fair hearing and had not had been

given an opportunity to mitigate before sentence was passed (224, lines 690 et. seq.). Although Hampton CJ also examined Rules 88 A to H (as they then stood, since replaced by Division 5 of the Rules) and found that these rules had been breached, it was not the breach of the rules which led to the Court granting the applications sought but the fact that the breach had resulted in the applicants being deprived of the constitutional protection afforded to them by Clause 70. In the words of the Court of Appeal (1997 To. L.R. 210) dismissing the appeal:

> "Hampton CJ who ordered the release of the [applicants] held in substance that the allegations contained in the form of summons fell outside the terms of Clause 70 of the Constitution. He held that the minimum requirements of a fair trial were not met by the proceedings which occurred in relation to the matter".

[13] Given these clear statements of the law in Tonga it seems to me that only two questions arise:

(i) Are the Applicants asking the Court to enquire into the validity of the Assembly's internal proceedings, and
(ii) Is a breach of the Constitution alleged?

[14] In my opinion, before any of the orders sought in paragraph 6 above could be granted there would have to be an investigation into the way in which the Committee and its members were appointed and a further investigation to determine whether in fact, as claimed, the Committee's terms of reference were exceeded. These investigations would almost certainly involve consideration of the effect of Rules 159(2), 169, 170 as well as Rule 3. In my view such an enquiry plainly would amount to an enquiry into the Assembly's internal proceedings. Unless a breach of the Constitution is alleged such an enquiry is beyond the jurisdiction of the Court.

[15] Mr Pidgeon at paragraph 38 of his submissions suggested that the Court in *Moala* (paragraph 11 above):

> "took the view that natural justice applied to the actions taken by the Legislative Assembly and that was overriding, even though natural justice was not specifically referred to in the Constitution. It is submitted that this proposition is implicit in the Constitution and arises fundamentally out of the spirit of the Constitution".

[16] As has been seen from paragraph 7 above, Mr Pidgeon suggested that a demonstrated denial of natural justice afforded sufficient ground for the Court to intervene. In support of his proposition he referred to *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1993] NZLR 662; [1984] 3 All ER 201; [1984] 3 WLR 884 and to *Attorney General v Leigh* [2012] 2 NZLR 713. In my opinion these authorities do not assist the Applicants. The first is concerned with the requirement that a Royal Commission, which is quite a different thing from Parliament, abide by the rules of natural justice. The second concerns communications between a civil servant and a minister, not between a Select Committee and the House.

[17] So far as the proceedings of Parliament (and its committees) are concerned my opinion is that an alleged breach of the rules of natural justice which does not directly result in a breach of a discrete provision of the constitution does not afford a jurisdictional basis upon which the Supreme Court can intervene.

[18] Since the only evidence before me is that of the Applicants, I do not know whether an enquiry would reveal that the Applicants have in fact been unfairly or unjustly treated. If in fact they have been then that is a cause for regret and something which the House may well wish to put it right. In my judgment, however, it is not a matter for the Supreme Court.

210 **Result:**

The Application for leave is refused.

# Sevele v Loto'aniu anor

Land Court, Nuku'alofa
Cato J
LA 6/2013

24 May 2013

*Land law – unregistered leases – no right to continued occupation*
*Civil procedure – plaintiff did not have strong arguable case – interim orders made in favour of plaintiff were rescinded*

On 26 April 2013 the plaintiff, Lord Sevele, commenced action against the defendants alleging that the first defendant had wrongfully refused to renew leases that he had over two tax allotments or had wrongfully declined to give him continued occupation for three years. Both leases had expired and the second defendant as the registered lessee of one of the allotments of land was pressing to evict the plaintiff and take possession of land and buildings thereon. As for the second lease the plaintiff claimed also that he was entitled to a renewal or occupation of this allotment for three years based also on an alleged agreement from the first defendant that a renewal would be given, and on a later agreement in December 2012 he had with the first defendant that he would be able to occupy the land for three years, this being evidenced in a letter written by the first defendant's brother Soakimi Loto'aniu to the Minister of Lands dated 17 March 2013. After the court requested copies of the leases from the Minister of Lands, it was discovered that the plaintiff did not have a registered lease over either of the allotments. It was alleged that on 17 April 2013, after there had been a failure by the plaintiff to arrive at any agreement with the defendants concerning the continued occupation of the land, the second defendant had hired a security company to prevent employees of the plaintiff from entering the land. The plaintiff alleged that this had caused damage to a pig feed enterprise that was being operated and had interfered with the operations of another company which the plaintiff had allowed to occupy the premises for an agreed rental. The plaintiff commenced an action for judgment that he could remain in occupation for three years and sought orders restraining the first and second defendants from trespassing, interfering with, demolishing premises, or machine and equipment and any goods of the plaintiff in the land in dispute. On 2 May 2013, the court made interim restraining orders. Both the first and second defendants move on notice to rescind these orders.

Held:

1. Whilst the plaintiff did not have to show a strong prima facie case, to succeed on such an application there must be an issue demonstrated of

some real substance. Whilst the court refrained from deciding these issues conclusively on the affidavits, the court had regard to them to assess whether the plaintiff could be said to have a good arguable case. For reasons set out, the court did not consider he had such a case.

2. The interim orders made on 2 May 2013 were rescinded.

Cases considered:

American Cyanimid Co v Ethicon Ltd [1975] AC 300
Ma'ake v Lataimu'a [2007] Tonga LR 15
Sanft v Tonga Tourist and Development Company and Minister for Lands [1981-88] Tonga LR 26

Statute considered:

Land Act (Cap 132)

**Judgment in relation to applications made by the First and Second defendants to rescind interim orders made on the 2nd May 2013.**

[1] On the 26th April, 2013, the plaintiff Lord Sevele, commenced action against the defendants alleging that the first defendant had wrongfully refused to renew leases that he had over two tax allotments or had wrongfully declined to give him continued occupation for three years. Both leases had expired and the second defendant as the registered lessee of one of the allotments of land (referred to in the Statement of Claim as lease No 5294) was pressing to evict the plaintiff and take possession of land and buildings thereon.

[2] As for the second lease referred to in the statement of claim as Lease No 5387, the plaintiff claimed also that he was entitled to a renewal or occupation of this allotment for three years based also on an alleged agreement from the first defendant that a renewal would be given, and or a later agreement in December 2012 he had with the first defendant that he would be able to occupy the land for three years, this being evidenced in a letter written by the first defendant's brother Soakimi Loto'aniu to the Minister of lands dated 17th March 2013.

[3] I requested the Minister of Lands to deliver up copies of the leases. It appeared that the plaintiff did not have a registered lease over either of the allotments. Lease no 5294 was granted to a company which I was informed at the hearing had not been registered for some years. That company was Squash Exports Company Ltd of which the plaintiff was the former chairman of the Board of Directors. The lease had been granted for 20 years from the First Defendant for commercial purposes with the rent being $100.00 pa annually, the term being 2nd July 1992 to the 1st July 2011. On the 28th November, 2012 the second defendant, who was the son-in–law of the First defendant, became the registered leaseholder of the land.

[4] As for Lease 5294, this had been granted to the brother of the first defendant, Soakimi Loto'aniu, who had held it as registered lessee for the period 1st April 1993 to 31st March 2013. Although it appears that the plaintiff, Squash Export Company Ltd and or another company Touliki Trading Company of which the plaintiff was a shareholder, had occupied the allotment and worked it, I was advised by Mr Fakahua,

counsel for the plaintiff, that there was no formal sublease or permit arrangement and nothing of this kind appears to have been registered.

[5] It is to be noted that at the time when Mr Soakimi Loto'aniu wrote to the Minister on the 17th March 2013, seeking consent for the plaintiff to have his lease extended for three years, reference is made there to a lease to the plaintiff. Whatever the arrangement, be it a sublease or a permit to occupy, there was as I have said no registered instrument and accordingly, under section 126 any unregistered lease, sublease of greater than three years, or permit would not be effectual to pass or affect an interest in land. Further, at the time of writing his letter of request to the Minister, Soakimi had only days of his registered lease to run. The lease reverted to his brother, the first defendant, on the 1st April 2013. I was informed that it is the intention of the second defendant also to take a registered lease of this allotment.

[6] The statement of claim alleged that valuable buildings and a concrete slab valued at about $700,000 were on the land and that on the 17th April 2013, after there had been a failure by the plaintiff to arrive at any agreement with the defendants concerning the continued occupation of the land, the second defendant had hired a security company to prevent employees of the plaintiff from entering the land. The plaintiff alleged that this had caused damage to a pig feed enterprise that was being operated and had interfered with the operations of another company which the plaintiff had allowed to occupy the premises for an agreed rental.

[7] As a consequence, the plaintiff commenced an action for judgment that he could remain in occupation for three years from the 1st July 2012 to the 30th June 2015 (lease 5294) and from the 1st April 2013 to the 30th May 2016 (lease no 5387) Orders were also sought that the first and second defendants, their heirs, servants, agents or family were restrained from trespassing, interfering with, demolishing premises, or machine and equipment and any goods of the plaintiff in the land in dispute. Damages under various heads were sought.

[8] On the 2nd May 2013, having heard Mr Fakahua I made interim orders.

1. The first and second defendants, members of their families, agents, employees or persons acting on their behalf are hereby restrained.
   (a) From molesting, harassing, or interfering in anyway whatsoever with the plaintiff Fred V Sevele and his employees or agents on the properties described in the application contained in leases no 5294 and No 5387;
   (b) From demolishing or damaging the 2 buildings, equipment, and machinery of the plaintiff on the land in dispute which is the former lease no 5294 and no 5387;
   (c) From stopping the plaintiff and his employees entering the land in dispute until further order.

2. A copy of this application and affidavit in support together with the direction notice and this Order shall be served personally on the defendant within 7 days of this Order.
3. Any Police Officer is authorised and directed to take whatever action is reasonably necessary to give effect to this order.
4. Application for variation or cancellation of this Order may be made within 48 hours notice to the Plaintiff.
5. The Minister of Lands is to provide a copy of the said leases No 5294 and No 5387 and any subsequent lease of the said land to Peter Dean Tupou and deliver these up to the Court within 7 days of this Order.

[9] Both the first and second defendants now move on notice to rescind these orders.

[10] I had ordered the plaintiff to serve copies of the proceedings on the Minister of Lands and advise him of the date for the hearing of the application to rescind. The Minister did not make any appearance.

[11] The first defendant denies that any assurance was given to the plaintiff that he could lease or occupy the allotments beyond the expiry of the leases. He seemed to admit that some discussions were had in December 2012, by which time the second defendant had become the registered lessee of the land over which formerly lease 5294 had existed, but the plaintiff had not met conditions he had sought.

[12] In any event, by that time the land had been leased to the second defendant and registration effected in November 2012. Accordingly, unless the second defendant was a party to any such arrangement and there was no evidence he was, he could not be bound by any arrangement his father had made in December 2013 with the plaintiff.

[13] Of concern to me also is the fact that the plaintiff did not annexe to his affidavit a letter addressed to him as director of "The Squash Company" from the first defendant dated 13th September 2012, advising that the lease had expired on the 1st July 2012. The first defendant said that he did not want the company operating further on the land. Mr. Fakahua confirmed the plaintiff had received this letter. Ex parte applications must reveal material that may be unfavourable to the plaintiff's case as well as material that is favourable.

[14] It seems despite this letter, the plaintiff did nothing until December 2012, when there was, as I have said, some verbal discussion between the plaintiff and the first defendant concerning a possible extension of occupation even though by that stage the plaintiff was aware that the second defendant had a registered lease. Faced with such a clear intention not to grant any further lease, in September 2012, it is surprising that the plaintiff did nothing at all about attempting to persuade the first defendant to honour his alleged previous assurance until it seems December.

[15] Mr Fakahua resisted rescission on two bases;

1. He contended that the first defendant had given the plaintiff an assurance that he would be permitted to continue in occupation beyond the period of the leases,

and he was estopped from denying this. Accordingly, he and, it would seem to follow, the second defendant were bound to recognise and grant him a right to occupy the land for a further three years.

2. The second point made by Mr Fakahua was that the lease to Squash Exports mortgage to the Tongan Bank should not have been released to the second Defendant and that something was wrong about the registration of the lease in November 2012 to him.

## The Assurance of a further right to occupy

[16] The first correspondence concerning any alleged assurance of a right to occupy came from the plaintiff's solicitor in a letter to the second defendant dated 12th December, 2012. In that letter, the plaintiff's solicitor purports to write not on behalf of the plaintiff but the companies, Squash Exports Company Limited and Touliki Growers Company Ltd and asserts;

> "Although the lease expired on the 1st July 2012, there was some understanding between our clients and the lessor that the lease will be continued for another five years after the expiration of the lease. As such it is obligatory and imperative on the lessor to honour their verbal agreement as it is binding on both parties to the lease."

[17] This was written after the second defendant had written to the plaintiff on the 5th December 2013, threatening to assert his rights as registered lessee. A copy of the letter of the 5th December 2013 was not before the Court. Although asserting that an assurance had been given by the first defendant, it is noted no particulars were given as to the date, time, or place of this assurance. Any such assurance was not given personally to the plaintiff, it seems either, but to companies with which he was associated.

[18] There was a further letter from the plaintiff's solicitor to the second defendant dated 25th January 2013 in which the plaintiff said that, after the plaintiff's letter of the 12th December, there was a meeting in which the first defendant agreed to give the said company another three years to continue occupying the land until the 31st December 2015. At this point, it is unclear whether the assurance was given to Squash Exports or Touliki Growers Company Ltd, but again there is no suggestion in that correspondence that it was given to the plaintiff personally. There is mention in this letter of a letter sent by the plaintiff to the Tonga bank which had held a mortgage over the lease to Squash Exports confirming this arrangement.

[19] Accordingly, it seems at that point, there was no longer reliance on any earlier assurance but on the fact of an alleged agreement with the first defendant in December 2012 that the company would be given another three years to continue occupying the land until the 31st December 2015.

[20] Subsequent correspondence annexed to the affidavits evidenced that conditions insisted upon by the first and second defendants at various times since December had not been met. It was apparent from the correspondence that the second defendant also suggested terms on which he would be prepared it seems to grant the plaintiff a right to occupy the land for a further three years but it is plain the parties did not reach any accord. Indeed, Mr Fakahua for the plaintiff at the hearing agreed that was the case. In a further letter dated 7th February 2013, the first defendant states his view of the December meeting, which confirms not only had his terms not been met, but the lease by then had expired and the land had been released to the second defendant.

[21] The plaintiff, although alleging a right of renewal of the lease of 5294 for three years, could not and did not rely at the hearing on any purported renewal of the registered lease to Squash Exports which expired in July 2012. The company had been unregistered for a number of years. If it had existed, any renewal of that lease would have required a written application under 36(1) of the Land Act to have been made within six months of the expiration of the lease.

[22] At the hearing, Mrs Taufateau, for the first defendant, strongly contended that the proceedings brought by the plaintiff were misconceived. She contended that the plaintiff was not the correct party to bring these proceedings. No assurance as alleged had been given to the plaintiff personally, but on the evidence provided by the plaintiff in support of the claim to the companies with which the plaintiff was associated. This point seems correct. I adjourned the proceedings to see what had become of Squash Exports and I was informed it had ceased to be a registered company some years ago. No mention was made of Touliki Trading company it appears from his affidavit that the plaintiff is a shareholder of that company. The thrust of the correspondence adduced in the plaintiff's affidavit from the solicitors would suggest that any alleged assurance was given companies with which the defendant was associated and not personally. As such the claim for relief by the plaintiff would seem to be misconceived.

[23] However, even assuming the assurance was given to the plaintiff personally, the plaintiff is in difficulty. Any suggestion by Mr Fakahua that representation and estoppel might operate to personally bind the first defendant to grant the plaintiff a lease or right of occupation (possibly a permit) of the former 5294 seems to conflict, in these circumstances, with *Sanft v Tonga Tourist and Development Company and Minister for Lands* [1981-88] Tonga LR 26. That case stands against invoking equity if it were to conflict with the Act's own procedures for the creation and registration of interests in land. The Land Act in Division III lays down procedures for the creation and registration of leases, subleases transfers and permits and in section 36 the procedure for renewal of leases. The plaintiff could have personally sought from the first defendant a lease or permit to occupy in the appropriate form and if granted taken steps for registration of that instrument to take effect when the lease to Squash Exports terminated. He did not do so. It is difficult to see that the plaintiff incurred any detriment consequent upon any alleged assurance being given for extended personal occupation. All that happened was that he neglected to make good the assurance by obtaining a lease or permit to occupy, in the proper form and obtaining registration as he was required to do under the Act, if he wanted the arrangement to take effect under section 126 of the Land Act. I note that the plaintiff, in his statement

of claim, alleges as an alternative to renewal a right to occupy for three years. A sublease for a period of no greater than three years does not have to be registered under section 126 to take effect, but there could be no sublease other than one taken from the second defendant. That was not alleged.

[24] Nor was there evidence that the second defendant was a party to any alleged representation made by his father to the plaintiff prior to the expiry of the lease to Squash Exports that a lease or right to occupy would be granted to the plaintiff, or anybody else. As such, the second defendant could not be bound by any assurances made allegedly by his father to the plaintiff concerning renewal or right to occupy for a further period. Having achieved registration in November 2012, as Mr Pouono for the second defendant contended, the second defendant was entitled to assert the rights the lease gave him after registration.

[25] In relation to the second allotment lease 5387, it seems that Squash Export never enjoyed any registered sub-lease or permits to occupy it, at all. Mr Fakahua said that was so, at the hearing. It seems that tenure, such as it existed, was informal. The lease to Soakimi has now also expired with the reversion falling to the first defendant on the 1st April, 2013. In his letter to the plaintiff of the 7th February 2013, the first defendant informed the plaintiff he would not grant a renewal of this lease (presumably to his brother Soakimi) and that he was aware from the Ministry's record that there was no agreement between the plaintiff and Soakimi for a sub lease. He said that after the 31st March, 2013 he would give the plaintiff two weeks to clear his work and machinery from the land after that he would lock up his "api". Whatever may have been the relationship between the plaintiff and Soakimi (and it would not seem anything more than informal), the letter of request to the Minister to renew a sub lease sent on the 17th March 2013 a few days before the expiration of the lease plainly cannot bind the reversioner.

**The release by the Bank of its mortgage over lease 5294**

[26] I asked Mr Fakahua whether any inquiry had been made why this had occurred. He said there had been none. In the absence of any lawful challenge to the regularity of the register, the second defendant must be recognized by this Court as the lawful registered lessee. *Ma'ake v Lataimu'a* [2007] Tonga LR 15 it would seem that on the expiration of the lease at least that part of the security would be worthless anyway.

[27] Accordingly, applying the principles in *American Cyanimid Co v Ethicon Ltd* [1975] AC 300, I do not consider that there is a serious question to be tried. Whilst the plaintiff does not have to show a strong prima facie case, to succeed on such an application, there must be an issue demonstrated of some real substance. Whilst at this stage, I refrain from deciding these issues conclusively on the affidavits, I do have regard to them in order to satisfy myself whether the plaintiff can be said to have a good arguable case. For reasons, I have given I do not consider he has such a case.

[28] Accordingly I rescind the orders previously made on the 2nd May 2013.

[29] Further I order the costs of these applications be those of the first and second defendants, and payable by the plaintiff.

[30] If they are not agreed to within 14 days of this judgment they are to be assessed by the Registrar.

# R v Angilau anors

Supreme Court, Nuku'alofa
Cato J
CR 164-166/2012

5 June 2013

*Evidence – admissibility of evidence of accomplice – concern with police offering immunity – should be for Crown officers to offer immunity – admissible evidence*

The Crown proposed to call an accomplice, Meli Foliaki, as the first witness in relation to the complicity of all three accused in an attempted armed robbery of an Asco service station. The evidence of Meli Foliaki who was the driver of the vehicle and took the alleged robbers to an area near the place where the robbery was to take place in Nuku'alofa, implicated all three. Further, he was able to give evidence of planning and the role of each of the accused. His evidence was of vital importance to the prosecution. Although initially Mr Foliaki had made a statement in which he denied involvement, after being pressed to tell the truth by a police officer who knew he and his family, he had volunteered a statement admitting his role in the plan and his actions afterwards which included meeting up with the robbers and assisting them to get home. Later, he volunteered to give evidence for the Crown and was advised by a senior police officer that, if he would agree to give evidence for the Crown, charges would be withdrawn. He did and as a consequence the charges were withdrawn prior to the depositions hearing. The court adjourned to consider the admissibility of the evidence.

Held:

1. The court was concerned that the actions of the police officer in offering such an inducement had pre-empted the law officers of the Crown, the Attorney-General and the Solicitor-General who have responsibility in Tonga for the commencement and termination of criminal prosecutions. Also, there was concern about the integrity of the accomplice witness if it were to be adduced without a formal indemnity being given.
2. Police officers should not offer inducements to accomplices that amount to de facto indemnities. Undertakings of immunity from prosecution may have to be given in the public interest but they should not be given by the police.
3. The evidence was admissible. The police, whilst improperly securing the undertaking to give Crown evidence, and withdrawing a charge after

securing agreement, did not do so in circumstances where there was any inducement for the accomplice to make incriminating and possibly false statements to secure protection. His confession was obtained before any inducement had been offered to him by the police.

4. By the time, the witness came to give his evidence he had been properly indemnified by the Attorney-General upon the request of the Solicitor-General. He was made well aware of the conditions upon which his immunity from prosecution had been granted, namely that he tell the truth before his evidence was given.

Cases considered:

Brown [1983] 8 A Crim R 320
R v McDonald [1983] NZLR 252
Turner v DPP (1975) 61 Cr App Rep 67

Counsel for the Crown : Mrs Langi and Ms Macomber
Counsel for first and second defendants : Mr Fa'otusia
Third defendant appeared in person

**Ruling in relation to the admissibility of the evidence of an accomplice Meli Foliaki**

[1] The Crown indicated during her opening address that she proposed to call an accomplice, Meli Foliaki, as the first witness in relation to the complicity of all three accused in an attempted armed robbery of an Asco service station. During the course of that armed robbery a shotgun was discharged and the complainant was shot in the leg. The evidence of Meli Foliaki who was the driver of the vehicle who took the alleged robbers to an area near the place where the robbery was to take place in Nuku'alofa, implicated all three. Further, he was able to give evidence of planning and the role of each of the accused. His evidence was of vital importance to the prosecution.

[2] The prosecution, in outlining the evidence that was proposed to be called, said, that, although initially Mr Foliaki had made a statement in which he denied involvement, after being pressed to tell the truth by a police officer who knew he and his family, he had volunteered a statement admitting his role in the plan and his actions afterwards which included meeting up with the robbers and assisting them to get home. Later, he approached the police volunteering to give evidence for the crown. I was informed a senior police officer had advised him that, if he would agree to give evidence for the crown charges would be withdrawn. He did and as a consequence the charges were withdrawn prior to the depositions hearing.

[3] When the trial commenced, the accomplice had been given a de facto indemnity against prosecution by a senior police officer involved in the prosecution. I indicated my concern about this and adjourned the trial for Mrs Langi to secure further instructions. I wished to consider the admissibility of this evidence, and hear further argument, if necessary, the following day. I adjourned the trial overnight.

[4] My concern was that the actions of the police officer in offering such an inducement had pre-empted the law officers of the Crown, the Attorney-General and the Solicitor-General who have responsibility in Tonga for the commencement and termination of criminal prosecutions. I was also concerned about the integrity of the accomplice witness if it were to be adduced without a formal indemnity being given.

[5] The approach taken by the courts in other jurisdictions where the police have been involved in securing Crown evidence by inducement, has received judicial consideration by the Court of Criminal Appeal in England in *Turner v DPP* (1975) 61 Cr App Rep 67 and by the Privy Council, on appeal from the Court of Appeal of New Zealand in *R v McDonald* [1983] NZLR 252. In these both cases, the issue of the evidence of accomplices, the effect of police inducement and indemnities were considered. In both cases, the evidence was ruled admissible. However, certain principles emerged from these cases that are of fundamental importance.

[6] First, police officers should not offer inducements to accomplices that amount to de facto indemnities. This point was made in *Turner v DPP*. There Lawton LJ, said;

> "Undertakings of immunity from prosecution may have to be given in the public interest. They should never be given by the police."

[7] Should police officers engage in attempting to persuade accomplices to make incriminating statements or give Crown evidence by offering them de facto indemnities against prosecution, they not only usurp the role of the law officers but they also risk corrupting the evidence of a witness to such a degree that the evidence may be excluded as matter of judicial discretion even though a later formal indemnity is granted. In both *Turner* and *McDonald*, challenges were made to evidence which was the subject of formal indemnity where police officers had been earlier involved in entering into arrangements with accomplices who wished to avoid prosecution.

[8] In both cases, the argument was that police inducement had so corrupted the integrity of the evidence that it should not be admitted even though indemnities had been provided by the appropriate authority. In both cases, these challenges failed. However, the message given is clear. Police officers should not offer inducements to accomplices to make incriminating statements and, or give crown evidence against confederates.

[9] Where, police officers wish to encourage an accomplice or other possible witness to make incriminating admissions and, or give crown evidence with a prospect of an indemnity against prosecution, this should be effected by confidential overtures made between only very senior police officers and the Solicitor- General. As was said in *Turner*, indemnities against prosecution should only be given sparingly and in situations where the public interest requires such an approach. It is not for police officers to privately enter into such arrangements with accomplices without consulting the law officers. I have mentioned the importance of confidence because of the dangers inherent in an accomplice giving evidence for the crown.

[10] On the morning after I had adjourned the trial, Mrs Langi produced a document in which the Solicitor-General had sought an indemnity for the accomplice from the Attorney-General on the ground that the witness had important evidence to give and

was involved in the robbery only as a lesser accomplice and driver. The Attorney-General granted this and the indemnity was produced when the trial recommenced.

[11] I considered the indemnity which bore both the signature of the Solicitor-General and the Attorney-General was sufficient to remove any incentive for the witness to give false evidence.

[12] Although the indemnity did not include an assurance of truthfulness, this was in my view implied in the request submitted to the Attorney which formed part of the indemnity document. In *Brown* [1983] 8 A Crim R 320, Leary J in the Supreme Court of the Northern Territory of Australia, considered *Turner* and an argument that an indemnity that did not contain a condition that immunity was conditional upon truthful evidence was inadmissible as providing an incentive for a witness to give false evidence. Although Leary J in *Brown*, as had Lawton LJ in *Turner*, considered that an indemnity should contain a condition or requirement that the witness would tell the truth, Leary J considered that this was implicit. In this case, I impressed upon witness, before he gave evidence that his future protection from prosecution depended upon his telling the truth and he confirmed he understood this.

[13] In my view, the evidence was admissible. The police in this case, whilst improperly securing the undertaking to give Crown evidence, and it seems withdrawing a charge after securing agreement, did not do so in circumstances where there was any inducement for the accomplice to make incriminating and possibly false statements to secure protection. His confession had been obtained before any inducement had been offered to him by the police. It was the reliability of the trial evidence in the absence of a formal indemnity that had concerned me.

[14] Importantly, by the time, the witness came to give his evidence; he had been properly indemnified by the Attorney-General upon the request of the Solicitor-General. He was made well aware of the conditions upon which his immunity from prosecution had been granted, namely that he tell the truth before his evidence was given.

[15] If police officers in Tonga persist in offering de facto indemnities in exchange for crown evidence, a practice which I have encountered before this case in Tonga, they should appreciate that they may well prejudice the admissibility of that evidence even though the Attorney-General may later grant an indemnity. That is the effect of *Turner v DPP* and *R v McDonald*.

## Police v Liava'a

Supreme Court, Nuku'alofa
Scott CJ
AM 13/2013

1 July 2013

*Criminal procedure – respondent acquitted on grounds that summons not good – wording clear and amendment Act not needed to be included in summons – matter remitted to Magistrate's Court*

On 18 June 2013 the respondent appeared at the Nukunuku Magistrates' Court and faced two charges: the first of being drunk in a public place (contrary to section 3(j) of the Order in Public Places Act (Cap 37)) and the second of "obstruction" of a police officer (contrary to section 113 of the Criminal Offences Act (Cap 18)). The respondent pleaded guilty to both charges. On the first charge, the Magistrate fined him $100 to be paid in default imprisonment for one month, and on the second charge, the respondent was acquitted on the grounds that the summons was not good because the amended Act was not included in the summons. The Police appealed against that acquittal on the grounds that the summons was correctly written out, the amended Act was not required to be written onto the summons as well; and the Court's decision to acquit was not right.

Held:

1. It was not every charge which was technically defective that would be held to be a nullity. Obviously if a person was charged with an offence that did not exist then that charge would be a nullity. Where, however, the error was purely technical and the facts of the charge as pleaded clearly reveal the nature of the conduct complained of, a charge would not be bad. After mistakenly referring to both "assaulted" and "obstructed", and mistakenly referring to "Section 113 (b) (c)" the wording of the charge was perfectly clear and could have left the respondent in no doubt of the conduct alleged against him.
2. The Magistrate gave as his reason for acquitting the respondent the fact that no reference to the amendment of the Act was made in the charge. The Criminal Offences Act (Cap 18) was amended by the Criminal Offences (Amendment) Act 2012 (Act 19 of 12) however section 113 was not affected by the amendments. There was no requirement for the amending Act to be referred to in the charge and the Magistrate erred in dismissing this charge on that ground.

3. The appeal was allowed. The matter was remitted to the Magistrates Court. The prosecution was given an opportunity to correct the defects in the charge and the corrected charge was put to the respondent and his plea taken. The matter should then proceed to conclusion according to law.

Statutes considered:
Criminal Offences Act (Cap 18)
Criminal Offences (Amendment) Act 2012 (Act 19 of 12)
Magistrates' Courts Act (Cap 11)
Order in Public Places Act (Cap 37)

Counsel for the appellant : Mr 'A Kefu
Respondent appeared in person

**Judgment**

1. On 15 June 2013 the Respondent was summoned to appear at the Nukunuku Magistrates' Court to face two charges: the first of being drunk in a public place contrary to section 3(j) of the Order in Public Places Act (Cap 37) (MC 135 of 2013), the second of "obstruction" of a police officer, contrary to section 113 of the Criminal Offences Act (Cap 18) (MC 136 of 2013).

2. According to the record of the proceedings before the Court on 18 June 2013 the Respondent pleaded guilty to both charges. After hearing the facts and the Respondent's mitigation the Magistrate delivered the following judgment:

> "Charge 135/2013: Fine $100 to be paid now in default imprisonment for one month;
>
> Charge 136/2013: the accused will be acquitted, the summons was not good because the amended Act was not included in the summons."

This is an appeal against that acquittal.

3. The grounds of appeal are:

> "(i) The summons was correctly written out, the amended Act was not required to be written onto the summons as well;
> (ii) The Court's decision to acquit is not right."

4. The material parts of the summons in question read as follows (translated):

> "Complaint has been made to me that you on the 9th day of April 2013 at Ha'avakatolo, you assaulted and obstructed a police officer while on duty contrary to section 113 (b)(c) Criminal Offences Act Cap. 18 whereby you punched with your right hand the shoulder of Police Officer Vaha Taufa without his consent."

5. Section 14 of the Magistrates' Courts Act provides that every summons:

> "shall state concisely the offence with which the defendant is charged ..."

Section 15 specifies that:

> "every summons shall be for one offence only ..."

Section 16 (i) requires:

> "Every summons before being issued for service shall be read by the magistrate who shall affix his signature and seal thereto."

80 6. Both the police, before requesting this summons to be issued and the Magistrate, before signing the summons should have noticed that there is no such offence as section "113(b) (c)". Subsections (b) and (c) are distinct and different subsections of section 113; either section (b) should have been relied upon or subsection (c). To include both sub sections in one summons was a breach of section 15 of the Act.

7. It is evident from the facts that sub-section 113(c) has no application to the case against the Respondent and accordingly only subsection 113(b) should have been included in the summons. Subsection 113(b) reads as follows:

> "Every person who assaults, obstructs or resists any police officer acting in the execution of his duty ... is guilty of an offence and is liable on
90 summary conviction to a fine not exceeding $500 and in default of payment thereof to imprisonment for any period not exceeding one year".

8. It will have been observed that three distinct types of conduct are referred to in subsection 113(b):-

1. assaults;
2. obstructs;
3. resists.

When charging a breach of this subsection only one of these types of conduct should be included in a single charge, otherwise the charge will violate section 15.

9. The charge 136/2013 was defective:

100 (i) Because there is no such subsection as 113 (b) (c); and
(ii) Because the Respondent was charged with two types of conduct, namely "assaulted and obstructed", rather than one.

10. It is not every charge which is technically defective that will be held to be a nullity. Obviously if a person is charged with an offence that does not exist (eg because it has been repealed) then that charge will be a nullity. Where, however, the error is purely technical and the facts of the charge as pleaded clearly reveal the nature of the conduct complained of, a charge will not be bad. In the present case, after mistakenly referring to both "assaulted" and "obstructed", and mistakenly

referring to "Section 113 (b) (c)" the wording of the charge was perfectly clear and can have left the Respondent in no doubt of the conduct alleged against him.

> "... you punched with your right hand the shoulder of Police Officer Vaha Taufa without his consent"

11. The Magistrate gave as his reason for acquitting the Respondent on this charge the fact that no reference to the amendment of the Act was made in the charge. The Criminal Offences Act (Cap 18) was amended by the Criminal Offences (Amendment) Act 2012 (Act 19 of 12) however section 113 was not affected by the amendments. There was no requirement for the amending Act to be referred to in the charge and the Magistrate erred in dismissing this charge on that ground.

12. As a general rule, any objection to the form of a charge should be taken before the plea is taken. If the error in the charge is slight then the prosecution must be given an opportunity to amend. If the defendant is placed in a difficulty by the amendment he may be granted an adjournment to consider his position. The overall aim must be justice both to the prosecution and the defence.

13. During the hearing of this appeal the Solicitor General told me that in some quarters a charge is regarded as defective if the maximum penalty is not specified; this is incorrect, a charge does not have to state the maximum penalty. A magistrate does, of course, have to satisfy himself that the maximum penalty for the offence does not take it beyond his jurisdiction.

14. I wish to refer to three other matters which arise in this appeal. The first is that, according to the record, the Magistrate made no enquiry into the Respondent's means before imposing a penalty of $100. This is incorrect; a Magistrate should never impose a financial penalty without at least making some enquiries to establish that the offender has the means to pay the fine. Secondly, the default period, one month, is the maximum allowed by section 28 of the Act, as amended, for fines up to $500. On the face of it a default period of 1 month for a fine of $100 seems very high. Thirdly, no time was given to the Respondent to pay the fine imposed, indeed the sentence specified that the fine was to be paid "now" i.e immediately. In fact, it is understood that the fine has been paid and therefore no harm has been done. It is better practice for the Magistrate to enquire whether the fine can be paid immediately and, if not, to allow a reasonable time for payment to be made. It is not good sentencing to impose a fine which has to be paid immediately, but, because the offender has no, or not enough money on his person, results in imprisonment instead. Offenders should not be sent to prison merely for non-payment of fines; imprisonment is only appropriate when an offender, who had the means to pay the fine within a reasonable period of time allowed to him, has nevertheless failed to pay.

15. The appeal is allowed. The matter will be remitted to the Magistrates Court. The prosecution should be given an opportunity to correct the defects in the charge to which I have referred. The corrected charge should then be put to the Respondent and his plea taken. The matter should then proceed to conclusion according to law.

# Tu'utafaiva, In the matter of Part VI of the Law Practitioners Act 1989

Supreme Court, Nuku'alofa
Scott CJ
LPF 51/1992

10 July 2013

*Law practitioners – Disciplinary Committee – abuse of relationship of confidence and trust found proved – recommendation of Committee accepted – practitioner suspended for 12 months*

On 4 October 2012 the Disciplinary Committee of the Tonga Law Society found the Law Practitioner guilty of two counts of professional misconduct contrary to Section 21(1)(a) of the Act. The Practitioner did not dispute that he had received substantial sums by way of legal fees, that he had not performed the services for which he had been paid and that he had not repaid the money received, despite repeated requests. After taking into account all facts and matters placed before it both by the complainants and the Law Practitioner the Committee found that the Law Practitioner's conduct "amounted to an abuse of the relationship of confidence and trust between practitioner and client stated in Rule 1.01 of the Rules of Professional Conduct for Law Practitioners 2002". The Committee recommended that the practitioner be suspended for 12 months.

Held:

1. The court was satisfied that the Committee carefully considered and evaluated all the facts and matters placed before it. An appellate court, except in a very strong case, should not interfere with a sentence recommended by a disciplinary tribunal. The court was satisfied that there were no grounds to interfere with the recommendation made. Accordingly, it was confirmed.
2. The practitioner was suspended from practice for 12 months.

Cases considered:

Bolton v Law Society [1984] 2 All ER 486
Daniels v Complaints Committee [2011] 3 NZLR 850

Statute considered:

Law Practitioners Act 1989

Rules considered:
Rules of Professional Conduct for Law Practitioners 2002

## Ruling and order

1. On 4 October 2012 the Disciplinary Committee of the Tonga Law Society found the Law Practitioner guilty of two counts of professional misconduct contrary to Section 21(1)(a) of the Act. The Practitioner did not dispute that he had received substantial sums by way of legal fees, that he had not performed the services for which he had been paid and that he had not repaid the money received, despite repeated requests.

2. In June 2013 the Disciplinary Committee met to consider how to exercise the powers conferred on it by Section 21(2) of the Act. On 4 June the Committee heard the two complainants who advised that the moneys paid by them in 2003 and 2008 respectively had been substantially repaid following their complaints to the Society

3. On 6 June the Committee heard the Law Practitioner and also considered a written plea in mitigation dated 7 May 2013.

4. After taking into account all facts and matters placed before it both by the complainants and the Law Practitioner the Committee found that the Law Practitioner's conduct "amounted to an abuse of the relationship of confidence and trust between practitioner and client stated in Rule 1.01 of the Rules of Professional Conduct for Law Practitioners 2002".

5. The Committee also endorsed the view that "the misconduct of the [Law Practitioner] is serious and harmful to the clients and does not reflect the image and standing of the lawyers in Tonga, or elsewhere, too well. It does not promote the integrity and good name of the profession in the Kingdom". "The Committee feels that the penalty must be such that not only the Respondent but other lawyers are reminded that they must always act in the best interests of their clients, which is their primary concern". The Committee recommended that the Law Practitioner's practising certificate be suspended for 12 months.

6. In *Bolton v Law Society* [1984] 2 All ER 486, 491 the Master of the Rolls explained that:

> "It is required of lawyers … that they should discharge their professional duties with integrity, probity and complete trustworthiness … Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him …".

7. The approach taken in *Bolton* was followed in *Daniels v Complaints Committee* [2011] 3 NZLR 850, 855 in which it was stated:

> "It is well known that the Disciplinary tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the

> public interest (which include protection of the public) to maintain professional standards, to impose sanctions on a practitioner for his/her breach of duties and to provide scope for rehabilitation in appropriate cases."
>
> "Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.

8. Following receipt of the Committee's recommendation by the Court on 19 June 2013 the Law Practitioner was accorded the 14 days allowed by him under Section 23(1) of the Act to appeal. At the date of writing this ruling no appeal has been received.

9. I am satisfied that the Committee carefully considered and evaluated all the facts and matters placed before it. As pointed out in *Bolton* an appellate court, except in a very strong case, should not interfere with a sentence recommended by a disciplinary tribunal. I am satisfied that in the present case there are no grounds at all to interfere with the recommendation made. Accordingly, it is confirmed.

**Order:**

> Mr Siosifa Tu'utafaiva is to be suspended from practise as a law practitioner for a period of 12 months from today.

## Havea v Lauhingoa anors

Land Court, Nuku'alofa
Scott CJ and Assessor N Tu'uholoaki
LA 14/2012

12 July 2013

*Land law – issue as to who had the rights to leasehold land and a warehouse – restraining order granted preventing third defendant entering the land – discharge of restraining order sought by third defendant – not granted*

The plaintiff was the registered holder of a tax allotment at Hofoa which was Crown Land. On 3 March 1996 the land was leased to the second defendant (Advance Steel Tonga Ltd) for a term of 20 years at an annual rent of $2000. The second defendant built a warehouse on the land. According to the statement of claim, rent was not been paid since 2000 and therefore there were now arrears of rent amounting to about $26,000. In December 1999 the lease was mortgaged to the Bank of Tonga. The amount secured was increased to $91,000 in March 2010. The mortgage was discharged on 4 April 2013. On 12 September 2012 the plaintiff filed an application for an order restraining the first and third defendants from entering the land. The plaintiff claimed that servants or agents of the third defendant had partially demolished and removed the warehouse which the third defendant claimed to have bought from the first defendant. The plaintiff claimed a statutory lien over the warehouse until the arrears of rent had been paid. On 18 September 2012 an order was granted ex parte in favour of the plaintiff, as sought. On 28 September the order was extended until further order, by consent. The third defendant applied to discharge the order granted on 18 September 2012. The third defendant claimed that he bought the warehouse "from the second defendant through the first defendant and the [Westpac] Bank of Tonga".

Held:

1. There was an issue as to whether the second defendant was an existing company or whether it was deregistered (because it did not apply to be re-registered under the Companies Act). If it was deregistered the undistributed assets of the company (including leasehold property) would vest in the Crown. This would mean that the lease and the warehouse were not available for sale at all, whether by the company, the bank, the first defendant or anyone else.
2. The sale of the warehouse was not a mortgagee sale at all since the vendor was not the mortgagee Bank. Even if the sale of the warehouse and repayment of the Bank's loan was with the agreement of the Bank, that did

not mean that the sale was by the mortgagee, although it may have been to the mortgagee's advantage.

3. The order granted on 18 September 2012 was made in order to preserve the status quo pending a full determination of the quite complicated issues between the parties following trial. The further issues raised by the application reinforce the view that the Order of 18 September 2012 should remain in place. The application was dismissed.

Statutes considered:
Companies Act (14 of 1995)
Land Act (Cap 132)

| | | |
|---|---|---|
| Counsel for the plaintiff | : | 'O Pouono |
| First defendant in person | | |
| No appearance by the second defendant | | |
| Counsel for the third defendant (applicant) | : | Mrs 'A Taumoepeau SC |
| Counsel for the fourth defendant | : | Mr 'A Kefu (Solicitor General) |

**Judgment**

1. The Plaintiff is the registered holder of a tax allotment at Hofoa which is Crown Land. On 3 March 1996 the land was leased to the Second Defendant for a term of 20 years at an annual rent of $2000.

2. A warehouse was built on the land by the Second Defendant. According to the Statement of Claim, rent has not been paid since 2000 and therefore there are now arrears of rent amounting to about $26,000.

3. According to an affidavit of the Plaintiff filed on 14 September 2012 he approached the Ministry of Lands in 2010 or 2011 with a view to forfeiture of the lease but, as conceded by Mr Pouono, he has not formally taken possession of the land as provided for in the standard Form of Lease (Schedule IX-Form 3 – the Land Act).

4. It appears that in December 1999 the lease was mortgaged to the Bank of Tonga. The amount secured was increased to $91,000 in March 2010. The mortgage was discharged on 4 April 2013.

5. On 12 September 2012 the Plaintiff filed an application for an order restraining the First and Third Defendants from entering the land. In his supporting affidavit, the Plaintiff deposed that servants or agents of the Third Defendant had partially demolished and removed the warehouse which the Third Defendant claimed to have bought from the First Defendant. The Plaintiff relying on the standard proviso incorporated in the lease and referred to in paragraph 3 above claimed a statutory lien over the warehouse until the arrears of rent had been paid.

6. On 18 September 2012 an order was granted ex parte in favour of the Plaintiff, as sought. On 28 September the order was extended until further order, by consent.

7. This is an application by the Third Defendant to discharge the order granted on 18 September 2012.

8. On 18 September 2012 a statement of defence was filed by the Third Defendant. The Third Defendant claimed that he bought the warehouse "from the Second Defendant through the First Defendant and the [Westpac] Bank of Tonga".

9. On 28 May 2013 the Third Defendant filed an affidavit in support of his application. He deposed that he entered into an agreement with the First Defendant and the Westpac Bank of Tonga "to purchase the First Defendant's warehouse" for $18,000. Annexures A & B to the affidavit are receipts by the First Defendant "for the sale of my steel frame building" which it is not disputed refers to the warehouse. Annexure D is a statement by the Westpac Bank of Tonga that the "Advance Steel Loan Account" "has been cleared on 6 March 2012 between Angina Finau and Duke Lauhingoa". As has already been seen, the mortgage was discharged on the following 4 April.

10. In support of her application Mrs Taumoepeau filed helpful written submissions. She suggested:

> First, that the Third Defendant was not a party to the lease and was therefore not liable to the Plaintiff for unpaid rent;
> Secondly, that the Third Defendant was a bona fide purchaser for value, and
> Thirdly, that the Third Defendant was a purchaser under a mortgagee sale.

11. There is no difficulty about the first proposition. As to the second and third however, Mr Pouono submits that the lender was, as confirmed by the Third Defendant in his supporting affidavit and as appears further confirmed by Annexures A and B already referred to, not the bank, nor the Second Defendant (as claimed by the Third Defendant in paragraph 3(iii) of his Defence), but the First Defendant who has filed no defence to the Plaintiff's claim that he was the Second Defendant's Manager.

12. Under the Tenth Schedule to the Companies Act (14 of 1995), all companies were to apply for re-registration before the expiry of the transition period specified in Section 1 of the Schedule. Section 5 (1) requires the Registrar of Companies to remove those companies from the register which have not complied with Section 1. According to paragraph 6 of the Plaintiff's supporting affidavit a search of the companies register does not reveal the existence of the Second Defendant. It seems, on the information before the court, that the Second Defendant has been deregistered and, accordingly, dissolved (see Companies Act – Section 327 (i) (b) (iv)).

13. When a company is deregistered, Section 333 of the Companies Act provides that the undistributed assets of the Company (including leasehold property – S333(2)) vest in the Crown. In order for such properly to become available for distribution to creditors Sections 336 to 340 of the Companies Act have to be considered.

14. If the lease and the warehouse vested in Crown then they were not available for sale at all, whether by the Company, the Bank, the First Defendant or anyone else.

15. There is a further complication resulting from the fact that the lease, at the time it vested under Section 333 was, on the information before the Court, subject to a mortgage which, however, has now been discharged.

16. In my opinion the sale of the warehouse was not a mortgagee sale at all since the vendor was not the mortgagee Bank. Mrs Taumoepeau suggested that the sale of the warehouse and repayment of the Bank's loan was with the agreement of the Bank but in my view that does not mean that the sale was by the mortgagee, although it may have been to the mortgagee's advantage.

17. The order granted by this Court on 18 September 2012 was made in order to preserve the status quo pending a full determination of the quite complicated issues between the parties following trial. The further issues raised by this application reinforce my view that the Order of 18 September 2012 should remain in place. The application is dismissed.

# R v Lui

Supreme Court, Nuku'alofa
Cato J
CR 154/2012

24 July 2013

*Statutory interpretation – "advise" to commit offence – query whether offence if person did not accept advice – legislation unclear – jury directed to return verdict of not guilty*

*Customs and excise – charge of advising to commit offence – advice not followed – no offence committed*

Scenic Hotel Tonga wished to import a container of items. It approached a customs agent whom the accused worked for in Tonga to facilitate customs clearance. Scenic had prepared a schedule of the goods and had calculated a fee of $91,670.28 as payable for import duties. This document was given to Mr Lui who was employed as a customs agent. Mr Lui then approached a senior employee of Scenic, Mr Ross Brljevich, who was looking to have the goods cleared in Tonga. Mr Lui advised that he could decrease the duties payable to $33,235.44. Scenic proceeded to file an "import entry" for the higher amount of duty which it paid and both Mr Lui and Mr Brjevich informed Customs about the matter and Mr Lui was interviewed by the police. The accused was charged with one count of advising an importer to commit an offence contrary to section 96(3) of the Customs and Excise Management Act 2007. At the conclusion of the Crown case, Mr Pouono for the accused argued that there was no case to answer. He submitted that because no offence had been committed by the importer, that is the importer had not accepted the advice, the accused could not be charged with an offence of advising him to commit an offence under the section.

Held:

1. It was a principle of legal policy that a person should not be penalized except under clear law; so the court, when considering which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so was doubtful, or penalizes him in a way which was not made clear by the legislation in question.

2. The intent of the legislation was unclear and accordingly the Crown did not establish a prima facie case. In accordance with Tongan practice, the court directed the jury to return a verdict of not guilty.

Cases considered:

Beckworth v R [1976] HCA 55; (1976) 135 CLR 569

R v Cuthbertson [1981] AC 470

R v Funaki [2005] Tonga LR 239

Statute considered:

Customs and Excise Management Act 2007

| | | |
|---|---|---|
| Counsel for the Crown | : | Mrs Langi |
| Counsel for the accused | : | Mr Pouono |

**Ruling**

[1] The accused Viliami Lui was charged with one count of advising an importer to commit an offence contrary to section 96(3) of the Customs and Excise Management Act 2007. The particulars are that he on or about the 10th April 2012 at Ma'ufanga did advise Ross Brljevich to commit an offence.

[2] Section 96(3) provides;

> Any Customs broker, who aids, abets, advises or assists in any way an importer or exporter to commit an offence under this Act commits an offence and shall be liable upon conviction to a fine not exceeding $100,000 or to a term of imprisonment not exceeding 10 years, or both.

[3] The evidence established that Scenic Hotel Tonga wished to import a container of items. It approached a customs agent whom the accused worked for in Tonga to facilitate Customs clearance. Scenic had prepared a schedule of the goods and had calculated a fee of $91,670.28 as payable for import duties. This document was given to Mr Lui who was employed as a customs agent. Mr Lui then approached a senior employee of Scenic, Mr Ross Brljevich, who was looking to have the goods cleared in Tonga with an email in the following words;

> "Hi Ross,
>
> Attachment, its my method to decrease your duty/Ct. So all I'm asking you that if you accept it or not. So that I'll start deal it with customs.
>
> Its decrease from TOP 91670.28 to TOP 33235.44.
>
> The difference is $58434.84
>
> You can also tell me how much for me if I do this or you can ring me.

> Thanks Boss awaiting your confirmation"

Mr Brljevich then responded;

> "Can you please advise why there is so much difference from the first amount of $91,670.28. Can you scan and send me a copy of the first document."

The accused replied;

> "Morning Ross,
>
> Attach it's the duty &ct based on Proforma invoice that you send from New Zealand.
>
> The one I sent yesterday it my own invoice to cut down the duty &ct.
>
> I just want to help because I have been a broker here in Tonga since 2006 and I'm telling you $91670.28 its too MUCH for 1x40' FCL.
>
> So which one you want me to lodge with custom. Your early reply would be appreciated so that we can move on.

[4] Scenic proceeded to file an "import entry" for the higher amount of duty which it paid and both Mr Lui and Mr Brjevich informed Customs about the matter and Mr Lui was interviewed by the police. He admitted sending the emails. He said he had told Ross he can decrease the amount of tax using my way and I send him a copy of the estimate. Essentially, the method used by the accused, involved a falsification of values of the goods in the container. Mr Brjevich learned this by comparing the original document prepared by Scenic with the document prepared by Mr Lui for the lesser amount of duty.

[5] Mr Lui was charged with the present offence by the police. At the conclusion of the Crown case, Mr Pouono for the accused argued that there was no case to answer. He submitted that because no offence had been committed by the importer, that is the importer had not accepted the advice, the accused could not be charged with an offence of advising him to commit an offence under the section. Mrs Langi contended that the section should be read disjunctively so that advising an importer or exporter to commit an offence under the Act would constitute an offence even though the advice had not resulted in any offending. She submitted this should be the case because the accused's actions were corrupt, and he was deserving of punishment under the section even though the advice had not been accepted by Scenic and acted on.

[6] Mr Pouono also contended that in any event no "advice" had been given by his client to commit an offence under the Act, an argument with which Mrs Langi also disagreed. On this point, I consider that the language in texts consisting of an invitation by the accused to the importer to reduce the cost of importation by

submitting a document to customs containing he knew false values of goods, could amount to the giving of corrupt advice.

[7] Mr Pouono argued, however, that there had to be evidence that the advice led to the importer accepting the advice and committing an offence. Plainly this would be the case if aiding, abetting or assisting were the basis of the charge. Mrs Langi referred to *R v Funaki* [2005] Tonga LR 239 at 247 where Blackstone is cited and the point made;

> "The phrase "aid, abet, counsel and procure" may be, and generally is, used as a whole even though the accused's conduct may only be properly described by one of the four constituent words. Partly for this reason, the precise meaning of each constituent word has not been authoritatively determined but "aid" and "abet" are generally considered to cover, respectively assistance and encouragement given at the time of the offence, where as "counsel" and "procure" are more apt to describe advice and assistance given at an earlier stage."

[8] She argued that this meant I should consider the word "advise" disjunctively. The section was, she contended, intended to permit prosecution for giving advice to an importer and exporter to perform an act that was unlawful under the Act even though the importer, as here, did not accede to the advice and act upon it. Whilst a disjunctive reading of the section could support that interpretation, I find more persuasive the fact that advice was coupled in the section with the words aid, abet, or assist to mean, as Mr Pouono argued, that the legislature intended prosecution to follow only if the importer acted on the advice and there was evidence that an offence had been committed. This being penal legislation, (the English version consisting of a penalty of $10,000 or a term of imprisonment of 10 years, the Tongan version, as Mrs Langi pointed out, providing for fines of $10,000 or 3 years imprisonment), had the legislature wanted to expose a person to such heavy penalties for giving corrupt advice that was not accepted and did not result in offending, then I consider that should have been expressed far more clearly.

[9] In my view, the interpretation placed on the section by Mr Pouono is preferable to that for which Mrs Langi contends, which I consider doubtful at best. Halsbury vol 44(1) 4th ed, para 1456 provides guidance on the approach which I should take in such circumstances.

> "It is a principle of legal policy that a person should not be penalized except under clear law, or in other words should not be put in peril upon ambiguity; so the court, when considering, in relation to the facts of the instant case which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so is doubtful, or penalizes him in a way which was not made clear by the legislation in question."

See further Lord Diplock in *R v Cuthbertson* [1981] AC 470, at 48, and Gibbs J in *Beckworth v R* [1976] HCA 55; (1976) 135 CLR 569, at 576.

150 [10] Applying these principles to this case, I consider that the intent is unclear and accordingly applying the above rule of construction, the Crown has not established a prima facie case. In accordance with Tongan practice, I will direct the jury to return a verdict of not guilty.

# Lemoto v Veikune

Family Jurisdiction, Nuku'alofa
Lord Chief Justice Scott
FD 17/2013

25 July 2013

*Dissolution of marriage – desertion was not the same as consensual separation – separation period was not two years – petition dismissed*

The husband petitioned for divorce on 22 March 2013 on the grounds that the parties had been separated since 21 March 2011 without either of them intending to maintain normal marital relations. On the day of the hearing the petitioner amended the date of separation to 11 July 2011.

Held:

1. The court heard the petitioner and found that the reality was not that the July 2011 separation was consensual but that in fact the petitioner deserted the respondent at about that time. Two years separation without the parties' consensus that normal marital relations not be maintained or resumed was not a ground for divorce. Furthermore, a petitioner could not seek relief on the basis of his own desertion.
2. The petition was dismissed. The respondent's costs of $400 were to be paid within 14 days. Ancillary relief to be considered following disposal of civil appeal AM 15/13.

Statute considered:
Divorce Act (Cap 29)

| | | |
|---|---|---|
| Counsel for the petitioner | : | Mrs F Vaihu |
| Counsel for the respondent | : | 'O Pouono |

## Judgment

1. This is a defended husband's petition for divorce brought under the provisions of Section 3(1)(f) of the Divorce Act (Cap 29).

2. Section 3(1)(f) is as follows:

"Any husband or wife who is at the time of the institution of the suit domiciled in the kingdom may present a petition to the Supreme Court praying the Court to dissolve the marriage upon evidence:-

> (f) that the respondent and petitioner have been separated for a continuous period of 2 years or more immediately preceding the presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other;"

3. Paragraph 7 of the petition (which was filed on 22 March 2013) stated that:

> "The parties have lived separate and apart since 21st day of March 2011 to date without either of them intending to maintain normal marital relations."

4. On the day of the hearing Mrs Vaihu obtained leave to amend the date 21 March 2011 to 11 July 2011.

5. In her answer (entitled "statement of defense") the respondent wife disputed paragraph 7 of the petition. She pleaded that:

> "(a) the petitioner went on a family and business trip to Australia using the family's travel agency business of Angelica Travel when the respondent managed;
> (b) the petitioner did maintain contact with the respondent as either by electronic means and/telephone; and
> (c) the petitioner came back to Tonga in about October 2012 and has chosen to live separate from the respondent."

6. The petitioner was the only witness. He told the Court that he went to Australia in March 2011, making use of a multiple entry business visa which he had held for many years. He went with the intention of leaving his wife because he "had enough" of her. He returned in June 2011 but he and his wife kept arguing. Apparently the main problem was the wife's alleged incompetence in running the family's travel business. In July 2011 the petitioner again went to Australia. He went to attend a tourism trade show. He told his wife that he was actually going to pick fruit. According to the petitioner he had frequently gone to Australia before for 3 months stays and on this occasion he did not discuss the length of his departure with his wife.

7. Rather than stay 3 months the petitioner actually stayed in Australia until October 2012. What happened on his return is not clear but the petitioner told me that in that month he met the respondent who was now living at her parent's home. According to the petitioner the respondent attempted to have sexual intercourse with him "one last time" after which she would sign his divorce papers. The petitioner's evidence was that he had not had sexual intercourse with his wife since July 2011.

8. In response to questions from the Court the petitioner claimed that he told the respondent "a week after" his arrival in Australia in July 2011 that their marriage was

"all over". The petitioner told the Court that when she was given this news, the respondent was very upset, she was "not at all happy about it". Despite having told his wife that their marriage was over, the petitioner accepted that he continued to communicate with her by telephone and by sending money to her on eight occasions.

9. At the close of the petitioner's case I ruled that the respondent had no case to answer. My reasons are as follows:

10. Section 3(1)(f) requires proof of two distinct ingredients. The first is that the parties had lived separate and apart for 2 years immediately preceding the presentation of the petition. Even disregarding the October 2012 contact, the petitioner's case (upon which the petition was amended) was that he and his wife separated in July 2011. The petition was presented in March 2013 which is less than 2 years after the separation was said to have occurred.

11. The second ingredient requiring proof is that during the separation period neither of the parties maintained or intended to maintain or renew normal marital relations with the other. In undefended suits this ingredient is pleaded, is not disputed and is therefore taken as proved. In the present case the petitioner's own evidence was that his wife was very upset to hear that the petitioner regarded the marriage as over and, in October 2012, made an attempt to renew their sexual congress. The respondent's case was that it was in October 2012, not July 2011 that the final separation took place.

12. Having seen and heard the petitioner it was plain to me that the reality was not that the July 2011 separation was consensual but that in fact the petitioner deserted the respondent at about that time.

13. Two years separation without the parties' consensus that normal marital relations not be maintained or resumed is not a ground for divorce. Furthermore, a petitioner cannot seek relief on the basis of his own desertion (see Section 3(c)).

14. Mrs Vaihu referred me to the three months period provided in Section 3(2)(b) of the Act, however my view is that this period has no application when the parties have not resumed cohabitation to attempt reconciliation. She also suggested that the consequence of my interpretation of the Act was that the petitioner was left with no means to terminate his marriage. In the circumstances as they are now that may well be the case; Tonga's divorce laws are still fault-based and an innocent party (Sections 3(1)(d) and (e) apart) cannot be forced into divorce against his will. Circumstances, however, change and the time may well come when the respondent recognises that her marriage cannot be revived.

**Result:**

1. The petition is dismissed.

2. Respondent's costs of $400 to be paid within 14 days.

3. Ancillary relief to be considered following disposal of civil appeal AM 15/13 which is to be mentioned on 2 August 2013.

## R v Sefesi

Supreme Court, Nuku'alofa
Cato J
CR 50/2011

1 August 2013

*Criminal law – fraudulent misappropriation – only tangible property in Tongan legislation – not electronic transfer of money*
*Criminal procedure – application for indictment to be amended – considerations of court – indictment amended*

The accused was charged with five counts of fraudulent misappropriation. The Crown alleged that the accused had been entrusted with the bank's money for safe keeping as an employee of the bank and he had fraudulently converted to the use of others moneys belonged to the bank and this was represented by a credit in the account of another customer.

Held:

1. "Misappropriation" in the Criminal Offences Act referred to things capable of being stolen and that definition spoke only in terms of tangible property. Although in a sense credits in bank accounts were regarded as equivalent to cash, in reality the law was different - a credit in a bank account reflects no more than a chose in action which at most could only be regarded as intangible property.
2. The Crown conceded that it could no longer maintain that the conversion counts could be sustained under the Tongan definition of property and so applied to have the indictment amended by adding an alternative to the first count relating to falsification of a document under section 159 of the Act. Evidence had been given by the bank officer in connection with count one that the accused had admitted to her forging a bank document with the debited customer's name to assist in a transfer of funds.
3. The court found that there was no prejudice to the accused in making the amendment since the evidence of admission had already been given and the accused could not be said to have been taken by surprise. The evidence was relevant to the existing first count of the indictment to which the alternative amendment was sought, and the lateness in amending arose because of the difficulty associated with resolving issues of law relating to electronic transfers and intangible property under Tongan legislation.

4. The accused pleaded guilty to the alternative count of false accounting and the jury were directed to acquit him on the remaining counts of misappropriation for which the Crown had accepted there was no case to answer.

5. There was an urgent need for Tonga to effect reform of the existing Criminal Offences Act to avoid the problems the Crown encountered. Offences involving dishonesty such as embezzlement, theft and misappropriation generally require to be revisited because they were so important for the maintenance of probity in business and commercial dealings. Consideration was also required to be given to the concept of property itself and electronic transfers so important in banking and commerce today. Penal legislation should be fashioned to plainly meet the demands of the modern age.

Cases considered:

Croton v the Queen (1967) 117 CLR 326
R v Bennitt [1961] NZLR 452
R v Davenport [1951] 1 All ER 600
R v Johai [1972] 2 All ER 449
R v Preddy [1996] AC 815

Statutes considered:

Criminal Offences Act (Cap 18)
Larcency Act 1916 (English)
Supreme Court Amendment Act 2012
Theft Act 1968 (UK)

Counsel for the Crown : Mr Sisifa and Ms Macomber
The accused was unrepresented

## Ruling

[1] The accused had been charged with five counts of fraudulent misappropriation under section 162(b) of the Criminal Offences Act. This section provides;

> Every person who –
>
> (b) "being entrusted with anything capable of being stolen in order that he may retain the same in safe custody or apply, pay or deliver for any purpose or to any person such thing or any part thereof or any proceeds thereof,..."

[2] Shortly after the opening of the trial, I inquired of the Crown prosecutor, Mr Sisifa, the basis upon which it could be said that the accused under section 162(b) of the Criminal Offences Act had committed an offence. At that point, I had thought that he had claimed that the accused had fraudulently acted by debiting one customer's account in favour of another which turned out to be the essence of the Crown case. I

was concerned that under the provisions of the section anything capable of being stolen which is further defined in section 144(2) of the Act could not include a customers' credit in a bank account which is a chose in action. *R v Bennitt* [1961] NZLR 452; *Croton v the Queen* (1967) 117 CLR 326; *R v Davenport* [1951] 1 All ER 600.

[3] Thing capable of being stolen is defined in section 144 as;

> (1) Every animate thing which is the property of any person is capable of being stolen.
>
> (2) Every inanimate thing which is the property of any person is capable of being stolen;
>
> (3) Provided that –
> (a) It is moveable; or
> (b) It is capable of being made movable and has been made moveable only in order to steal it.

[4] The legislature at the time of drafting this provision plainly treated property and things capable of being stolen as tangible items. They had to have a physical presence. The examples in the Tongan legislation of what things may be stolen are plainly tangible. Thus the commentary reads;

> "A horse, dog or fowl is capable of being stolen by reasons of subsection one.
> Money, a boat, or coconuts lying on the ground are capable of being stolen by reason of subsection 2 paragraph;
> (a) Coconuts growing on a tree, yams growing in the ground are capable of being stolen under subsection paragraph
> (b) As soon as the coconuts are detached from the tree of the yams are dug up even though the detaching or digging was done by the thief in order to steal them."

[5] However, Mr Sisifa stated that his case was that the accused had been entrusted with the bank's money for safe keeping as an employee of the bank and he had fraudulently converted to the use of others moneys belonged to the bank and this was represented by a credit in the account of another customer. Mr Sisifa acknowledged that he would be unable to construct a case based on fraudulent conversion from a customer's account since the customer enjoyed a mere chose in action, but he suggested that what was being converted was in reality not a chose in action of the customer but the bank's own money. He said that what the accused had done by electronic transfer was to have applied the property of the bank namely its money representing deposits held by the bank to the credit of the customer without any authorization to do so, either from the bank or the debited customer and hence dishonestly. The electronic transfer had the effect of shifting this money although not in any physical sense. The debit in the customer's account was merely an illustration

of the accused's modus operandi with neither the bank nor the debited customer agreeing to what had been done.

[6] Initially, in the short time I had to consider the matter with the jury absent, I was attracted to the argument Mr Sisifa had presented to me, although the apparent absence of any apparent tangible property concerned me. It seemed to me that there should be no difference in principle between the position of a person who, being entrusted with money in a bag, had converted it to his own use or the use of another and one who being employed by a bank fraudulently converted the bank's money by electronically transferring money that belonged to the bank to his or another's account. The exchange in at least money's equivalent was affected by the electronic transfer, although this was not a physical transfer.

[7] Rather than rule there was no case to answer at that very early stage, when I had heard nothing of the evidence, I allowed the case to proceed. I had intimated to Mr Sisifa, however, were the accused to have been convicted I intended to refer the matter to the Court of Appeal. The problem as I saw it was that the section relating to misappropriation referred to things capable of being stolen and that definition spoke only in terms of tangible property. Although in a sense, as Lord Goddard CJ explained in *Davenport*, credits in bank accounts are regarded as equivalent to cash, in reality the law is different - a credit in a bank account reflects no more than a chose in action which at most could only be regarded as intangible property.

[8] I was advised that the Tongan provisions contained in section 162 of the Act followed the English Larcency Act 1916, and were enacted about a hundred years ago, although the English definition of property seemed wider than the Tongan being described as anything that has value and is the property of any person. Banking with its system of electronic debits and credits has, however, moved well beyond coin and banknotes passing hands and tangible property in that sense.

[9] After I had allowed the case to proceed, *R v Preddy* [1996] AC 815 came to my notice. That was a decision of the House of Lords quashing a conviction for obtaining property by deception namely an advance from a mortgage institution contrary to provisions in the Theft Act, 1968. Section 4(1) of the Act defined property much more broadly than section 144 of the Tongan Act, as including money and all other property, real or personal, including things in action and other intangible property.

[10] *Preddy* concerned electronic transfers from a lending institution to the bank account of a fraudulent borrower. Lord Goff observed;

> Let it be assumed that the lending institution bank account is in credit, and there is therefore no difficulty in identifying a credit balance standing in the account as representing property, ie a chose in action, belonging to the lending institution. The question remains, however, whether the debiting of the lending institution's bank account and the corresponding crediting of the bank account of the defendant and or his solicitor constitutes obtaining of the property. The difficulty in the way of that conclusion is simply that, when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institutions "chose in action".

[11] Lord Goff further explained;

> "... I do not see for myself how this can be properly be described as obtaining property belonging to another. In truth the property which the defendant has obtained is the new chose in action constituted by the debt now owed by the bank, and represented by the credit entry in his own bank. That did not come into existence until the debt so created was owed by him to the back, and it never belonged to anybody else. True, it corresponded to the debt entered into lending institutions bank account; but it does not follow that the property which the defendant acquired can be identified with the property which the lending institution lost when the account was debited. In truth, section 15(1) is here being invoked for the purpose for which it was never designed, and for which it does not legislate."

[12] I also found very useful an article on this subject by Jacquline Lipton of Monash University entitled "Property Offences into the 21st Century". Electronic law Journals JILT, 1999(1). She reviewed the difficulties associated with trying to accommodate older legislation with new means of electronically transferring moneys as here. Importantly, she wrote, having considered the judgment of Lord Goff in *Preddy*;

> "In contrast to cheque payments, there is no way that a payment by electronic funds transfer can be construed as involving physical, tangible property. The electronic system itself does not constitute 'Property.' It is merely a mechanism through which a payment is made. In theory, it effects the transfer of money from one persons' account to that of another. However, the 'money' in question is not tangible property in the form of notes and coins, nor even in the form of a negotiable instrument. Rather the funds are represented electronically by entries in the relevant banks accounts representing debts owed by the banks to their respective customers."

[13] To similar effect is the statement of David M Fox "Property Rights and Electronic Funds Transfer' (1996) Lloyd's Maritime & Commercial Law Quarterly 456, at p457, when it is said;

> "An Electronic Fund Transfer is not a form of property. We cannot reify, and regard as property, a mere process by which instructions are communicated and debts settled between banks. The so-called transfer was only a transaction which adjusted the parties' rights to demand money from the bank. The transfer had consequences for the parties' property, without being property itself."

[14] After hearing more from the Crown's principal witness, a representative of the bank, and after considering *Peddy*, it seemed there was nothing on which the Crown could base a case that tangible property was involved here as is required by section 144. As such, in my view there could be no prima facie case. I readdressed my

concerns to the Crown Prosecutor Mr Sisifa and referred *Preddy* and the Lipton article to him.

[15] The next day, Mr Sisifa fairly conceded that he could no longer maintain that the conversion counts could be sustained under the Tongan definition of property but he applied to have the indictment amended by adding an alternative to the first count relating to falsification of a document under section 159 of the Act. Evidence had been given by the bank officer in connection with count one that the accused had admitted to her forging a bank document with the debited customer's name to assist in a transfer of funds.

[16] I was concerned both with the lateness of this application and the fact that I was being asked to amend by introducing an additional count involving a different offence. Although Tongan law does not provide any amendment provision for indictments, under section 2 of the Supreme Court Amendment Act 2012, a Supreme Court Judge in Tonga has all the powers of a Judge of the High Court in England and Wales. Plainly, the power to amend indictments is inherently important to ensure that the administration of criminal justice and the trial process is fairly and efficiently conducted, and amendments to indictment in practice in Tonga are not uncommonly made. I was unsure, however, whether the power to amend included additional counts involving separate offending, and, in any event, whether, in this case, I should allow the Crown to amend given the lateness of the application. Research, however, established that the Court of Appeal (Criminal Division) in England in *R v Johai* [1972] 2 All ER 449 had rejected an argument that there could not be amendment of the indictment to introduce an additional count after a jury had been sworn and empanelled, although the Court said that "great care" should be taken to ensure there was no prejudice to the accused before an amendment was made.

[17] I considered there was no prejudice to the accused here in making the amendment since the evidence of admission had already been given and the accused could not be said to have been taken by surprise. The evidence was relevant to the existing first count of the indictment to which the alternative amendment was sought, and the lateness in amending has simply arisen because of the difficulty associated with resolving issues of law relating to electronic transfers and intangible property under Tongan legislation.

[18] Shortly, after making my ruling the reasons and the background which I said I would record in writing, because of the unusual nature of the issues, the accused pleaded guilty to the alternative count of false accounting and the jury were directed to acquit him on the remaining counts of misappropriation for which the Crown had accepted there was no case to answer.

[19] In my view, this prosecution illustrates an urgent need for Tonga to effect reform of the existing Criminal Offences Act to avoid the problems the Crown encountered in this case. Offences involving dishonesty such as embezzlement, theft and misappropriation generally require to be revisited because they are so important for the maintenance of probity in business and commercial dealings. Consideration is also required to be given to the concept of property itself and electronic transfers so important in banking and commerce today. Penal legislation should be fashioned to plainly meet the demands of the modern age.

## Fatai v Police

Supreme Court, Nuku'alofa
Scott CJ
AM 12/2013

9 August 2013

*Magistrate's court – no case to answer submission rejected – should be opportunity for defendant to present evidence – appeal allowed*

The appellant was charged with obstruction of the road contrary to Sections 37(b) and 41(2) of the Traffic Act (Cap 156). The appellant pleaded not guilty and a trial was held. At the conclusion of the prosecution's case, counsel for the appellant briefly submitted that there was no case to answer. The Magistrate, rather than ruling on the no case to answer submission, proceeded to judgment and entered a conviction against the appellant in Fasi Magistrate's Court on 17 April 2004. The appellant appealed.

Held:

1. When a submission of no case to answer was made, the accused, or when represented, his counsel, should explain in detail why the submission was being made. After hearing from the defence, the prosecution should be given an opportunity to answer.
2. If a submission of no case to answer was upheld, that was the end of the case against the accused. Where, however, the submission was rejected, the accused should be given an opportunity to present his own evidence and the case proceed to its conclusion and judgment.

Case considered:

Practice Direction 3 March 1962 [1962] I WLR 227

Statutes considered:

Magistrate's Courts Act (Cap 11)
Traffic Act (Cap 156)

Counsel for the appellant : Mrs P Tupou
Counsel for the respondent : S Sisifa

**Judgment**

1. This is an appeal against a conviction entered against the Appellant in Fasi Magistrate's Court on 17 April 2004. The Appellant had been charged with obstruction of the road contrary to Sections 37(b) and 41 (2) of the Traffic Act (Cap 156).

2. The Appellant pleaded not guilty and a trial was held. At the conclusion of the prosecution's case, Mrs. Tupou advised the Magistrate:

> "I seek permission to make a motion and if my motion is rejected then I will call my witnesses."

As recorded, the submission was very brief:

> "I submit there is no case to answer because this is a criminal case and the prosecutor has not been able to prove his charge."

In answer, the prosecutor was equally brief:

> "The prosecutor believes he has already done his job in proving the charge through the witnesses who have already [given] evidence this morning."

3. Given the very broad nature of these submissions, it is not altogether surprising that the magistrate, rather than rule on the no case submission proceeded to judgment. In taking that step he fell into error, conceded by Mr. Sisifa. This was a fatal procedural error and the appeal must be allowed.

4. It may be helpful to explain the place and purpose of a submission of " no case to answer" since no reference is made to such a submission either in section 24 (and especially section 24 (5)) of the Magistrate's Courts Act (Cap 11) or in the Tongan Magistrates' Bench Book (Part J defended hearings).

5. As provided in section 24 (4) and (5), after an accused has pleaded not guilty, the magistrate then proceeds to hear the evidence against the accused. What is not included in the statutory procedure is the right of an accused, at the close of the prosecution case, and before any evidence is called on his behalf, to submit that there is no case for him to answer.

6. When a submission of no case to answer is made, the accused, or when represented, his counsel, should explain in detail why the submission is being made. After hearing from the defence, the prosecution should be given an opportunity to answer.

7. In Practice Direction 3 March 1962 [1962] I W.L.R 227, the Lord Chief Justice of England and Wales explained that magistrates should be guided by the following considerations:

> "A submission that there is no case to answer may properly be made and upheld:

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

8. Where the magistrate finds either of these tests to be satisfied he will explain why in his ruling and then acquit. Where however he is not satisfied with the submission then he should simply rule against it, without giving reasons. All that should be said is "I find that there is a case for the accused to answer and reject the submission."

9. If a submission of no case to answer is upheld, that is the end of the case against the accused. Where, however, the submission is rejected, the accused should be given an opportunity to present his own evidence and the case proceeds to its conclusion and judgment as provided for in sections 24 (6) to (9) of the Act.

**Result:**

1. Appeal allowed.
2. Matter remitted for re-trial before a different magistrate.

# Taione v Tu'ivakano anors

Supreme Court, Nuku'alofa
Scott CJ
CV 2/2013

22 August 2014

*Constitutional law – declaration sought that payments made by the Kingdom of Tonga were wrong and unlawful – Constitution to be interpreted purposively and flexibly – declaration not made*

The plaintiff sought a declaration that payments made by the second defendant of $2 million to Lord Kalaniuvalu on 30 June 2011, of $119,500 to Prince Tungi on 16 June 2011 and of $1 million to Prince Tu'ipelehake on 10 February 2012 were wrong and unlawful. The grounds advanced in support of the application were that they were in breach of the Land Act, and that they did not comply with the requirements of clause 19 of the Constitution and with section 9(1) of the Public Finance Management Act 2002.

Held:

1. The court found that the first ground of objection to the payments, namely that they were in breach of the Land Act, was not arguable in this Supreme Court.
2. Clause 19 of the Constitution provided that, save in emergencies (19(ii)), money must not be paid out except where specifically permitted by the terms of an Act passed beforehand by the Legislative Assembly. The question therefore was whether the Finance Management Act which permitted the creation of a Contingency Fund which allowed payments for general purposes which were not specified in advance and which were not to be paid only in emergency situations, was itself unconstitutional.
3. Constitutions had to be construed purposively and flexibly taking into account "the realities and needs of the modern world". Although read literally, clause 19 seemed to disallow expenditure which had not been specifically authorized by Act of Parliament, save only in emergencies, the court was satisfied that it should not so be construed. The adjustment provisions of section 12 lawfully allowed payment for reasonably necessary purposes not specifically identified and beforehand approved by Parliament.
4. The court declined to grant the declaration sought.

Case considered:
Tu'itavaka v Porter & Ors [1989] Tonga LR 14

Statutes considered:
Constitution of Tonga (Cap 2)
Land Act (Cap 132)
Public Finance Management Act 2002

The plaintiff appeared in person
Counsel for the defendants : Mr 'A Kefu (AG)

## Judgment

[1] This Judgment should be read together with my Decision in the same matter dated 21 June 2013. The Plaintiff seeks a Declaration that payments made by the Second Defendant of TOP $2 million to Lord Kalaniuvalu on 30 June 2011, of TOP $119, 500 to Prince Tungi on 16 June 2011 and of TOP $1 million to Prince Tu'ipelehake on 10 February 2012 were wrong and unlawful.

[2] As explained in paragraph 19 of my Decision (although, with hindsight perhaps not as clearly as I would have wished) I am of the view that the first ground of objection to these payments namely that they were in breach of the Land Act, is not arguable in this Court. The second ground of objection is that the payments did not comply with the requirements of Clause 19 of the Constitution and with Section 9 (1) of the Public Finance Management Act 2002. Alleged breach of the Public Procurement Regulations 2010 is not pursued.

[3] Clause 19 is as follows:

> "Expenditure to be voted"
>
> No money shall be paid out of the Treasury nor borrowed nor debts contracted by the Government but by the prior vote of the Legislative Assembly, except in the following cases:
>
> (i) Where an Act duly passed by the Legislative Assembly gives power to pay out money or borrow or contract debts, then money may be paid out, or borrowing carried out or debts contracted in terms of that Act; and
>
> (ii) In cases of war or rebellion or dangerous epidemic or a similar emergency, then it may be done by the Minister of Finance with the consent of Cabinet and the King shall at once convoke the Legislative Assembly and the Minister of Finance shall state the grounds for the expenditure and the amount."

Section 9 is as follows

"(1) No public money shall be expended unless the expenditure has been authorized by an Appropriation Act limited in accordance with subsection (2) or is statutory expenditure.

(2) The authority to expend money or incur expenses or liabilities under an Appropriation Act lapses at the end of the financial year to which that Act relates.

(3) Subject to section 10, any money appropriated under this section may be expended only in relation to that appropriation and for no other purpose.

(4) –

(5) Donor funds received subsequent to the passage of the Appropriation Bill shall be made available to the respective votes without further approval from the Legislative Assembly."

[4] Section 10 deals with transfer of funds between programs within a Ministry.

[5] Section 12 of the Act is as follows:

"Adjustment for Contingency Fund

(1) The Estimates presented to the Legislative Assembly shall contain a vote for a Contingency Fund, with a proposed appropriation not exceeding 5 per cent of the Tonga Government Fund.

(2) When the Minister considers that expenditure from the Public Fund in any financial year in excess of or without appropriation by the Legislative Assembly should be approved, he may, with the approval of Cabinet transfer to one or more nominated programs from the Contingency Fund such sum or sums as he considers necessary up to but not exceeding the amount of the balance from time to time available in the Contingency Fund.

(3) If, during any review of economic and fiscal performance, the Cabinet determines that it is necessary to redirect spending, the Minister, with the consent of Cabinet may sequestrate any amounts from any program or programs and such amounts shall be made available to the Contingency Fund.

(4) No expenditure in excess of, or without appropriation other than provided in this section, shall be permitted."

The Public Fund is defined in section 15. No evidence was given in relation to this section.

[6] Section 2 of the Act defines "Contingency Fund" to mean:

> "Expenditure that –
> (a) Could not have reasonably expected to have been included in the Estimates of the Vote;
> (b) Becomes essential to the carrying on of the program operations; and
> (c) Cannot be met through the re-allocation of financial resources from within a program allocation or from within the total allocation to the relevant Ministry programs:"

[7] Two substantial affidavits were filed on behalf of the Crown on 9 August 2013. The first was by Lusitania Latu Eke, Chief Economist and Head of the Budget Division, the second by 'Ana Fakaola 'I Fanga Lemani, Acting Head of the Treasury Department, both of the Ministry of Finance and National Planning. From these affidavits and the affidavits filed by Mr. Taione on 15 January 2013 and 12 April 2014, several key facts emerged which were not disputed by Mr. Taione.

[8] On about 17 February 2011 the Deputy Prime Minister and Minister of Transport received a paper (exhibit D to Mr. Taione's supplementary affidavit) containing proposals for the renewal of leases at Tonga's Airports including Fuamotu. The reorganization of the lease arrangements at the Airports was stated to be one of the conditions precedent to obtaining a very substantial injection of funds (US $30 – 35 million) by the World Bank. Included in the leases to be reorganized were those of Princes' Tungi and Tu'ipelehake and Lord Kalaniuvalu, these leases being the subject matter of this application.

[9] In an underlined paragraph on page 4 of the paper it was emphasized that "there is little if any room for delay in any aspect. Accordingly the lack of timely resolution on these issues is likely to result in the opportunity for financing this large grant being lost". It was also a requirement of the World Bank that the lease agreements with the landholders were to be of similar duration and at the same or similar rates of rent.

[10] On 23 March 2011, Cabinet Decision 205, it was agreed in principle that TOP$3.7 million would be paid to Lord Kalaniuvalu and that TOP$119,500 would be paid to Prince Tungi. The first payment was for a 99 year lease and the second for twelve months. On 15 June 2011 purportedly acting under Section 12 (2) of the Public Finance Management Act, Cabinet approved transfer of TOP$1,347,000 from the Finance Department to the Contingency Fund. It also approved payment from the Contingency Fund of TOP$120,000 to the Ministry of Transport for payment to Prince Tungi, again under the provisions of section 12 (2). On 30 June 2011 by Cabinet Decision 579 (confirmed 1 July 2011) approval was given pursuant to section 12 (3) for sequestration amounting to TOP$2.5 million and subsequent allocation of TOP$2 million to the Ministry of Transport. This sum, less deductions was then paid to Lord Kalaniuvalu on 30 June 2011.

[11] On 12 January 2012, Cabinet Decision 29, payment of TOP$2 million to Prince Tu'ipelehake was approved. On 10 February 2012 TOP$ 1 million of the sum was paid out of the Ministry of Finance's "other special projects" vote. The remaining TOP $1 million owed to Prince Tu'ipelehake, together with the balance of TOP$ 1.7 million owing to Lord Kalaniuvalu was paid following passage of the Supplementary Appropriation Act 2012 and are not in issue in these proceedings.

[12] Mr. Taione, in paragraph 5 of his very helpful and excellently presented opening statement filed on 29 July 2014 pointed out that the payments in question were not specifically approved by the Legislative Assembly. He also submitted:

(i) That recourse to the Contingency Fund was not permitted since the expenditures in question were reasonably foreseeable;
(ii) That payments could only be approved for expenditure in the year of approval;
(iii) That it was not permissible to add to the Contingency Fund by sequestration if the result was that the Contingency Fund thereby exceeded the 5% limit imposed by section 12 (1);
(iv) That there was no evidence of any review as required by section 12 (3); and
(v) That there was nothing to show that section 12 (6) had been complied with.

[13] It is important to remember where the burden of proof lies: it is with the Plaintiff. In my view submissions (iv) and (v) fail because the absence of evidence does not prove that the omission complained of occurred. Submission (i) fails because, apart from the suggestion that negotiations for the improvement of the airports had been underway for a long time, there was insufficient evidence to show whether the World Bank's pre-conditions were or were not reasonably foreseeable. Submission (ii) overlooks the fact that the payments for the lengthy leases were in fact all made in the current financial year. I do not think that commitments to expenditure to be met in subsequent years are prohibited by the Act. As to submission (iii) I take the view that the figure of 5% relates to the original size of the Contingency Fund, as approved by Parliament, but does not impose a cap of 5% after sequestration. It should also be pointed out that the breaches complained of in submissions (i) to (v) all involved sections of the Act other than section 9 which is the section which is relied on by the Plaintiff in the Statement of Claim.

[14] In my opinion the strongest argument advanced by Mr. Taione was that the very substantial payments for the leases were not, as a matter of fact, the subject of specific and identified Parliamentary approval. In other words, the members of Parliament who were not Cabinet members had no opportunity to discuss these payments before they were made. Adopting the 6 August 2012 advice given by the former Attorney General, Mr. Taione argued that "shuffling money" through the Contingency Fund when the expenditure was reasonably foreseeable and there was ample opportunity for supplementary appropriation to be applied for was in breach of Clause 19 of the Constitution.

[15] Careful examination of Clause 19 reveals that, save in emergencies (19 (ii)) money must not be paid out except where specifically permitted by the terms of an Act passed beforehand by the Legislative Assembly. The question therefore is whether the Finance Management Act which permits the creation of a Contingency Fund which allows payments for general purposes which are not specified in advance and which are not to be paid only in emergency situations, is itself unconstitutional.

[16] In *Tu'itavaka v Porter & Ors* [1989] To. L.R 14 the Supreme Court explained, after a very thorough review of the authorities, that constitutions have to be construed purposively and flexibly taking into account "the realities and needs of the modern world". Although read literally, Clause 19 seems to disallow expenditure which has not been specifically authorized by Act of Parliament, save only in emergencies, I am satisfied that it should not so be construed. In my opinion the adjustment provisions of section 12 lawfully allow payment for reasonably necessary purposes not specifically identified and beforehand approved by Parliament. In my opinion, the sanction attracted by "shuffling through" the Contingency Fund is not legal, but political. Where substantial payments are to be made for previously unidentified purposes, supplementary appropriation is, if at all feasible, the politically correct and wise way to proceed.

[17] In his written submissions filed on 30 July 2014 (and in his submissions filed on 12 March 2013) Mr. Kefu pointed out that, as interested parties, the estate holders should have been either joined as parties or at the very least have been served with the papers as interested parties (see RSC (E&W) O 53r 5 (3)) and that the Defendant should have been "the Kingdom of Tonga" rather than the named Defendants, some of whom are no longer members of Cabinet and against several of whom there was no evidence of actual participation in the decisions impugned. I agree with both these submissions. In fact, however, none of the Defendants, with the exception of the 8th Defendant, filed a Defence or took any part in the proceedings and neither did the estate holders. I do not think that the procedural shortcomings identified by Mr. Kefu have resulted in any prejudice to those who have been affected.

**Result:**

I decline to grant the declaration sought.

There will be no order as to costs.

# Finau v Fakahua

Supreme Court, Nuku'alofa
Scott CJ
AM 9/2013

23 August 2013

*Civil procedure – appeal filed out of time against Magistrates' Court decision – right to appeal not lost – Supreme Court granted leave to appeal out of time*

The appellant commenced proceedings in the Magistrates' Court in 2008. The matter first came before the Supreme Court in October 2010 where it was ordered that the matter be remitted to the Magistrates' Court for continuation of the trial. The Magistrates' Court set 11 April 2011 as the date for the resumption of the trial however neither party appeared on that date and the action was struck out. On 29 August 2012 the appellant filed a notice of appeal against the strike out order. On 13 September 2012 a Magistrate issued an order refusing the appeal against the strike out order.

Held:

1. The Magistrates' Courts Act provided that in every civil case every party had the right of appeal to the Supreme Court. The appellant should have appealed within 10 days after the date of the Magistrate's decision. The question was whether failure to comply with the time limit for filing the appeal meant that the right of appeal was lost.
2. Time limits for filing appeals were usually included in regulations or rules to the statute rather than in the statute itself. Where limits were included in the rules the Court generally had the power to extend the time for the avoidance of injustice to the parties. Where, however, Parliament defined the limits by Act, the Court could not extend the limits unless it reached the conclusion that the specified limit was directory rather than imperative. In order to ascertain the character of the limit in question all the circumstances must be looked at.
3. The court took into account the wording of section 74(1), the difficulties that faced the courts and practitioners in Tonga and the dire consequences of strict adherence to a 10 days limit. The court was satisfied that section 75(1) was directory rather than imperative and that a person who wished to appeal to the Supreme Court against a decision of the Magistrates Court did not lose that right of appeal because more than 10 days were allowed to pass before the notice of appeal was lodged with the court.

4. Application should be made to the Supreme Court for leave to appeal out of time. This application should be supported with the proposed grounds of appeal and a supporting affidavit. If leave was refused that would be the end of the matter; if leave was granted then the Supreme Court should order a transcript of the proceedings in the Magistrates Court to be prepared. A Magistrate had no jurisdiction to refuse an application to the Supreme Court for leave to appeal out of time.
5. The matter commenced approximately eleven years ago, and involved a complaint of professional misconduct against the respondent, which had been to the Law Society and then to the Supreme Court twice, as well as to the Magistrates' Court. This had not been substantively heard and adjudicated upon. The unmeritorious state of affairs strongly suggested that procedural shortcomings should be overlooked and the matter brought on for trial at the earliest opportunity.
6. Leave to appeal was granted and the court ordered that the parties should request a date for hearing before another magistrate.

Cases considered:

Howard v Bodington (1877) 2 PD 203
MBf Bank v Mangisi [2005] Tonga LR 396
Schafer v Blyth [1920] 3 KB 143

Statute considered:

Magistrates' Courts Act (Cap 11)

Counsel for the appellant : L M Niu
Counsel for the respondent : Mrs Vaihu

## Judgment

1. The Appellant commenced proceedings in the Magistrates' Court in 2008. The matter first come before me in October 2010 and in my judgments of 11 October 2010 and 10 January 2011 I briefly set out the history of the action which I ordered remitted to the Magistrates' Court for continuation of the trial.

2. On 29 March 2011 the Magistrates' Court set 11 April 2011 as the date for the resumption of the trial however neither party appeared on that date and the action was struck out.

3. It was not until 29 August 2012 that the Appellant filed a notice of appeal against the strike out order. On 13 September 2012 a Magistrate issued an order as follows:

> "re: Notice of Appeal has been refused
> 1. Notice of Appeal is way out of time.
> 2. I cannot rely on unsupported allegations for failure of counsels to appear either,

> 3. When our records clearly show that both counsels were present when the hearing date was fixed."

4. This is an application, commenced by way of letter addressed to the Supreme Court dated 14 November 2012, seeking leave to appeal against the Magistrate's order of 29 August 2012.

5. Section 74(1) of the Magistrates' Courts Act states that:

> "In every civil case ... every party shall have a right of appeal to the Supreme Court from any judgment, sentence or order of a magistrate."

6. Section 75(1) provides that:

> "The appellant shall *within 10 days* after the date of the Magistrate's decision give written notice to the magistrate and to the other party stating his intention to appeal and the general grounds of appeal." (Emphasis added)

After the provisions of Section 75 have been complied with the clerk of the Magistrates' Court is required to send the appeal papers to the Supreme Court (Section 76).

7. Section 80 provides that the Supreme Court may, upon hearing the appeal "affirm reverse or amend the decision of the magistrate or may remit the case with the opinion of the Supreme Court ... or may make such other order ... as it thinks just and may by order exercise any power that the magistrate might have exercised."

8. Section 81 provides that:

> "No decision of a magistrate shall be reversed or varied for any defect in form therein or in any of the proceedings before the Magistrate but every appeal shall be decided on its merits only."

9. Mr Niu conceded that while he had filed a notice of appeal against the order of 11 April 2011, no notice had been filed against the order of 13 September 2012. Mrs Vaihu however accepted that a magistrate has no jurisdiction to strike out an appeal to the Supreme Court and since want of jurisdiction was the only complaint against the decision of 13 September 2012 I am of the view that the failure to lodge a formal appeal against the decision should not be fatal.

10. The next question is whether failure to comply with the requirements of Section 75(1) has the consequence that the right of appeal granted by Section 74(1) is lost.

11. Time limits for filing appeals are usually included in regulations or rules to the statute rather than in the statute itself. Where limits are included in the rules the Court generally has the power to extend the time for the avoidance of injustice to the parties (*Schafer v Blyth* [1920] 3 KB 143). Where, however, Parliament has itself defined the limits by Act, the Court cannot extend the limits unless it reaches the conclusion that the specified limit is directory rather than imperative. In order to ascertain the

character of the limit in question all the circumstances must be looked at (*Howard v Bodington* (1877) 2 PD 203).

12. Taking into account, in particular, the wording of Section 74(1), the difficulties facing the courts and practitioners in Tonga and the dire consequences of strict adherence to a 10 days limit, I am satisfied that Section 75(1) is directory rather than imperative and that a person who wishes to appeal to the Supreme Court against a decision of the Magistrates Court does not lose his right of appeal because more than 10 days are allowed to pass before the notice of appeal is lodged with the court.

13. In my view the correct procedure, following failure to comply with Section 75(1) is for application to be made to the Supreme Court for leave to appeal out of time. This application should be supported with the proposed grounds of appeal and a supporting affidavit. If leave is refused that will be the end of the matter; if leave is granted then the Supreme Court will order a transcript of the proceedings in the Magistrates Court to be prepared. In my opinion a Magistrate has no jurisdiction to refuse an application to the Supreme Court for leave to appeal out of time.

14. Turning then to the merits of the appellant's grounds of appeal, I am inclined to agree with Mrs Vaihu that there is really no acceptable reason for waiting until August 2012 to appeal the 11 April 2011 strike out. The Appellant says that his former solicitors failed to follow his instructions to prosecute his appeal however as pointed out by the Court of Appeal in *MBf Bank v Mangisi* [2005] Tonga LR 396, 399 this is not a good reason for not complying with the rules.

15. On the other hand, this litigation, which has its roots in LA 02/2002, commenced approximately eleven years ago, which involves a complaint of professional misconduct against the Respondent, which has been to the Law Society and then to the Supreme Court twice, as well as to the Magistrates' Court, has still not been substantively heard and adjudicated upon. In my opinion this unmeritorious state of affairs strongly suggests that procedural shortcomings should be overlooked and the matter brought on for trial at the earliest opportunity.

16. On 10 January 2011 I adjudged that Magistrates Court Civil Action 166/08 be brought to trial for hearing and judgment. I now repeat that order.

**Result:**

(i) Order of 13 September 2012 is set aside.
(ii) Leave to appeal against the order of 11 April 2011 is granted.
(iii) The order of 11 April 2011 is set aside.
(iv) The parties are to request a date for the hearing of civil action 166/2008 at the earliest opportunity before another magistrate.
(v) No order for costs.

# Maile v Minister of Lands anor

Land Court, Nuku'alofa
Scott P
LA 27/09

28 August 2013

*Land law – application for strike out – drawn out nature of dispute – statement of claim struck out*

The second defendant applied for an order that the statement of claim be struck out because the action had not been set down for trial since the writ was issued, over two years ago, in September 2009; and that it was an abuse of the process of the Court. The dispute between the parties, which concerned a town allotment, had a long history which was summarized in the judgment.

Held:

1. The verdict of the Court in LA 5/2008 which was not appealed stood. Given the long drawn out nature of the dispute it was incumbent on the plaintiff to prosecute his action with reasonable despatch. He failed to do so, the result being that the second defendant remained deprived of the possession of the allotment awarded to him by the Court in 2008. This was clearly most unsatisfactory.
2. The application succeeded on both grounds and the statement of claim was struck out.
3. The court raised the question whether the Land Court had the power to commit for contempt on the ground of disobedience of its orders. The power of a superior court of record to enforce its orders by committal was part of its inherent jurisdiction; that this power was not derived from statute but instead flowed from the very concept of a court of law. The Land Court was a superior court of record and therefore had an inherent right to enforce its orders by way of committal.

Cases considered:

Connelly v DPP [1964] AC 1254; [1964] 2 All ER 401
Executors of Dr Sam Lin Wang v Commercial Factors Ltd [AC 6 of 2011]
Lever Bros Ltd v Kneale and Bagnall [1937] 2 KB 87
Taylor v Attorney-General [1975] 2 NZLR 675

Rules considered:
Land Court Rules 2007
Supreme Court Rules 2007

Plaintiff appeared in person
Counsel for the first defendant : Mr 'A Kefu Solicitor General
Counsel for the second defendant : Ms L Tonga

**Decision**

1. This is an application by the Second Defendant for an order that the Statement of Claim be struck out:

(a) because the action has not been set down for trial since the writ was issued, over two years ago, in September 2009 (O.2 r 2 Land Court Rules and O.8 r 8 (3)(b) of the Supreme Court Rules); and
(b) on the ground that it is an abuse of the process of the Court (O.8 r 8(1)(a)).

2. The dispute between the parties, which concerns a town allotment at Tofoa Lot 36 on Survey Plan 3403, has a long history which must first be summarized.

3. In 1993 the then Minister of Lands approved the grant of the allotment to the Second Defendant, however that grant was cancelled and the allotment was instead granted to one 'Enele Ongoongotau. Shortly after this grant the Plaintiff, being a relative of 'Enele, moved onto and began to clear the land.

4. In 1997 the Second Defendant brought proceedings in the Land Court LA 628/97 to set aside the grant to 'Enele. In 2001 the Land Court found in favor of the Second Defendant, ordered the cancellation of the grant and directed the Minister to reconsider the Second Defendant's claim to have the land granted to him. An appeal by 'Enele was dismissed by the Court of Appeal in July 2003 and in June 2004, after meetings were held at the Ministry to consider the competing claims, the Ministry advised the Plaintiff that it had been decided to grant the land to the Second Defendant. The Plaintiff was given notice to quit but he did not comply.

5. On 19 January 2007 the allotment was granted to the Second Defendant and a second notice to quit was served on the Plaintiff. He did not comply.

6. On 14 February 2008 the Second Defendant commenced proceedings for a vacant possession against the Plaintiff (LA 5 of 2008). A certificate of service was filed but no defence was filed by the Plaintiff.

7. On 8 September 2008 the Second Defendant's case was formally proved and on 12 September 2008 the Plaintiff was ordered to vacate the allotment forthwith. Paragraph 3 of the order warned the Plaintiff that failure to comply with the order "will amount to a contempt of Court". The Plaintiff did not comply.

8. On 12 February 2009 the Plaintiff filed an application for leave to apply for committal of the Plaintiff for failing to comply with the order of 12 September 2008

and leave was granted on 15 April 2009. On 23 May 2009 the Plaintiff applied for a stay of the order of 12 September 2008.

9. Both applications were heard together and on 3 July 2009 the Plaintiff was found to be in contempt of court. He was again ordered to vacate the allotment, by 3 August 2009. The application for a stay of the Order of 12 September 2008 was refused. The Plaintiff did not comply with the Order of the Court.

10. On 14 August 2009 the Plaintiff appealed (AC 28 of 2009). He sought an order quashing "the orders" of the Land Court and a stay of the judgment of 18 September 2008. It will be noted that there was no appeal against the *judgment* of 18 September 2008 and, as appears from the judgment of the Court of Appeal dated 14 July 2010, the only "orders" considered were the orders of 3 July 2009.

11. The Court of Appeal allowed the appeal against the orders of 3 July 2009. It took the view that the Land Court had no power to commit for contempt for failure to obey its orders. No order was made on the application for a stay. The Court concluded its judgment with the following remarks:

> "… it should be quite clearly understood by the Appellant that his success in this appeal is likely to prove Pyrrhic unless he takes prompt steps to resolve the very longstanding dispute about this land. He should be in no doubt that his present success is only procedural and that in any further substantive proceeding he would face the problem of the accumulated past decisions. We discussed with counsel the present position which, on any view, is very unfortunate for both parties. Ms Tonga indicated her client would allow some further reasonable time for the Appellant to obtain another allotment and move his house there. It may be, bearing in mind that the long saga of this litigation began with some errors in the Ministry of Land, that the present Minister may be able to assist in the solution by making an alternative allotment available to the Appellant, to which he could move his house. We can only express our strong encouragement to all parties to make the endeavour."

12. On 17 September 2009, a month after the 14 August 2009 appeal AC 28/09 was lodged, the present action LA 27 of 2009 was commenced. Paragraph 5.5. of the Statement of Claim states:

> "As a result of the mistake advice by the staff (of the Ministry of Lands] … 'Enele's entitlement to the Allotment was treated as a new applicant with the result that the Land Court held in 2001 in proceedings LA 628 of 1997 that the Minister of Lands at the time erred in granting the Allotment to 'Enele Ongoongotau and registered him in 1993."

13. The Statement of Claim does not refer to the fact that LA 628/97 was the subject of an appeal to the Court of Appeal that was dismissed (AC 14/202).

14. On 3 November 2009 the Second Defendant filed his Defence. He pointed out that LA 628/97 which had decided against 'Enele was unsuccessfully appealed. Furthermore, no defence was filed in LA 5/2008 and no appeal was filed against the

Land Court's judgment in favour of the Second Defendant. It will be seen from the introduction to the Plaintiff's Statement of Claim that his claim to a right to reside on the allotment is dependent on the validity of 'Enele's claim, 'Enele being his brother.

15. In the supporting affidavit to this application, in addition to the facts already summarised, the Second Defendant averred that he and the Plaintiff had several meetings with the Minister of Lands between 2001 and 2007 when he received his deed of grant. He also deposed that in an attempt to resolve the impasse he had approached the Ministry which on 13 September 2012 wrote to the Plaintiff [Exhibit A] notifying him that an allotment had been found for him at Hofoa to allow him to comply with the remarks of the Court of Appeal set out in paragraph 11 above. The Plaintiff has not complied.

16. On 28 August 2012 the action was called on for mention before the Court. Mrs Tupou appeared to represent the Plaintiff. She told the Court that she had just been briefed and obtained leave to inspect the file. On 21 September 2012 Mrs Tupou withdrew. I told the Plaintiff that further delay in advancing his action would not be acceptable. Ms Tonga advised the Court that she would be making the present application which was eventually filed on 13 March 2013.

17. On 27 August the parties appeared. The Plaintiff was unrepresented. No affidavit or other submissions were filed by him. The Plaintiff repeatedly suggested that his case had never been properly heard. He denied ever meeting the Minister. He admitted that he had not responded to the letter from the Ministry dated 13 September 2012. The Plaintiff plainly felt aggrieved by what had taken place but did not appear to be able to understand the consequences of the previous determinations of the various courts which have handled this dispute since 1993.

18. It is plain to me that the verdict of the Court in LA 5/2008 which has not been appealed stands. It is also plain to me that 'Enele's appeal having been dismissed there is now no available ground on which to re-open consideration of the issues between the parties. Given the long drawn out nature of this dispute it was incumbent on the Plaintiff to prosecute his action with reasonable despatch. He has failed to do so, the result being that the Second Defendant has remained deprived of the possession of the allotment awarded to him by the Court in 2008. This is clearly most unsatisfactory.

19. The application succeeds on both grounds and the Statement of Claim is struck out.

20. Before leaving the matter, I wish to raise, with the greatest respect, the question whether the Land Court has power to commit for contempt on the ground of disobedience of its orders.

21. In allowing the Plaintiff's appeal [AC 28 of 2009] the Court of Appeal held that an order for possession of land could not be enforced by an order for committal since the Rules of the Land Court provide that only orders *other than* orders for possession can be so enforced. The Court expressed the view that:

> "It needs to be borne in mind that the Land Court is a purely statutory court and it is questionable whether a power to commit for contempt in any manner could be implied into the rather terse statement of its powers in the Land Act."

22. This judgment was followed in 2011 by the *Executors of Dr Sam Lin Wang v Commercial Factors Ltd* [AC 6 of 2011], in which the power of the Supreme Court to appoint a receiver was considered. During discussion of the issue the Court held that the appointment of a receiver was purely procedural and that the Court had the power to make a rule governing the procedure whereby such appointments should be made. The Court also approved *Lever Bros Ltd v Kneale and Bagnall* [1937] 2 KB 87 in which "the issue before the Court was whether ordering a person to be committed to prison was a matter of practice and procedure. The Court of Appeal concluded it was." This conclusion, adopted by the Court of Appeal suggests that there is no objection to a rule being made (similar to O 29 R.5 of the Supreme Court Rules) specifically allowing the orders of the Court to be enforced by committal (if such power is not already imported by O.2 r 2 of the Land Court Rules).

23. There is a further consideration. It has generally been accepted that the power of superior court of record to enforce its orders by committal is part of its inherent jurisdiction (see e.g. *Taylor v Attorney-General* [1975] 2 NZLR 675 and that this power is not derived from statute (in this case, the Land Act) but instead flows from the very concept of a court of law (see *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401). In my respectful opinion it cannot be doubted that the Land Court is a superior court of record and therefore it has an inherent right to enforce its orders by way of committal. Although the power to commit is not now before this Court for decision I respectfully express the opinion that it would be desirable if an opportunity were to be found for the Court of Appeal to review its conclusion reached in AC 28 of 2009.

**Result:**

The Application succeeds. The Statement of Claim is struck out. I will hear counsel as to costs.

## R v Tonga

Supreme Court, Nuku'alofa
Scott CJ
CR 66/2013

24 September 2013

*Criminal procedure – 2012 amendments to the Criminal Offences Act – "simple" or "serious" should always be included in the charge – determine whether should be Magistrate's Court or Supreme Court matter*

On 5 March 2013 the accused was charged with one offence of bodily harm. The particulars were that the accused "did cause bodily harm" to the complainant, Pualani 'Ahokovi, when he "repeatedly punched her causing injuries to her face". On 25 March 2013 the prosecutor filed notices to the magistrate and to the accused that upon the appearance of the accused before the Court to answer to the charge, the prosecutor would have to apply to have the accused committed for trial to the Supreme Court. In view of the fact that the charge faced by the accused was required to be tried in the Magistrate's Court, these notices were filed in error. The error was not spotted either by the magistrate or by defence counsel and the accused was committed for trial to the Supreme Court on 24 June 2013.

Held:

1. The wide-ranging amendments to the Criminal Offences Act made by the amendment Acts of 2012 were designed, among other objectives, to reserve the trial of less serious matters to the Magistrate's Courts while sending more serious matters to the Supreme Court. For the avoidance of confusion, where an offence may be either "Simple" or "Serious", depending on the circumstances, the word "Simple" or "Serious" should *always* be included in the charge or indictment. Had this been done the procedural errors which occurred might well have been avoided.
2. It was a matter of concern that so many mistakes were made. The Attorney-General may wish to consider whether further workshops were needed to ensure that all concerned properly understand the substantive and procedural changes brought about by the 2012 amendments to the Magistrate's Court Act and to the Criminal Offences Act.
3. The matter was remitted to the Magistrate's Court for disposal of the charge dated 5 March 2013. A fresh summons to the accused was to be issued.

Statutes considered:
Criminal Offences Act (Cap 18)
Criminal Offences (Amendment) Act 2012
Magistrates' Courts Act (Cap 11)

Counsel for the Crown : Ms S 'Atiola
Counsel for the accused : 'O Pouono

**Ruling**

1. On 5 March 2013 the accused was charged with one offence of bodily harm contrary to Section 107(1), 2(c), 5(a) and (b) of the Criminal Offences Act (as amended by the Criminal Offences (Amendment) Act 2012).

2. As will be seem from an examination of Section 107, the allegation was that the accused unlawfully (subsection (1)) caused a "wound which is not severe" (subsection 2(c)) contrary to subsections 5(a) and (b) which provide that this offence:

> "(a) is punishable by a term of imprisonment for any period nor exceeding three years: and
>
> (b) *shall be heard and determined by the Magistrate's Court*." (emphasis added).

3. On 25 March 2013 the prosecutor filed forms 19 and 20 in the Magistrate's Court. These forms are notices to the magistrate and to the accused that upon the appearance of the accused before the Court to answer to the charge, the prosecutor will apply to have the accused committed for trial to the Supreme Court. In view of the fact that the charge faced by the accused was, by virtue of subsection 5(b) required to be tried in the Magistrate's Court, these notices were filed in error. The error was not spotted either by the magistrate or by defence counsel and the accused was committed for trial to the Supreme Court on 24 June 2013.

4. On 6 September 2013 an indictment was presented. The offence was described as "Bodily Harm" contrary to Section 107(1)(2) and (4) of the Criminal Offences Act. It will be noted that the section contained in the indictment was not the same section as was included in the charge. The particulars were that the accused "did cause bodily harm" to the complainant Pualani 'Ahokovi when he "repeatedly punched her causing injuries to her face".

5. The medical report describes the complainant as suffering from swelling, tenderness and bruising to her face.

6. In view of Subsection 5(b) the magistrate had no power to commit the accused to the Supreme Court for the offence with which he was charged. Accordingly, the committal was a nullity as was the indictment subsequently filed. Where there is no jurisdiction to commit the error cannot be cured by filing an indictment within the jurisdiction of the Supreme Court.

7. The wide-ranging amendments to the Criminal Offences Act made by the amendment Acts of 2012 were designed, among other objectives, to reserve the trial of less serious matters to the Magistrate's Courts while sending more serious matters to the Supreme Court. For the avoidance of confusion, where an offence may be either "Simple" or "Serious", depending on the circumstances, the word "Simple" or
80 "Serious" should *always* be included in the charge or indictment. Had this been done in this case the procedural errors which occurred might will have been avoided.

8. It is a matter of concern that so many mistakes were made in this case. The Attorney General may wish to consider whether further workshops may be needed to ensure that all concerned properly understand the substantive and procedural changes brought about by the 2012 amendments to the Magistrate's Court Act and to the Criminal Offences Act.

9. The matter is remitted to the Magistrate's Court for disposal of the charge dated 5 March 2013. A fresh summons to the accused is to issue.

## R v Bloomfield

Supreme Court, Nuku'alofa
Cato J
CR 212/2010

24 October 2013

*Sentencing – embezzlement – breach of trust paramount sentencing consideration – five year imprisonment starting point – after limited mitigating factors imposed four years four months with last 12 months suspended*

The accused, Mrs Bloomfield, was convicted after a trial lasting about three weeks before a judge and jury of one count of embezzlement contrary to section 158 of the Criminal Offences Act. The sum initially alleged to be converted from her employer Forum Travel Ltd between the months of September 2009 to March 2010 was said to be $246,166 to her own benefit. However, during the course of the trial the Crown amended the particulars of money alleged to have been applied to her use. It was alleged, finally, that the amount converted by Mrs. Bloomfield was $204,033.09. For sentencing purposes, the court approached the matter as involving the sum of $204,033.09.

Held:

1. The court noted that the defendant chose to accept responsibility and advanced no reason why she behaved as she did. The court could not speculate as to why she behaved as she did. Courts had only a very limited ability to grant mitigation on the basis that a mother was involved in criminal activity and to imprison her would deprive children of her care. The children were not of very tender age and nor was the prisoner a sole parent.
2. Breach of trust had always been regarded by the courts as the paramount sentencing consideration. Without trust, business could not efficiently function and flourish. Without business being viable, there would be limited employment and commercial opportunity in Tonga. Embezzlement damaged the integrity of business.
3. The court considered that the conduct required a strong deterrent message that embezzlement was a serious crime. The court fixed as a starting point a period of imprisonment of five years, taking into account the large amount of money involved none of which has been accounted for, the

damage she did to Forum Travel, the extent of her deception and the involvement by her of others in her fraudulent scheme.

4. The mitigating factors were only few: her previous lack of convictions, previous good character and her support of various organisations in the Tongan community. The court also granted her some very limited credit for her late expression of contrition and acceptance of responsibility. In all, eight months were allowed for these factors.

5. The court suspended the final 12 months of the sentence of four years and four months for embezzlement on the condition that she commit no further crimes of imprisonment for a period of two years. The sentence was backdated to the time she was remanded in custody.

Cases considered:

R v Attah – Benson [2005] 2 Cr App R (S) 52
R v Collins [2005] 1 Cr App R (S) 103
R v Greaves [2008] 2 CR App R (S) 42
R v Keeny [2004] EWCA Crim 2357
R v Kula [2009] Tonga LR 394
Wall v R [2001] Tonga LR 238

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Kefu
Counsel for the defendant : Mr Bloomfield

**Sentence**

[1] The prisoner, Mrs. Bloomfield, was convicted after a trial lasting about three weeks before a judge and jury of one count of embezzlement contrary to section 158 of the Criminal Offences Act. The sum initially alleged to be converted from her employer Forum Travel Ltd between the months of September 2009 to March 2010 was said to be $246,166 to her own benefit.

[2] The Crown, however, during the course of the trial the amended the particulars of money alleged to have been applied to her use. It was alleged, finally, that the amount converted by Mrs. Bloomfield was $204,033.09. This was made up of $121,199.19 that had been the subject of false invoicing after moneys either cheques or cash had been received by her to pay for tickets; a further $60,951.30 had been received by her for tickets that had been paid for, but where tickets had not been issued or had been cancelled by her, and the sum of $21,882.60 which was known as the Jas Log shortfall (her daily receipts) for the dates of the 12th, 16th and 17th March 2010. This made a total sum of $204,033.09.

[3] During the course of the trial, evidence was led also that Mrs.Bloomfield had wrongly and against company instructions credited certain other travel agencies which did not have the ability themselves to directly issue tickets with tickets which were and probably remained unpaid. False invoices were also prepared to cover up

these transactions. At the trial, however, the Crown acknowledged that they were not in a position to prove that Mrs Bloomfield had in fact received cash or cheques to meet the debts on these tickets from the travel agencies concerned. It seems that these debts were unpaid so that Forum Travel had to account to the Airline for the value of these improperly issued tickets in the sum additionally of $66,384.00. The Crown, at trial, led this evidence as part of the pattern of the deception when it came to the process of false invoicing. However, for sentencing purposes, I approach the matter as involving the sum of $204,033.09.

[4] I also add that I find beyond any reasonable doubt, that the amount alleged by the Crown of $204,033.09 was applied by Mrs Bloomfield fraudulently to her own use, although in order to sustain a conviction the Crown had only to prove of that amount. The methods used were obviously associated with acts by Mrs. Bloomfield; false invoicing, issuing tickets and then cancelling them, all to give the impression that her ticketing and receipt of cash and cheques as a senior consultant was in order when it was far from so.

[5] Mrs Bloomfield, who elected not to give evidence or call evidence at trial, appeared to acknowledge to her probation officer that she had acted wrongly in false receipting, but she minimized the suggestion to her probation officer that she personally had benefited from the fraud. The suggestion seems to be that she did this only to benefit third parties for whom she had given credit and wrongfully let her down by not paying of Forum Travel. A person related to Mrs Bloomfield and with earlier experience in the Airline industry has suggested in a reference on her behalf that in fact false invoicing had been widespread in the Airline industry earlier as part of the extension of credit to passengers and perhaps that, although this was wrongful, Mrs Bloomfield was doing no more than others had done. I simply do not accept at all that false invoicing was in any way defensible, whenever it may have occurred, and I find also that Mrs Bloomfield contrary to any protestation she made to the probation officer, did in fact take the proceeds in the sum of $204,033.09 and I am quite unable to draw any other inference on the evidence produced by the Crown at trial. The Crown made allowance appropriately for the substantial amount $66,384.00. I accordingly reject that she did not receive the money the subject of charge and misapply it although I still have no idea where it went, or to what it was applied. I sentence her on the basis she received $204,033.09.

[6] When it came to this hearing, counsel for Mrs.Bloomfield asked me not to act on those parts of the report in which Mrs Bloomfield rejected responsibility for her actions. He said she now accepted responsibility for what she had done. As I have said, the evidence in my view was so strong, that I have no intention, in any event, of accepting such explanation. However, it was helpful to me that she now appeared to accept responsibility for her actions, albeit at a very late stage.

[7] Mrs Bloomfield, at the sentencing hearing, also made a fulsome apology for her actions and indicated she had written a letter of apology to Ms Gardiner which I asked the Crown to pass on to her. She also expressed extreme sadness for the children and her husband who are innocent victims. I sensed in Mrs. Bloomfield, however, someone who was moving away from a stage of denial which had been her attitude until recently, to a more accepting sense of responsibility. Her fall from grace

as a woman of some standing formerly in the Tongan community has been very considerable. Although she has struggled to come to grips with this, I accept her tearful and in fact rather graceful statement today in court amounted to probably a genuine expression of public contrition. However, notwithstanding, the credit I can give her for this can only be measured. She put the Crown to proof, over a period of three weeks, her former employer Ms Gardiner gave evidence in demanding circumstances for some 7 days and other colleagues also had to give evidence as she persisted in her denial at trial. There has been no offer of restitution and no explanation at all as to where the money went.

[8] I had very great difficulty in understanding why after several years of trusted employment and with all the obvious respect and standing she had in the Tongan community and with a supportive family, Mrs. Bloomfield should have engaged in her spree of deception in 2009. No explanation was forthcoming. She chose to accept responsibility and advanced no reason why she behaved as she did. I cannot speculate as to why she behaved as she did.

[9] As I indicated to her counsel, one of the factors I found concerning and aggravating, also is that she inveigled at least one young employee into her deception by instructing her to make out false receipts to cover her fraud. This employee, who gave evidence, said she trusted Mrs. Bloomfield and I accept that unequivocally. She had exposed Mrs. Bloomfield when she could not reconcile her daily receipts. She lost her job and was an innocent victim in my view also of this offending.

[10] The references I have read from Church, other organizations, relatives and others with which she has been involved, speak warmly of her good deeds and character. Several, who have spoken of her trustworthiness, have it seems no concept of the extent of the deception she practiced on Forum Travel. I accept, however, she was formerly a person of good character, contributed particularly in the Tourism industry to Tonga and had standing in the Tongan community. She will get some credit for this.

[11] Her deceit, however, was audacious to say the least, as it was rapacious or avaricious over a period of about 9 months in 2009-2010. Mrs. Bloomfield had considerable experience in the travel industry before she joined Forum Travel. She was obviously entirely trusted by Miss Gardiner and for some years she acted accordingly; but in 2009 for some reason, still unexplained, she determined to fraudulently exploit her employer's trust. Over a period of several months, she embezzled large sums of money by manipulating daily ticketing balances, issuing and then cancelling tickets, taking money or cheques from one customer to apply to the account of another customer to settle issued tickets, and then falsely issuing invoices to give the appearance of moneys owed to Forum Travel from various government organizations, church, foreign embassies and other entitles, and private individuals. These accounts were all selected by her and in this period she operated her deception, there were many fraudulent acts, some of very significant financial deception, which accounted for the embezzlement of $204,033.09.

[12] It was fraud that inevitably would be exposed but she managed to get away with her dishonesty because the accounting system did not detect the frauds until one day, a deficiency in her daily balance was noticed by the junior staff member, whom I

have mentioned, who up until then seems to have trusted Mrs. Bloomfield. Despite Mrs Bloomfield's excuse for the missing money, it became apparent that there was a very serious problem. Ms Gardiner conducted interviews with her with the company lawyer being also present at one interview. During these interviews, the prisoner admitted in essence her fraud, to taking some of the money and allowing credit friends but the true extent of the losses was not revealed until the company engaged on a more extensive, time consuming and probably expensive independent and resident audit.

[13] I am informed by Mr Kefu that the embezzlement caused serious financial difficulty for Forum Travel to the extent that the business had to be sold. Forum appeared to be a good business which had operated well and to which Mrs Bloomfield had made an obvious contribution for several years before she and her co-accused defrauded it of the significant sum alleged in the indictment. Ms Gardiner had some years before asked Mrs Bloomfield who was working for another agency to work for Forum Travel. Ms Gardiner, obviously, would have good reason to feel very let down by the serious breaches of trust of her formerly trusted senior consultant. Ms Gardiner continues to be involved in the business under the new entity.

[14] During the course of the investigation, it appeared that one other employee had also been involved in the fraud. He pleaded guilty shortly after what was then a joint trial had commenced. The sum he pleaded guilty to embezzling amounted to $88,051. I sentenced him to a period of imprisonment of three years, 3 months with the final 12 months suspended. When sentencing him, I formed the view that he bitterly regretted his involvement. I took the view that some credit could be given for his very late guilty plea in the face of what was a strong Crown case of deception on his part as a trusted travel consultant. He also had a previous conviction for forgery and embezzlement for which he had been sentenced to 2 years imprisonment in 1998 with the final 18 months suspended for three years.

[15] This was by Tongan standards very significant embezzling. I observed that through the trial Mrs Bloomfield was an extensive note taker and appeared to be taking close interest in the trial, including giving her counsel instructions. I formed the view she was an intelligent woman.

[16] I have read the probation report, references and report on the children filed by the defence. It saddens me to think that a mother of 4 children and a wife of a person holding a responsible position in Tonga with all the advantages that this should bring should engage in conduct of this kind. She held a senior position in Forum Travel. She seems to have been trusted and well regarded by others in the community and I have read several references from people who hold her in very high regard, the Church and The Tongan Tourist Association in particular with whom she had held an executive position. I have also read a report on her 4 children from a social worker, the childrens' letters of support, and I also express concern understandably for the position in which Mrs Bloomfield had placed her children and her husband. I have no doubt that Mrs Bloomfield was a good mother and wife and the children and her husband will bitterly miss her. I am concerned for the well-being of these children and hope that her extended family can give these children and father all the support they will require over the period Mrs Bloomfield is in prison. I note that counsel for

Mrs Bloomfield asserted that although it seems her husband is in an executive since Mrs Bloomfield lost her position. I do not regard this as a mitigating factor. Indeed, I was told very little about the family's financial circumstances.

[17] Courts have only a very limited ability to grant mitigation on the basis that a mother is involved in criminal activity and to imprison her will deprive children of her care. The children are not of very tender age and nor is the prisoner a sole parent. They, however, are the innocent victims of their mother's deception. It is very surprising to me that she seems to have dismissed from her mind the adverse consequences to her family when her fraud would be detected.

[18] Sadly, it has been my experience that embezzlement is prevalent in Tonga. I have had to sentence people too often (mainly youngish persons in clerical positions of trust), to terms of imprisonment for embezzlement of financial and other institutions. I have repeatedly expressed my concern about this.

[19] This case is by far the worst of its kind I have encountered here, however. The fraud was systematic, frequent and carried on over a lengthy period by a mature person who could only be regarded as a trusted and senior consultant. Further, she was not a young person exposed often to the temptation of peer or it seems family pressures. She had many years of experience in the travel business, as I have said.

[20] Breach of trust has always been regarded by the courts as the paramount sentencing consideration in cases of this kind. Without trust, business cannot efficiently function and flourish. Without business being viable, there will be limited employment and commercial opportunity in Tonga. Embezzlement damages the integrity of business.

[21] In my view, Mrs Bloomfield's conduct requires a strong deterrent message that embezzlement is a serious crime. I fix as a starting point a period of imprisonment of five years, taking into account the large amount of money involved none of which has been accounted for, the damage she did to Forum Travel, the extent of her deception and the involvement by her of others in her fraudulent scheme. I regard this offending and the frequency of it as in the upper level of offending, the maximum sentence for a single count being 7 years. I have considered and approached as a guide to the level of sentence I should impose the judgment of the Court of Appeal in *Wall v R* [2001] Tonga L R 238. There, Wall, a Tongan aged 31 and a trusted senior representative of an overseas company doing business in Tonga, had pleaded guilty to embezzling on 11 occasions a total of $181,000. He also was a first offender. The sentencing Judge had sentenced him to a period of imprisonment of five years. On appeal by Wall, that sentence was reduced to 4 years imprisonment. The Court of Appeal, however, observed;

> "Taking into account all the circumstances of the offending and the mitigating factors, but for the plea of guilty we consider that a sentence of five years imprisonment would be within the sentencing Judges discretion."

[22] I now turn however to mitigating factors. There are few aside from her own previous lack of convictions, previous good character and her support of various

organisations in the Tongan community. I also grant her some very limited credit for her late expression of contrition and acceptance of responsibility. In all, I allow her 8 months for these factors. That means the sentence I impose upon her is four years 4 months imprisonment for the court of embezzlement for which she has been convicted which I consider bears some reasonable parity with *Wall*. That is to be backdated to the time she was remanded in custody.

[23] I now turn to whether I should suspend any part of this sentence. My initial feeling when I came to consider this matter over the past few years was that I should not. There was nothing in the way of contrition, offer of restitution or acceptance of responsibility, form which I could infer that she was a worthy candidate for rehabilitation and of a suspended sentence. However, having heard from Mrs Bloomfield's counsel, and accepting that she has demonstrated some contrition and acceptance of responsibility for her deceit, I consider that a measure of partial suspension should be allowed. I have taken into account also that she has 4 youngish children who are bitterly saddened by their loss. I have read the report from a social worker about this. I accept that the children will all suffer from their mother's absence, but the suggestion advanced by the social worker in her report that this can be resolved according to a family conference recommendation of a community-based sentence is unrealistic. I have given this a good deal of thought, after hearing from both counsel before adjourning sentence after submissions two days ago, until today. I have also considered such authorities as *R v Collins* [2005] 1 Cr App R (S) 103; *R v Attah – Benson* [2005] 2 Cr App R (S) 52, *R v Keeny* [2004] EWCA Crim 2357 where these kinds of factors were taken into account but compare *R v Greaves* [2008] 2 CR App R (S) 42 where they were not. See Banks on Sentence, 5th edition, at para. 1161. Mr Kefu provided me also with the judgments of the Court of Appeal in *Havili* 14th July, 2010, AC 2 of 2010 where a sentence of 9 months imprisonment with the last 3 months suspended was imposed where the prisoner had several children and a baby. The sentence was not interfered with by the Court of Appeal. In that case, there had been a breach of trust but the embezzlement involved a sum of only $2,141.64. The Crown also referred me to *R v Kula* [2009] Tonga LR 394 where the Court took into account in making sentences of dishonesty concurrent rather than partly cumulative with the lead sentence being three years for the theft that there would be hardship to the family of three children aged between 10 and 10 months.

[24] Although here, these children were not in the sole care of their mother and nor were they children of tender years, I am aware from all I have read that the children acutely will miss their mother, and her absence may have a deleterious affect on their well being. There is also some worth I consider in my view expressed in *R v Collins* that a custodial sentence imposed on a mother kept away from young children means that the impact of such a sentence is worse than it should be for someone else in that situation committing that offence. There, the children, however, were much younger than here and it seems in the sole care of the mother. Every case will turn on its circumstances, the age of the child and degree of dependency being important considerations. However, in my view the likely prejudicial effect on children is a matter which can legitimately be taken into account by a sentencing court particularly in a jurisdiction which has the advantage of the suspended sentence as England and Tonga both have. The degree of suspension must, however, be tempered by the countervailing public interest that those who commit serious crime should serve

appropriate sentences of imprisonment. There must also I consider be parity with the sentence on Mr Fakava who pleaded guilty before evidence was commenced. Although a very late plea he was obviously contrite and acknowledged responsibility for his actions. Embezzlement by Mr Fakava was serious enough, and he was not a first offender but here the amount embezzled was much greater, and far more serious. For these reasons, I suspend no more than 12 months of the sentence.

[25] I accordingly, suspend the final 12 months of Mrs Bloomfield's sentence of 4 years and four months for embezzlement on the condition that she commit no further
310 crimes of imprisonment for a period of 2 years. The sentence is to be backdated to the time she was remanded in custody.

# 'Unuaki 'O Tonga Royal University of Technology anor v Kingdom of Tonga

Land Court, Nuku'alofa
Scott CJ
LA 16/2013

17 October 2013; 8 November 2013

*Land law – jurisdiction of Land Court – tenancy to use the buildings – no interest in land created – no jurisdiction of Land Court – struck out*

These proceedings were commenced by writ issued on 2 October 2013. The plaintiffs sought orders restraining the defendant from terminating a tenancy agreement between the first plaintiff and the defendant dated 19 December 2008 or entering into, taking possession of or evicting the plaintiffs from the premises. Alternatively they sought an award of damages in the sum of $1,712,000 being the value of renovations and improvements carried out to the Tonga National Centre (TNC) by the first plaintiff with the agreement of the defendant. An ex parte application for an interim injunction in terms of the first two orders sought was also filed, together with a supporting affidavit by the second plaintiff which exhibited as "A" a copy of the tenancy agreement upon which reliance was placed. The court granted the interim orders sought until further order and adjourned the application for continuation inter partes on 16 October 2013. On 16 October the judge raised the preliminary question of the Land Court's jurisdiction to deal with the action and, with the agreement of counsel, argument was adjourned to later that day.

Held:

1. All that the plaintiffs had was a tenancy of the buildings comprising the TNC and the right to use the land on which the buildings stood and which surrounded them. The use of the land was merely a collateral licence which endured so long as the tenancy remained alive. Once the tenancy was determined, the licence was also revoked.
2. There was no lease, merely an agreement (the tenancy) to use buildings and an associated and implied agreement (a licence) to use the land surrounding the buildings. No interest in the land known to the Act was created by the tenancy which, even viewed as a permit, was not registered and was therefore not "effectual to pass .... any interest in land" (Section 126).
3. The court found that the Land Court had no jurisdiction to entertain the plaintiffs' claim which was therefore struck out. The interim injunction granted on 2 October 2013 was discharged.

Cases considered:
Maka v Kainga [2006] Tonga LR 43
Tonga Industries Traders Ltd v Shell Company Pacific Island Ltd [2005] TOLC3; [2005] TOSC 5

Statute considered:
Land Act (Cap 132)

Counsel for the plaintiffs : Mrs Stephenson
Counsel for the defendant : Mr Kefu

**Decision**

[1] These proceedings were commenced by writ issued on 2 October 2013. In their Statement of Claim the Plaintiffs seek orders restraining the Defendant from:

(a) terminating a tenancy agreement between the First Plaintiff and the Defendant dated 19 December 2008; or
(b) entering into, taking possession of or evicting the Plaintiffs from the premises located on Taufa'ahau Road, Tofoa known as the Tonga National Centre; and
(c) alternatively, an award of damages in the sum of $1,712,000 being the value of renovations and improvements carried out to the Tonga National Centre (TNC) by the First Plaintiff with the agreement of the Defendant.

[2] On 2 October an ex parte application for an interim injunction in terms of (a) and (b) above was filed, together with a supporting affidavit by the Second Plaintiff which exhibited as "A" a copy of the tenancy agreement upon which reliance was placed.

[3] I granted the interim orders sought until further order and adjourned the application for continuation inter partes on 16 October 2013.

[4] On 16 October I raised the preliminary question of the Land Court's jurisdiction to deal with the action and with the agreement of counsel argument was adjourned to later that day.

[5] Mrs Stephenson filed a written submission for which I am grateful. She submitted that: "the First Plaintiff is the tenant of the TNC comprising the land and buildings located at Taufa'ahau Road, Tofoa". When it was pointed out that there is no reference to the land in the agreement she suggested that grant of the land was to be inferred from paragraph 11 of the agreement which requires the Plaintiffs "to be responsible for obtaining full insurance coverage for the TNC and all its contents and surrounding areas." (emphasis added).

[6] Mrs Stephenson accepted that the tenancy had not been registered (see Section 126 of the Act). She also accepted that tenancies are not among the various interests in land recognised by the Act. She further accepted that Section 13 of the Act prohibits agreements "for profit or benefit relating to the use or occupation of land"

other than in the manner prescribed in the Act, without the permission of the Minister of Lands.

[7] Mrs Stephenson grounded her claim to jurisdiction on subsection 149(1)(b) of the Act which gives the Land Court jurisdiction:

> "to hear and determine all disputes, claims and questions of title *affecting any land or interest in land* in the Kingdom" (emphasis hers)

Unfortunately the words "of title" immediately appearing before the word "affecting" was not emphasised by Mrs Stephenson. In my view, however, it is clear that the section, properly construed, only grants jurisdiction where a "dispute, claim or question of title" is concerned. In my opinion, to read the section in any other manner would grant the Land Court jurisdiction to deal with any dispute which is in any way connected with land (e.g. noise, smell or other discharges from land) and I do not accept this to be the case.

[8] In my opinion, all that the Plaintiffs may have in this case is a tenancy of the buildings comprising the TNC and the right to use the land on which the buildings stand and which surrounds them. As I see it, this use of the land is merely a collateral licence which endures so long as the tenancy remains alive; once the tenancy is determined, the licence is also revoked.

[9] Mrs Stephenson placed reliance on *Tonga Industries Traders Ltd v Shell Company Pacific Island Ltd* [2005] TOLC3; [2005] TOSC5; LA 002 2005 in which the Plaintiff sought:

> "payments due under a tenancy agreement between the parties, the subjects of the tenancy agreement are described in it as buildings on the land together with the use of land adjoining the buildings".

The Court concluded that:

> "this is therefore clearly a case where the Court is asked to hear and determine a question or amount of rent or a claim in respect of an *interest of some kind* in land" (emphasis added).

With respect I decline to follow this conclusion since the only interests in land which can legally be created are those permitted by the Act. All other purported interests are outside the purview of the legislation. It is not enough, in my opinion, to propound some vague interest in land unrecognized in the Act for the Land Court's jurisdiction to be invoked.

[10] In my opinion, the correct position is as explained in *Maka v Kainga* [2006] Tonga LR 43. In the present case there is no lease, merely an agreement (the tenancy) to use buildings and an associated and implied agreement (a licence) to use the land surrounding the buildings. No interest in the land known to the Act was created by the tenancy which, even viewed as a permit, was not registered and was therefore not "effectual to pass .... any interest in land" (Section 126).

[11] As I find, the Plaintiffs have no interest in the land and there is no dispute falling within the purview of Section 149 (1)(b). For the same reason, the alternative claim for damages is excluded by Section 149(1)(e). I do not accept that the jurisdiction of the Court can be extended, as opposed to invoked, by recourse to Section 150.

120 **Result:**

1. I find that the Land Court has no jurisdiction to entertain the Plaintiffs' claim which is therefore struck out. The interim injunction granted on 2 October 2013 is discharged forthwith.

2. Defendant's costs to be taxed if not agreed.

# Yang anor v Manoa anor

Land Court, Nuku'alofa
Scott CJ
LA 11/2013

21 November 2013

*Civil procedure – non-compliance with court order – imprisonment ordered for 28 days*

On 14 June 2013 and on 10 September 2013 the court made orders requiring the first defendant to remove corrugated iron and other impediments which he had attached to the shop premises which, according to the plaintiffs, had been let to her. The defendant refused to comply with the orders and did not pay the $500 fine imposed on him for disobeying the orders of the Court.

Held:

1. The orders of the court were to be obeyed. The first defendant would go to prison for 28 days. The chief bailiff was instructed to remove the corrugated iron, chains and other impediments from the shop.
2. The matter was adjourned for mention on 13th December 2013.

Counsel for the plaintiffs : Mr L Niu
Counsel for the defendants : Mrs P Taufaeteau

## Ruling

1. On 14 June 2013 and on 10 September 2013 I made orders requiring the First Defendant to remove corrugated iron and other impediments which he had attached to the shop premises which, according to the Plaintiffs, had been let to her.

2. I made these orders to allow the shop to continue trading until the trial could take place at which time the Court would decide whether the Plaintiff had the right to stay in the premises or would have to go.

3. Unfortunately, the Defendant has refused to comply with my orders and has not paid the $500.00 fine imposed on him on 4th October 2013 for disobeying the orders of the Court.

4. Yesterday the First Defendant told me that he would rather go to prison than comply with my orders.

5. It must clearly be understood the orders of the Court are to be obeyed.

6. The First Defendant will go to prison for 28 days. The Chief Bailiff is instructed to remove the corrugated iron, chains and other impediments from the shop today.

7. The matter is adjourned for mention on 13th December 2013 and there will be liberty to either party to restore for further directions.