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Editor: Ms Janine Ford LLB

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Court of Appeal

Lord Chief Justice Michael Dishington Scott (President)
Hon Justice James Burchett
Hon Justice Peter Salmon
Hon Justice Michael Moore
Hon Kenneth Handley

Supreme Court

Lord Chief Justice Michael Dishington Scott
Hon Justice Robert Shuster
Hon Justice Charles Cato

Land Court

Lord Chief Justice Michael Dishington Scott (President)
Hon Justice Robert Shuster
Hon Justice Charles Cato

Magistrates' Court

Chief Magistrate:
Mr Folau Lokotui

Principal Magistrate:
Mr Salesi Mafi

Senior Magistrates:
Mr Paula Tatafu
Mr Vaha'i Foliaki

Magistrate:
Mr Sione 'Etika
Mr Masao Paasi
Mr Pita Soakimi

Attorney General

Hon Samiu Kuita Vaipulu
Hon Neil James Adsett

Solicitor General

Mr 'Asipeli 'Aminiasi Kefu

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Australia and New Zealand Banking Group Ltd v Tatola

Land Court, Nuku'alofa
Scott P
LA 11/2006

28 January 2011

Land law – lease of land – mortgagee rights when mortgagor defaults – lease was still valid – mortgagee could enter into possession of land

The defendant was the registered holder of a tax allotment situated at Tofoa, Tongatapu. The area of the holding was 3.33 ha. In 2003, Viliami 'Alani Hoeft (Hoeft) submitted a form of application for lease in respect of 4047 square metres of the allotment. On 31 October 2003 the lease, number 7095, was granted. On the same day as the lease was granted Hoeft submitted an application for a mortgage to the plaintiff. On 18 May 2004 the plaintiff sent Hoeft a notice of demand in the amount of $61,060.15 plus interest and fees. In default of repayment the plaintiff commenced proceedings against 3H's (the company Hoeft was a director of). On 2 May, 2005 the Supreme Court gave final judgment in favour of the plaintiff in the amount of $63,397.89. The plaintiff claimed that it obtained legal possession of the mortgaged lease, including the house standing on the land, when Hoeft failed to respond to the notice of default within the stipulated 14 day period. The plaintiff sought a declaration that it was the mortgagee in possession of lease 7095 and that the defendant was not entitled to enter or interfere with the "premises containing lease 7095". It also sought damages arising from what was said to have been unlawful letting of the premises since they were vacated by Hoeft.

Held:

1. Although the *ownership* of the house remained throughout with the defendant, the *use* of the house passed to the lessee, together with the land on which it stood. By deciding not to remove his house from the land before he parted with possession of the land, for the duration of the lease, the lessor was seen to have accepted that he had also parted with possession of the house. That possession could only be re-assumed once the land reverted to him after the lease came to an end. This was because he could not lawfully enter the land, merely to take possession of the house, not only because he had to cross the land to reach the house but also because the house, as a matter of fact, stood on the land which he had leased. So long as the lease was not determined, the lessee was entitled to the house's use.

2. Equitable principles applied once a lease had been granted. In equity, the proviso for re-entry on non payment of rent was regarded as merely a security for the rent. Provided the landlord and other persons interested could be put in the same position as before, the tenant was entitled to be relieved against forfeiture on payment of the outstanding rent and any other expenses to which the landlord had been put.
3. No notice of failure to pay rent was given and the arrears of rent were paid by the plaintiff to the Minister as required by section 57(3) of the Act. The defendant's intention was not to determine the lease, but to evict Hoeft from his house. The court considered that the lease had not been determined.
4. The court found that the plaintiff was lawfully in possession of the land comprised in the lease, including the land upon which the house stood, and also the use of the house itself. There was judgment for the plaintiff.

Cases considered:

Belgraria Insurance Co Ltd v Meah [1964] 1 QB 436; [1963] 3 All ER 828
Carltona Ltd v Commissioner of Works [1943] 2 All ER 560
Cowley v Tourist Service Ha'api Ltd & Anr [2007] Tonga LR 183
Johnson v Osenton LR 4 Ex 107
Sanft v Tonga Tourist and Development Co Ltd & Ors [1981-1988] Tonga LR 26

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)
Land (Amendment) Act 1999

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

Judgment

[1] So far as agreed, the facts may be briefly stated, the Defendant is the registered holder of a tax allotment situated at Tofoa, Tongatapu. The area of the holding is 3.33 ha. (Defence Document D1 and D2).

[2] On a date unknown in 2003, one Viliami 'Alani Hoeft (Hoeft) submitted a Form of Application for Lease (Form No. 1 to schedule IX to the Land Act – Cap 132 – the Act; Doc. D1) in respect of 4047 square metres of the allotment.

[3] The first paragraph of the form is as follows:

> "I have the honour to make application for lease of certain property at Tofoa more particularly described below. The purpose for which I wish to put to use the said property is commercial and *residential"* (emphasis added).

[4] In addition to specifying the "area required", the term of 20 years and the annual rental of $4000.00 were also particularised. The Defendant endorsed his agreement to the application as grantor.

[5] On 18 September 2003 the application was forwarded to Cabinet (Doc. D3). On 23 September, 2003 Cabinet approved the application (Doc. D4). On 31 October, 2003 the lease, number 7095, was granted (Doc. D5).

[6] Several details of the contents of the lease (which is the usual Form 3 of schedule IX of the Act) may be noted. The consideration for the granting the lease is stated to be: "payment of the yearly rent that is recorded in this deed". The rent is stated to be $4000 to be paid on the 30th day of October each year.

[7] The lease contains the usual covenants. Covenant (c) has not been deleted although it is deleted by operation of section 4 of the Land (Amendment) Act 1999. It was also:

> "agreed by these presents if at the expiration of twenty one (21) days from the day the rent becomes due by the Lessee..... it shall be lawful for the Lessor or his successors to take possession of all or parts of the lands herein leased by this Deed or to sell by auction the houses or house or anything which may be on this land"

Earlier in the same paragraph it is stated that:

> "it shall be lawful for the Lessee, his heirs or those who represent him to remove all houses and improvements which may have been built on the said land"

[8] The lease also contains the usual Form 7 and Form 10 covenants. The first provides that the lessee will not erect any building on the demised premises without ministerial consent. The second provides for a rent review every five years. The diagram to the lease shows the area of the land to be 4048 square metres.

[9] On 31 October, 2003 (the same date as the lease was granted) Hoeft submitted a Form for Application for a Mortgage (Form 1 to schedule VIII to the Act – Document D9). The form contains a number of obvious errors. The period of the mortgage is stated to be "39 years and 11 months" when it should obviously have been "19 years and 11 months". The rent review was stated to take place on "31/12/2003" when the correct date was obviously 31 October, 2008. These clerical errors appear throughout the documents in this case. They should have been avoided but too much should not be made to them. When the meaning of the document is clear they may be disregarded.

[10] A memorandum of mortgage (Form 2 in schedule VIII) is Document D10. A number of details must be noted. The first is that the "customer" is variously described as Hoeft or as "3H Company" the second is that the mortgager, Hoeft, mortgages not only the land comprised in lease 7095 but also "all buildings and fixed improvements thereon". Thirdly, the "29 years 11 months" clerical error is repeated.

Fourthly, the amount advanced was stated to be "Fifty thousand and Four Hundred Pa'anga (TOP$50,000)" (sic).

[11] The actual mortgage deed is Document D11 to 24. A number of fresh clerical errors appear, including a lease commencement date in October, 2000. There is no mention of a customer and the mortgagor is Hoeft. The endorsement of registration required by section 103 (3) of the Act is not signed by the Minister of Lands personally.

[12] It is not disputed that on a date close to the date that the lease and mortgage were executed, Hoeft and a number of associates moved onto the land and into occupation of a substantial concrete block dwelling house thereon already erected. He began operating a scooter import, sale, leasing and repair business from the premises. The business was named "3H's Company Limited" and it was registered in July 2003 (Plaintiffs Document P3 and see also Additional Plaintiffs' document P39-42).

[13] On 18 May, 2004 the Plaintiff sent Hoeft, qua director of 3H's Company Limited (3H's), a notice of demand in the amount of $61,060.15 plus interest and fees. In default of repayment the Plaintiff commenced proceedings against 3H's. On 2 May, 2005 the Supreme Court gave final judgment in favour of the Plaintiff in the amount of TOP$63,397.89. (civil action no 854/04 – document D42).

[14] In reliance on Hoeft's position as a director of 3H's and the first paragraph of the mortgage, the Plaintiff gave "notification" both to the mortgagor, Hoeft and to the Minister of the intention to take possession of the mortgaged property in accordance with section 109 (1) of the Act. By now Hoeft had left Tonga and his whereabouts were unknown. The notification to him was by way of advertisement published in The Tonga Chronicle on 13 July, 2006: the notification to the Minister was by letter dated 3 August, 2006 (see exhibits "N" and "O" to an affidavit of Salome Po'oi dated 2 December, 2008 filed in support of an interlocutory application herein).

[15] According to Mrs. Po'oi, the Plaintiff became aware in April 2005 that Hoeft had not paid rent on the lease. According to the Defendant, Hoeft paid him $4000 "after the deed of lease was completed". No other sum of $4000 was paid the following year. After it became aware that there were arrears of rent the Plaintiff paid two sums of $4000 to the Minister of Lands in accordance with section 57(3) of the Act. The two original receipts were produced by consent. They were exhibited to Mrs. Po'oi's affidavit as Exhs. B and J and are numbered 27635 and 105768 respectively. The first payment was for the year October, 2004 to October 2005. The second payment was for the year October, 2005 to October, 2006.

[16] The Plaintiffs claim, as set out in the Amended Statement of Claim filed on 7 August 2008, is that the Plaintiff obtained legal possession of the mortgaged lease, including the house standing on the land, when Hoeft failed to respond to the notice of default within the stipulated 14 day period. Despite obtaining legal possession of the land, the Defendant has not allowed physical possession to take place but has instead installed his own tenants in the house. The Plaintiff seeks a declaration that it is the mortgagee in possession of lease 7095 and that the Defendant is not entitled to enter or interfere with the "premises containing lease 7095". It also seeks damages

arising from what is said to have been unlawful letting of the premises since they were vacated by Hoeft.

[17] The Defendant raises a number of questions of law, of fact and of mixed law and fact. They are as follows:

(i) The lease was of the land only, and did not include the house;
(ii) Since the lease did not include the house, Hoeft had no right to include the house in the mortgage;
(iii) The mortgage was in any event invalid (a) because of the numerous errors made in its preparation and (b) because sections 99 and 103 of the Act were not complied with;
(iv) The lease had already been terminated by the Defendant before the Plaintiff purported to enter into possession.

[18] The trial took place on 28, 29 October and 9 November 2010. The Defendant gave evidence. He told me he was aged 82 and a retired medical practitioner. He accepted that he had leased a portion of his allotment to Hoeft but told me that this agreement did not include the house. The house was the subject of another agreement, an agreement in writing, that Hoeft was to pay him $100,000 in advance for renting the house for the 20 year duration of the lease. The Defendant told me that although it had been agreed that this sum would be paid to him upon the registration of the lease, nothing had ever been paid. The Defendant was asked if he had a copy of this agreement. The Court adjourned to allow him to look for the copy which he thought he might have at home. The following day the Defendant told me that he had searched at home. He thought he might have had a copy in his closet, but everything had been washed away in the cyclone. Mr. Niu told me that his original file in the case had also been lost. Despite Hoeft breaching the agreement to pay $100,000 for the use of the house, it was the Defendant's case that he had allowed Hoeft to remain in possession until he re-entered.

[19] The date and nature of the re-entry are problematic. Paragraph 5 (b) of the Statement of Defence states that the Defendant "entered and took possession of the land of the lease and notified a representative of the Lessee on the premises to vacate the land and the Defendant's building on the land on 2/4/2004". In Mr. Niu's written submissions dated 16 November, 2010 the date is given as "2/4/05 [when] the Defendant repossessed the building". In his letter of 31 May, 2005 addressed to the Minister (Document D43) Mr. Niu advised the Minister that he had been instructed by the Defendant that he had re-entered "the land" on "1st May 2005 [and had] terminated this lease".

[20] The significance of the date and nature of the re-entry lies in the possible effect on the two payments made by the Plaintiff to the Ministry which have been described in paragraph 15 above. It is not disputed that Hoeft had not paid the rent for the lease which become due on 31 October, 2004. Since he was in arrear the lessor's right to terminate the lease was activated. If the Defendant purported to exercise that right he could arguably only do so if arrears still remained unpaid. If the arrears were paid on Hoeft's behalf before the date the Defendant re-entered, his right to re-entry would arguably have been lost.

[21] The Defendant was questioned at length about when the re-entry took place. He produced some copies of diary entries (Documents D25 to 40) in support of his claim to have re-entered on 2 April. His entry for 2 April reads as follows:

> "I decided to put a stop to Alan Hoeft use of my property because of wrong use of the trust deed and our agreement. Langi complains of not being paid by Hoeft for his work for over a year.... the house is full of broken scooter parts and 83 bodies without machine. In other rooms are scooters for repair but not yet. I told Langi to do all he could for those as today I will call all who has any business or rights to come and take it. I went to 'Ofa and paid the Radio Tonga to announce 3 x one in each day at evening of my intention".

On 4 April the diary records that the Defendant made a further assessment of the damage and took a number of photographs.

[22] I accept this evidence which is uncontradicted. The fact that Langi, an employee of Hoeft, may have continued working at the house for some time after 2 April does not, in my view, affect the fact that the Defendant had re-entered and had assumed control of the house. Two questions however arise. The first is whether the Defendant had a right to re-enter and the second is whether his re-entry had determined the lease. The answers to these two questions in turn raise further and difficult questions: was the house comprised in the lease? If not, was it the subject of a further agreement between the Defendant and Hoeft? If so, what was the nature of that agreement?

[23] In *Cowley v Tourist Service Ha'api Ltd & Anr* [2007] Tonga L R 183 the Court of Appeal explained that:

> "In Tonga, the law of fixtures, as understood in other common law countries, has been somewhat modified, so that buildings are not, in general, regarded as fixtures. They are treated rather as "chattel houses" are in Barbados – that is to say, as personal property detachable from the land: *Kalo v Bank of Tonga* (Court of Appeal 7 August 1998); *Mangisi v Koloamatangi* (Court of Appeal 23 July 1999); *Bank of Tonga v Kalo* (Ward CJ, 21 April 1995".

In *Kalo v Bank of Tonga* (supra, somewhat strangely, reported at 1997 Tonga L R 181) the Court said:

> "Buildings, as Ward CJ pointed out.... have been regarded as items of personal property rather than forming part of the realty. Because of the constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although all the implications have not yet been worked out, and their working out should be left to the process of development of the law of Tonga case by case, we

> think the broad proposition stated by Ward CJ should be accepted. That means that it was open to Mr. Kolo to pledge his house to the Bank as an item separate from the land on which it stood".

[24] After the hearing concluded the Court visited the Defendant's allotment and was shown the land which had been leased to Hoeft and the house which stands upon it. As already noted, it is a substantial concrete dwelling standing some feet from the nearest edge of the demised land. It was not removed from the land by the Defendant before the lease was executed. It would not be possible to remove it from the land without first demolishing it. If it were removed then there would be no other premises upon the land which could provide alternative residential accommodation envisaged when the lease was applied for and granted. In his letter to the plaintiff solicitors dated 28 July, 2005 (Doc D 45 and 46) Mr. Niu asked:

> "How was a buyer, a sub-lessee or a mortgagee to deal with a building which lawfully belonged to the lessor but which is situated on the land of the lease being sold, sub-leased or mortgaged?" and
>
> "What is the purchaser of Mr. Hoeft's lease going to do about my client's building on the land of the lease which he will buy from your client?

[25] To these rhetorical question may be added: how would the Defendant be able to exercise the usual rights of an owner without trespassing on the leased land? Supposing the tenant in the house failed to pay rent on the house but kept up to date with the rental due under the lease, how could possession of the house be lawfully effected?

[26] To my mind there is only one possible answer to these questions: although the *ownership* of the house remained throughout with the Defendant, the *use* of the house passed to the lessee, together with the land on which it stood. By deciding not, for obvious reasons, to remove his house from the land before he parted with possession of the land, for the duration of the lease, the lessor has to be seen to have accepted that he had also parted with possession of the house. That possession could only be re-assumed once the land reverted to him after the lease came to an end. This is because he could not lawfully enter the land, merely to take possession of the house, not only because he had to cross the land to reach the house but also because the house, as a matter of fact, stood on the land which he had leased. So long as the lease was not determined, the lessee was entitled to the house's use. In *Sanft v Tonga Tourist and Development Co Ltd & Ors* [1981-1988] Tonga L R 26, the Privy Council stated:

> "[We] wish to emphasise that equitable principles can apply only to leasehold interests after they have been validly granted. Such principles have no other application to any

other title, claim or interest in any other Tongan interest in land".

The right to use property to the exclusion of the legal owner is a typical equitable right.

[27] Since it is my view that the breach of any separate agreement for the rental of the house could not confer any exercisable right on the Defendant to repossession, it is not necessary for the Land Court to examine any further the agreement which the Defendant claimed to have reached with Hoeft. It is sufficient to note that the written agreement could not be produced, that such agreements are invariably required to be in writing (Statute of Frauds 1677) and that the consideration, $100,000, never paid, appears not to be consistent with the consideration appearing in the lease (see Evidence Act – Cap 15 – Section 78 & 79). Whether, in these circumstances the Defendant would be in a position to prove the existence of a separate contract would be a question for another court to decide.

[28] At the very end of his evidence, the Defendant was shown Defence Document D43. He confirmed what he had told the court earlier: when he re-entered the premises he did so because of the noise and other disturbance which had come from the house; he did not re-enter because the rent had not be paid. He also confirmed that he was not re-entering the land with the aim of determining the lease, he understood that only the Minister could do that. He told me that the claim, set out in Mr. Niu's letter D43, that he had determined the lease was "completely wrong".

[29] This evidence from the Defendant is, of course, the evidence of a layman; it does not settle the question whether in law the lease was determined at any time by the Defendant or his agents.

[30] As has been seen, Mr, Niu suggested that in Tonga there is no requirement for notice to be given before the lease can be terminated for arrears of rent, all that was required was the 21 day period included in the lease. I do not agree. The observations of the Privy Council in *Sanft* have already been noted; equitable principles apply once leases have been granted. In equity, the proviso for re-entry on non payment of rent is regarded as merely a security for the rent (*Belgraria Insurance Co Ltd v Meah* [1964] 1 QB 436; [1963] 3 All E R 828). Provided the landlord and other persons interested can be put in the same position as before, the tenant is entitled to be relieved against forfeiture on payment of the outstanding rent and any other expenses to which the landlord has been put. In my view, this principle applies equally to leases in Tonga.

[31] In the present case it is accepted that no notice of failure to pay rent was given and that in fact the arrears of rent were paid by the Plaintiff to the Minister as required by section 57 (3) of the Act. The Defendant's intention, as explained to the court, was not to determine the lease, but to evict Hoeft from his house. In my opinion the lease has not been determined.

[32] There remains the mortgage. Mr. Niu suggested that it was invalid because of the numerous clerical errors and because the Minister had not signed the registration personally (see paragraph 11 above). In my view the clerical errors, though regrettable and, I would imagine, the cause of some shame to the Plaintiff, do not

present any problem of construction and accordingly do not affect the rights of the parties.

[33] The second argument is also, in my opinion, without merit. In *Carltona Ltd v Commissioner of Works* [1943] 2 All E R 560, 563A, the Master of the Rolls explained the way in which government and the functions of ministers take place:

> "The duties imposed on ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department."

In my view this is also the position in Tonga (and see also *Johnson v Osenton* L R 4
340 Ex. 107).

[34] In all the circumstances the court is of the view that the Plaintiff is lawfully in possession of the land comprised in the lease, including the land upon which the house stands, and also the use of the house itself.

[35] There will be judgment for the Plaintiff in terms of paragraph A, B, C, E & F of the Amended Statement of Claim. It is not clear to me how paragraph D has been calculated and therefore if this aspect of the claim is maintained the court will need further submissions.

Ata v Fa'ase'e

Court of Appeal, Divorce Jurisdiction, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 27/2010

11 April 2011; 15 April 2011

Dissolution of marriage – not satisfied that respondent had committed adultery or acted unreasonably – appeal dismissed

The appellant was a 36 year old man who was married to the respondent, a 33 year old woman on 22 December 2001. There was one child of the marriage, a girl aged 8 who resided with the respondent. The appellant sought a decree that the marriage be dissolved on the basis that the respondent had behaved in such a way that the appellant could no longer reasonably be expected to live with the respondent. On 18 November 2010 the Supreme Court dismissed a petition for the dissolution of the marriage. The Court was not satisfied that the respondent had committed adultery or acted unreasonably. The sole ground of the appeal was that the learned Judge had erred in his findings of fact, contrary to the evidence and erroneous in law.

Held:

1. The evidence did not, in the Court's opinion, demonstrate the appellant could not be reasonably expected to live with the respondent. While the relationship between the appellant and the respondent became a troubled one in which they quarrelled, the evidence about the respondent's drinking and arguing and the other conduct the appellant complained of was not so serious as to compel the conclusion that the ground of divorce was made out.
2. The appellant did not demonstrate any error on the part of the trial judge. The appeal was dismissed with costs.

Case considered:

Sugar v Fatafehi & Taholo [1993] TLR 4

Statute considered:

Divorce Act (Cap 29)

Counsel for the appellant : Mr Fakahua
Counsel for the respondent : Mr Pouono

Judgment

[1] This is an appeal, filed on 21 December 2010, from an order of Justice Shuster of 18 November 2010 dismissing a petition for the dissolution of a marriage.

Facts and background

[2] The appellant is a 36 year old Tongan man who was married to the respondent, a 33 year old Tongan woman on 22 December 2001. There is one child of the marriage, a girl aged 8 who currently resides with the respondent. The appellant's petition in the Divorce Jurisdiction of the Supreme Court sought a decree on the basis that the respondent had behaved in such a way that the appellant could no longer reasonably be expected to live with the respondent. The alleged behaviour of the respondent included:

a) being a person of hard character, easily provoked and hard to pacify;
b) repeatedly committing adultery with other men without the consent of the appellant;
c) repeatedly drinking liquor without the knowledge of the appellant;
d) arguing with the appellant on occasions and using abusive language in the presence of their child and the appellant's mother;
e) arguing with the appellant on matrimonial matters and using abusive language directed toward the appellant;
f) taking their joint property and damaging the appellant's parents' house where the respondent was residing whilst the appellant worked in Vava'u; and
g) repeatedly trying to commit suicide.

The appellant also sought an order that custody of their child be granted to the appellant with reasonable access to the respondent.

[3] His Honour was not satisfied upon hearing evidence from 3 witnesses that the respondent had committed adultery or acted unreasonably.

Grounds of appeal

[4] The sole ground of the appeal was that the learned Judge had erred in his findings of fact, contrary to the evidence and erroneous in law. It was said that the trial Judge had erred in his consideration of the evidence from the appellant, respondent and the appellant's witness, Semi Taufa in respect of the alleged adultery of the respondent. It was also contended that the trial Judge had erred in his consideration of the evidence in respect of the other alleged behaviour and actions of the respondent.

Consideration

[5] Section 3(1) of the Divorce Act (Cap 29) provides:

> Grounds for divorce petition.
> 3(1) 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 (hereinafter referred to as "the Court") praying the Court to dissolve the marriage upon evidence-
>
> (a) that since the celebration of the marriage, the respondent has committed adultery or has been sentenced to a term of imprisonment of not less than 5 years; or
>
> …
>
> (g) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent *(Inserted by Act 39 of 1988.)*

[6] As noted earlier, the only ground relied on by the appellant was that the respondent had behaved in such a way that the appellant could no longer reasonably be expected to live with her. That is, the ground specified in s 3(1)(g). However a particular of that ground was the alleged adultery of the respondent which could have been raised as an independent ground under s 3(1)(a). Clearly an important feature of the appellant's case was the allegation of adultery.

[7] We have reviewed the evidence given before the trial judge. There was some evidence pointing to the respondent having committed adultery. One particular piece of evidence was the admission made by the respondent to the appellant that she had committed adultery. However in her evidence, the respondent did not deny making the admission to the appellant but gave evidence explaining why she did so. She also denied the adultery. This was credible evidence which the trial judge was entitled to accept. The other evidence led by the appellant concerning the alleged adultery was all circumstantial. Again it was evidence the trial judge was entitled to view as falling short of proving adultery. As noted by the Supreme Court in *Sugar v Fatafehi & Taholo* [1993] TLR 4:

> … Given the absence of Inquiry Agents in Tonga proof of adultery will always be a matter of some difficulty. Direct proof may of course be provided by the evidence of the participants. They are the people in the best position to say whether or not adultery took place and their evidence is perfectly competent. ... It is worth noting that adultery is usually committed (as here) without the presence of eye witnesses and accordingly there must be a significant body of evidence available to enable the Court to infer that a married person has engaged in the act of adultery. Section 5 of the Divorce Act (Cap 29) is remarkable for stating the obvious namely that "on a petition for divorce it shall be the duty of

> the Court to satisfy itself so far as it reasonabl[y] can … as to the facts alleged … " - subsection (1) – and, if not so satisfied, to dismiss the Petition and refused (sic) to grant the decree of divorce s[o]ught – subsection (3).

[8] The evidence relied on by the appellant to prove the other aspects of respondent's behaviour referred to in [2] of these reasons was not, in our opinion, so overwhelmingly compelling as to have required the trial judge to accept the evidence or, additionally, to accept that it demonstrated the appellant could not reasonably be expected to live with the respondent. The reasons of the trial judge did not address this behaviour in detail. We have reviewed the evidence ourselves and the evidence does not, in our opinion, demonstrate the appellant could not be reasonably expected to live with the respondent. While the relationship between the appellant and the respondent became a troubled one in which they quarrelled, the evidence about the respondent's drinking and arguing and the other conduct the appellant complains of was not so serious as to compel the conclusion that this ground of divorce was made out. The trial judge was entitled to conclude the respondent had not acted unreasonably though we note that, strictly, that is not the statutory formulation of this ground. But his Honour was, in substance, rejecting the ground relied on by the appellant.

[9] The appellant has not demonstrated any error on the part of the trial judge. The appeal should be dismissed with costs.

Ha'apai Marine Ltd v ANZ Banking Group Ltd

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 20/2010

12 and 13 April 2011; 15 April 2011

Contract law – frustration of contract – requirements not satisfied – contract not frustrated

The appellant borrowed $25,000 from the respondent Bank in October 2000. The purpose of the loan from the appellant's point of view was to repay money owing to the Tonga Development Bank so that it would release a charge over the MV Vaomapa which was then owned by interests of Mr Tofa's. The intention was to transfer ownership to the appellant although in fact this never happened. The money borrowed was also intended to provide working capital for the company. As security for the loan the bank took a debenture over the assets of the appellant, a mortgage over Mr Tofa's house and personal guarantees from the directors of the company. There was no reference in the documentation to the MV Vaomapa. The documents record the purpose of the loan as "working capital and refinance of Tonga Development." On the 19th November 2000 the Bank lent a further $20,000 to the appellant the purpose of which was recorded as "For payments associated with insurance of main boat 'Vaomapa'." On 19th November 2001 the Bank lent $26,300 to the appellant bringing total indebtedness to $33,833. The purpose was said to be to restructure the current overdraft into a term loan facility. Finally on 28th September 2004 an additional $5000 was lent bringing total commitments to $51,963. The purpose of the further $5,000 was said to be "Purchase of sandalwood/copra." The respondent bank claimed $50,077 and the appellant did not challenge the amount. The appellant raised two issues. First it claimed that the contract had been frustrated because the ship had been totally destroyed in a storm. The appellant maintained that the purpose of the loan was to enable it to purchase the vessel and later to insure it and that the destruction of the vessel destroyed the purpose of the contract. Secondly the appellant claimed US$210,000 for breach of fiduciary duty by the respondent by disclosing confidential information to a party with whom the appellant was in business negotiations thus destroying the possibility of the enterprise succeeding. Both of these claims were rejected by the Supreme Court. On 11th August 2010 the Court allowed the respondent's claim for $50,077 plus interest and dismissed the appellant's claim for damages for breach of fiduciary duty.

Held:

1. The modern approach to frustration of contract was that the court imposed upon the parties the just and reasonable solution that the new situation demanded. "Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'."
2. In this case, the circumstances were no different to an agreement to lend money which was used to buy a house or a car or any object over which security may also be taken. In none of these cases does the destruction of the object, no matter what the cause, result in frustration of the contract because its continued existence was not fundamental to the contract which was concerned just with repayment of the money lent. The contract was not frustrated by the loss of the vessel and the appeal must fail in that respect.
3. The evidence fell far short of providing the necessary nexus between the supply of information (and there was no evidence of what the Bank actually said) and the eventual failure of the proposed contract to proceed. Nor was there any sufficient evidence to establish the loss said to have been incurred. In these circumstances the claim was properly dismissed.
4. The appeal was dismissed and the respondent was entitled to its costs of the appeal.

Cases considered:

Denny Mott & Dickson Ltd v James Fraser & Co Ltd [1944] AC 265

Taylor v Caldwell [1863] 3 B&S 826

Counsel for the appellant : Mr Pouno (appellant represented by its Managing Director Mr Tofa on 13/4/11)

Counsel for the respondent : Mrs Tupou

Judgment

[1] This is an appeal from a judgment of Andrew J on 11th August 2010 in which the respondent's claim for TOP$50,077.0 plus interest was allowed and the appellant's claim for damages for breach of fiduciary duty was dismissed.

[2] At the commencement of the appeal Mr Pouono appeared for the appellant. He applied for an adjournment which we refused. He then tabled a letter from the appellant discharging him as counsel. Mr Tofa then sought permission to act on behalf of the appellant. We granted that request. He also sought an adjournment which we refused but we deferred the case until the following morning to give him time to undertake some preparation. In the event he was able very clearly and forcefully to put to us the matters in respect of which he considered the judge in the Court below had erred.

[3] We are now able to address the two claims made by the appellant and determine this appeal.

[4] The appellant borrowed TOP$25,000 from the respondent Bank in October 2000. The purpose of the loan from the appellant's point of view was to repay money owing to the Tonga Development Bank so that it would release a charge over the MV Vaomapa which was then owned by interests of Mr Tofa's. The intention was to transfer ownership to the appellant although in fact this never happened. The money borrowed was also intended to provide working capital for the company. As security for the loan the bank took a debenture over the assets of the appellant, a mortgage over Mr Tofa's house and personal guarantees from the directors of the company. There is no reference in the documentation to the MV Vaomapa. The documents record the purpose of the loan as "working capital and refinance of Tonga Development."

[5] On the 19th November 2000 the Bank lent a further TOP$20,000 to the appellant the purpose of which is recorded as "For payments associated with insurance of main boat 'Vaomapa'."

[6] On 19th November 2001 the Bank lent TOP$26,300 to the appellant bringing total indebtedness to $33,833.00. The purpose was said to be to restructure the current overdraft into a term loan facility. Finally on 28th September 2004 an additional TOP$5000.00 was lent bringing total commitments to TOP$51,963.00. The purpose of the further $5,000 was said to be "Purchase of sandalwood/copra."

[7] In the Court below the appellant did not challenge the quantum of the amount owing to the respondent, which, by the time proceedings were issued, was TOP$50,077.00. The appellant raised two issues. First it claimed that the contract had been frustrated because the ship had been totally destroyed in a storm. The appellant maintained that the purpose of the loan was to enable it to purchase the vessel and later to insure it and that the destruction of the vessel destroyed the purpose of the contract. Secondly the appellant claimed that the respondent had breached its fiduciary duty to the appellant by disclosing confidential information to a party with whom the appellant was in business negotiations thus destroying the possibility of the enterprise succeeding. Both of these claims were rejected by the judge.

Frustration of Contract

[8] A classic example of the application of the doctrine of frustration of contract is *Taylor v Caldwell* [1863] 3B&S826. In that case there was an agreement to allow the use of a music hall for certain specified days for the purpose of holding concerts. The hall was destroyed by fire and the hirer of the hall claimed damages for breach of contract. Blackburn J discharged the contract on the basis that its fulfilment depended on the existence of the hall and the parties must have understood that its continuing existence was the foundation of the bargain.

[9] The modern approach to frustration is that in circumstances such as those described above the court imposes upon the parties the just and reasonable solution that the new situation demands. Speaking of an event and whether it would lead to frustration of contract Lord Wright said in *Denny Mott & Dickson Ltd. v James Fraser & Co. Ltd.* [1944] AC 265 at 276:

> "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is a matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'."

[10] In the present case there is no doubt about the event relied on by the appellant. It was the destruction of the vessel by weather conditions over which it had no control. The problem for the appellant is that the continued existence of the vessel cannot be said to have been regarded as essential by both parties to the performance of the contract. This was a contract for the loan and repayment of money. The obligations on the parties were that the Bank would provide the money and the appellant would repay it in the manner required by the contract. The assets of the company including the boat were part of the security to which the Bank could have recourse in the event of failure to undertake the obligation of repayment. The circumstances are no different to an agreement to lend money which is used to buy a house or a car or any object over which security may also be taken. In none of these cases does the destruction of the object, no matter what the cause, result in frustration of the contract because its continued existence is not fundamental to the contract which is concerned just with repayment of the money lent. The contract was not frustrated by the loss of the vessel and the appeal must fail in that respect.

The Respondents fiduciary obligations

[11] The appellant claimed US$210,000 for breach of fiduciary duties. The allegation is that the bank leaked confidential information regarding the appellant's loan status to a potential purchaser of copra from the appellant and that the buyer later cancelled the arrangement. The evidence supporting this allegation consisted of an email from the potential purchaser which included the statement *"I have been talking to the bank and it appears you have a problem there but we are working our way around it"* The email goes on to point out the importance of a frank exchange of information regarding obligations to the bank. The appellant's response was to write to the bank complaining about the bank's disclosure but going on to authorise it to give the prospective purchaser the information he requested concerning the debt by the appellant to the Bank.

[12] The above evidence falls far short of providing the necessary nexus between the supply of information (and there was no evidence of what the Bank actually said) and the eventual failure of the proposed contract to proceed. Nor was there any sufficient evidence to establish the loss said to have been incurred. In these circumstances the claim was properly dismissed.

[13] For the above reasons the appeal is dismissed. The respondent is entitled to its costs of the appeal.

R v Dalgety

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 25/2010

15 April 2011

Criminal procedure – unsigned indictment defective – no requirement to sign – indictment reinstated

The respondent was charged with perjury arising out of evidence given by him to the Royal Commission of Inquiry into the sinking of the MV Princess Ashika. He was arraigned before the Supreme Court on 23 April 2010 and pleaded not guilty to the charge. The respondent on 26 June 2010 filed a notice of motion for orders that no Indictment be presented on a number of grounds which at that stage did not include any suggestion as to deficiencies in the indictment. That issue was raised for the first time in a memorandum filed on 27 October 2010. On 1 November 2010 the Court addressed issues relating to the validity of the indictment. An order was made that the indictment was defective and should be quashed. The Crown sought leave to appeal against the order dismissing the indictment and leave was granted by the President of the Court of Appeal on 8 December 2010. On 11 January 2011 the Chief Justice directed, pursuant to s24 Court of Appeal Act, that the appeal should be determined without a hearing. The parties provided written submissions to the Court.

Held:

1. The Tongan Constitution contains no requirement for the signing and dating of an indictment. Until a recent practice direction issued by the court, there was no provision in the rules of Tonga requiring the signing or dating of indictments. The practice direction could not have retroactive effect. The Constitution provided all that was needed in Tonga with respect to the form and content of indictments. There was no need or justification for importing the English practice into Tongan law other than by enactment or practice direction.
2. The Court made two further observations. The first was that even if the first indictment had been defective that defect was cured by the second one. There was no good reason for the Judge to prevent Mr Kefu from signing that indictment. The second point was that the recent practice direction concerned procedural matters. If there was a deficiency or irregularity in an indictment it would not in general make the indictment a nullity. It would be capable of correction.

3. The appeal was allowed and the indictment was reinstated. Therefore was no order for costs. The matter was referred back to the Supreme Court so that the remaining pre-trial matters could be heard and determined. The question of which Judge should undertake this further hearing was a matter for the Chief Justice.

Cases considered:

Giuseppe Sidoli's case (1833) 1 Lewin 55
Jane Denton's Case (1823) 1 Lewin 53
R v Clarke [2008] UKHL 8
R v Morais [1988] 3 All ER 161

Statutes considered:

Administration of Justice (Miscellaneous Provisions) Act 1933
Constitution of Tonga Act (Cap 2)
Coroners and Justice Act 2009

Counsel for the appellant : Mr Kefu
Counsel for the respondent : Mr Hirschfeld

Determined on written submissions

Judgment

[1] The Respondent was charged with perjury arising out of evidence given by him to the Royal Commission of Enquiry into the sinking of the M.V. Princess Ashika. He was arraigned before the then Chief Justice Ford on 23 April 2010 and pleaded not guilty to the charge.

[2] Counsel for the Respondent on 26 June 2010 filed a Notice of Motion for orders that no Indictment be presented on a number of grounds which at that stage did not include any suggestion as to deficiencies in the indictment. That issue was raised for the first time in a memorandum filed on 27 October 2010.

[3] The motion to quash the Indictment came on for hearing before Shuster J on 1 November 2010. The Judge elected to deal first with the issues relating to the validity of the indictment. Argument was heard on this issue and the Judge determined that the indictment was defective and should be quashed. That order was made following the hearing. On the 4th November 2010 the Judge issued a 17 page document entitled "Clarification of the Reasons for Quashing the Indictment in File Cr.64/2010"

[4] The Crown sought leave to appeal against the Order dismissing the Indictment and leave was granted by Chief Justice Scott in his capacity as President of the Court of Appeal on 8th December 2010. On the 11th January 2011 the Chief Justice directed, pursuant to s24 Court of Appeal Act, that the appeal should be determined without a hearing. The parties have now provided written submissions to this Court enabling us to proceed to a determination.

The Judge's reasons

[5] In his reasons dated 4 November 2010, the Judge set out the chronology of the file which was originally in the care of the former Chief Justice Ford. In the chronology the Judge notes that there is no record of an indictment being filed on or after the 23 April 2010. He records that on 27 April the defendant appeared for arraignment. Later the Judge notes that when he examined the file he discovered an indictment written in the Tongan language but not one in English. He noted that the Tongan indictment was neither dated nor signed and was the only indictment on the file. He records a pre-trial conference on 29 September at which he was advised by counsel for the defendant that the Crown had supplied him with an indictment. The Judge records that this was the first time he had seen an English translation of the Tongan indictment. The Judge set out the provisions of clause 11 of the Constitution which is as follows:

> **11.** No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a written indictment (except in cases of impeachment or for offences within the jurisdiction of the magistrate or for contempt of court while the court is sitting). Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and to make his own statement regarding the charge preferred against him. But whoever shall be indicted for any offence if he shall so elect shall be tried by jury and this law shall never be repealed. And all claims for large amounts shall be decided by a jury and the Legislative Assembly shall determine what shall be the amount of claim that may be decided without a jury. *(Act 25 of 1942; Amended by Act 13 of 1982 and Act 9 of 2006)*

[6] The Judge recorded that a criminal trial cannot start until there is a valid indictment before the Court. He went on to say, relying on English authority, that if an indictment is invalid then all proceedings therein are a nullity. He noted that the Tongan indictment was not signed or date stamped but that an amended indictment had been received which was stamped as received on 12 October 2010.

[7] He recorded that although Crown counsel argued that the practice had always been in Tonga that indictments were neither signed nor dated that practice had now been challenged. He expressed the view that most legal documents will have no validity if not signed and dated, and gave as examples wills, affidavits, summonses, warrants and Court of Appeal judgments. He held that because the indictment of 23 April 2010 was not dated or signed it was a nullity and held that it could not be cured by the amended indictment.

Mr Kefu's affidavit

[8] Mr. Kefu the Solicitor General filed an affidavit in support of an application for leave to appeal. In that affidavit he recorded that over a period of 15 years he had been involved in the drafting, filing and service of indictments. He said that in Tonga, so far as he was aware, indictments were never required under law or by the courts to be signed or dated by Crown counsel. He said that indictments were presented for filing in Court in both English and Tongan versions. The English version was on top and the Tongan version was stapled to it from the bottom. He said that once the Supreme Court staff receives an indictment for filing the Supreme Court file stamp is affixed to the English version only because that is the first page of the indictment. The staff then writes the date it was received for filing, the time and then initials that. The Supreme Court's staff retains one copy for the Supreme Court file and returns two copies to the Crown Law staff. One of those copies is served on defence counsel or the accused.

[9] He confirms that in the present case on 23 April 2010 the Crown filed an indictment in the normal manner, that it was stamped and dated 23rd of April 2010 at 1320 hrs. and was signed by a Supreme Court staff member. He annexed a copy of that document to his affidavit. He said that the indictment was served on the respondent on the same day it was filed. On the 27th April 2010 the respondent appeared for arraignment and stated in court that he had read the indictment.

[10] On 17 September 2010 a request was received from counsel for the respondent for a copy of the indictment. A copy was sent with a letter recording that the indictment had been served on the accused around 23 April 2010 and that during the arraignment his counsel had the original copy.

[11] The affidavit then recorded that on 29 September 2010 at a pre-trial conference the Crown was directed to amend the indictment and file it within 10 days. This was done with the amendments directed by the Judge. The amended indictment was served at the office of defence counsel on 12 October.

[12] None of the statements of fact in Mr Kefu's affidavit have been challenged by the respondent other than by reference to the Judge's reasons. In particular there is no challenge to the facts recorded in para. [9] above.

Counsel's submissions

[13] The appellant's submissions largely repeat the material contained in Mr. Kefu's affidavit. There is the additional information that there is in fact a stamped and filed English language indictment dated 23rd of April 2010 on the Supreme Court file. We have inspected the file ourselves and can find only a copy of that indictment on the file. However we requested the Court staff to obtain an original from the Crown Law Office and we have inspected that. We accept as a fact that an English language indictment dated 23rd of April 2010 was filed and that it was stamped dated and initialled by court staff (as appeared on the face of the original obtained from the Crown Law Office) in accordance with the usual custom in the Tonga Supreme Court Registry. We accept that stapled below it was the Tongan language version. The two

versions were separated at some stage but we have no way of knowing when this occurred.

[14] The submissions record that during the hearing in the court below the Judge did not make it clear that the undated indictment to which he was referring was the Tongan language version rather than the English language one. That was referred to for the first time in the reasons given later. Mr Kefu states that had he been informed at the time that the Judge was referring to a Tongan version of the indictment he would have proposed to the Judge that the hearing be adjourned to enable the English version to be located.

[15] Counsel submits that the practice direction relating to indictments made by the Chief Justice on 20th of October 2010 cannot have retroactive effect. Indeed the Judge acknowledged that this was so. That direction now requires indictments to be signed and dated by a person nominated by the Solicitor General. The submissions request that the appeal be allowed and that costs be awarded in favour of the appellant. There is also a request for a direction from us that the Judge in the court below should not deal with this matter any further, and that the proceedings should be referred to another Judge of the Supreme Court. In our view this is a matter for direction by the Chief Justice rather than by us.

[16] The respondent's submissions refer to the legal position in England as described in *R v. Morais* [1988] 3 All ER 161. At that time there was a mandatory statutory provision requiring indictments to be signed by a responsible officer of the court and dated. The position in England is discussed in more detail later in this judgment. Counsel for the respondent submits that the English procedure should be adopted in Tonga even though, as he accepts, English statutory provisions no longer form part of the law of Tonga. He puts forward two reasons for this proposition. The first is that a bill of indictment must be distinguished from an indictment proper to prevent potential abuse. The second is that rules of procedure may outlive their legislative existence to become, in effect, part of the procedural common law in Tonga. As will become apparent later in this judgment, we do not accept the second of these propositions and regard the first as of little weight. The submissions then go on to quote at length from the reasons of the Judge in the court below.

[17] The submissions note that on 29 September 2010 the Judge directed that if there was to be an amended indictment in this case it must be dated and signed prior to the trial date. An amended indictment was filed but it was not signed. Counsel criticizes this noncompliance with the Judge's direction. When this matter was raised in Court on 1 November 2010 Mr. Kefu said he would sign the indictment in Court. Counsel for the respondent objected to this being done on the grounds that the indictment of 23 April was not dated or signed and was a nullity and the later one could not cure that deficiency. The Judge agreed with that submission.

[18] Counsel for the respondent submits that an English type approach to criminal procedure generally as opposed to an American or Australian approach is adopted in Tonga. The submissions then go on to quote further passages from the Judge's reasons relating to the facts found by him and conclude by submitting that the appeal should be dismissed and costs should be awarded to the respondent.

The position in England

[19] In England, the form and essential terms of an indictment have long been regulated by statute. The origins and operation of the statute, The Administration of Justice (Miscellaneous Provisions) Act 1933, were discussed in a recent decision of the House of Lords, *R v Clarke* [2008] UKHL 8. Section 2(1) of the Act provided that a bill of indictment could be preferred by any person before a court and that a proper officer of the court should sign the bill. However the bill was to be signed only after the proper officer had been satisfied that section 2(2) had been complied with. Section 2(2) contained conditions, in the alternative, that had to be satisfied before a bill of indictment could be preferred.

[20] The central issues before the House of Lords were whether an unsigned bill of indictment was a valid indictment and whether there could be a valid trial on indictment if there was no valid indictment. Their Lordships concluded that without a signature there was no valid indictment and without a valid indictment there could be no valid trial on indictment. The historical position was addressed in some detail in the speeches of Lord Bingham of Cornhill and Lord Carswell in particular. Both their Lordship noted that the 1933 Act was enacted as part of a move away from grand juries which had, historically, undertaken a preliminary assessment of whether there was a case against the accused. When undertaking that preliminary assessment, the grand jury had before it a bill of indictment setting out the charges which it was proposed would be prosecuted. If the grand jury thought the matter should go to trial, the foreman would endorse the bill by writing "true bill" on it. If it was not to go to trial the words "no true bill" were written on it.

[21] As Lord Carswell noted (at [33]), the bill was good even if it had not been signed by the foreman as long as it had been delivered in court and read in his presence. His Lordship cited Giuseppe Sidoli's case (1833) 1 Lewin 55 and Jane Denton's Case (1823) 1 Lewin 53.

[22] Since the decision of the House of Lords in *R v Clarke*, the 1933 Act has been amended by the Coroners and Justice Act 2009. A signature of the proper officer of the court is now no longer a condition precedent to a valid indictment: see Archbold, Criminal Pleading, Evidence and Practice (2011) at 1 – 191. It can be seen that the background to the situation as it was prior to 2009 is very different to that which has prevailed in Tonga.

Discussion

[23] As we have noted earlier, there is no doubt that the practice in Tonga has been that unsigned indictments are filed in the Supreme Court where they are stamped dated and initialled by court staff. That practice was followed in this case. We note that in New Zealand indictments are not required to be signed by a responsible officer of the court. So the practice of filing unsigned indictments is not without precedent. The position in England as appears from the discussion above has changed from that which earlier applied. The result of the 2009 Amendment is that it is not now mandatory to sign and date an indictment but it is regarded as good practice.

[24] The provisions of clause 11 of the Tongan Constitution are set out earlier in this judgment. Those provisions contain no requirement for the signing and dating of an indictment. Until the recent practice direction there was no provision in the rules of Tonga requiring the signing or dating of indictments. In this respect the situation was similar to that in New Zealand. In this regard clause 89 of the Constitution is relevant. It provides:

> "The judges shall have power to direct the form of indictments, to control the procedure of the lower Courts, and to make rules of procedure."

This provision is the source of the power exercised by the Chief Justice in making the practice direction earlier referred to. Thus it can be seen that the Constitution provides all that is needed in Tonga with respect to the form and content of indictments. We can see no need or justification for importing the English practice into Tongan law other than by enactment or practice direction.

[25] There are two further observations that should be made. The first is that even if the first indictment had been defective that defect was cured by the second one. There was no good reason for the Judge to prevent Mr Kefu from signing that indictment. The second point is that the recent practice direction concerns procedural matters. If there is a deficiency or irregularity in an indictment it would not in general make the indictment a nullity. It would be capable of correction.

Conclusion

[26] For the above reasons the appeal must be allowed and the indictment reinstated. Section 25(1) of the Court of Appeal Act prohibits the grant of costs in criminal appeals; therefore there will be no order for costs.

[27] The matter is referred back to the Supreme Court so that the remaining pre-trial matters can be heard and determined. The question of which Judge should undertake this further hearing is a matter for the Chief Justice.

Mafile'o v Muhupeatau anors

Land Court, Nuku'alofa
Scott P
LA 5/2009

15 July 2011

Land law – plaintiff sought vacant possession of land – question as to defendants' rights – equitable rights to the defendants – registration of land to plaintiff was not quashed

In April 2009 the plaintiff issued a writ and sought vacant possession of a town allotment known as Hala-Ki-Langi which was registered in his name on 20 September 2006 (the land). The plaintiff claimed that prior to September 2006 the land had been registered in the name of Siaosi Vuki Mafile'o (Siaosi) his uncle, who had held the land since 16 January 1987. Siaosi had allowed a relative of his, Sione Sauesi (Sione), temporarily to occupy the land. Since Sione's death in 2004 the land has been occupied not only by Sione's widow, the second defendant, but also by his brother Hateni (who has also since died), a nephew Tevita (the third defendant), and by Hateni's daughter and son in law (the first defendants). The plaintiff claimed that the defendants had no right to continue their occupation of the land. The defendants argued that it was not Siaosi who allowed Sione onto the land, but Siaosi's uncle Samiu Tonga (Samiu) who was the registered owner of the land at all material times prior to 15 January 1987.

There were three main legal questions:

(a) How far was the plaintiff estopped from asserting his right to the occupation of the land by reason of assurances given by Samiu to Sione or to be inferred from Samiu's conduct towards Sione?
(b) Was the land "available" to be registered in the Plaintiff's name in 2006?
(c) Was there any ground for ordering the cancellation of the registration of the land in 2006?

Held:

1. While an estoppel might prevent an allotment holder from taking possession of the land, the estoppel did not itself create any form of title; only an equity and a licence were conferred. It was crucial that the representations which were said to have led to the creation of the estoppel

should precisely be defined. A party should not be estopped on an ambiguity.

2. The defendants' contention that the land was not available for registration in the plaintiff's name simply by virtue of the fact that a house had been erected thereon was unsustainable.
3. The court reached the conclusion that the defendants did not show that Sione acquired any legal rights under the Act and that the Minister was not been shown to have acted mistakenly in registering the land in the plaintiff's name.
4. The remaining question was the extent of the equity that must be satisfied.
5. The court declared that the second defendant and any children of Sione and Hateni who had not yet come of age were allowed to remain on the land. When the second defendant passes away and the youngest child comes of age (whichever is later) the land will revert to the plaintiff's possession. The house and other buildings could be removed by Sione and Hateni's family or alternatively they should be compensated for by the plaintiff for their value. The precise manner in which this operation was to be carried out may need to be supervised by the court and therefore there was liberty to apply for further directions.

Cases considered:

Fakatava v Koloamatangi & anor [1974-1980] Tonga LR 15
Havea v Tu'i'afitu, Kava and Minister of Lands [1974-1980] Tonga LR 55
Kolo v Bank of Tonga [1997] Tonga LR 181
Legione v Hately (1983) 152 CLR 406
Matavalea v Uata [1989] Tonga LR 100
OG Sanft & Sons v Tonga Tourist and Development Co Ltd [1981-1988] Tonga LR 26
Ongolea v Finau [2003] Tonga LR 147
Tafa v Viau anors [2006] Tonga LR 125
Tafa v Viau anors [2006] Tonga LR 287 (CA)
Vai v 'Uliafu & anor [1989] Tonga LR 56
Veikune v To'a [1981-1988] Tonga LR 138

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)

Counsel for the plaintiff : Mrs Vaihu
Counsel for the defendants : Mr Kaufusi

Judgment

A. Introduction

[1] The writ was issued in April 2009. The Plaintiff sought vacant possession of a town allotment known as Hala-Ki-Langi which was registered in his name on 20 September 2006 – Deed of Grant No.374 Folio 57 – R.P. 1491 Lot 4. (the land).

[2] The Plaintiff's case was that prior to September 2006 the land had been registered in the name of Siaosi Vuki Mafile'o (Siaosi) his uncle, who had held the land since 16 January 1987. According to the Plaintiff, Siaosi had allowed a relative of his Sione Sauesi (Sione) temporarily to occupy the land. Since Sione's death in 2004 the land has been occupied not only by Sione's widow, the Second Defendant, but also by his brother Hateni (who has also since died) a nephew Tevita, the Third Defendant, and by Hateni's daughter and son in law, the First Defendants. The Plaintiff says that the Defendants have no right to continue their occupation of the land.

[3] The Defendants' case is that it was not Siaosi who allowed Sione onto the land but Siaosi's uncle Samiu Tonga (Samiu) who was the registered owner of the land at all material times prior to 15 January 1987. As pleaded in the Statement of Defence, paragraphs 15 & 16.

> "… Hateni … and Sione… asked their uncle Samiu Tonga in 1967 for a piece of land on his tax allotment for them to develop, live and and own as they are from the island of Kotu in Ha'apai and had nowhere to live in Tonga."
>
> "… Samiu … pointed out and marked the area which is now the town allotment in question and gave it to Sione … and … Hateni to develop, live on and own and in consideration they gave Tongan mats, tapa cloths and artifacts valued at $300 at the time and money from time to time to help him out".

[4] Put briefly, the Plaintiff's submission is that he is the registered owner of the land and is therefore entitled to all the benefits that thereby accrue, including vacant possession. Unless the Defendants are able to show that in registering the Plaintiff the Minister acted on wrong principles, the registration must stand (see *Havea v Tu'i'afitu, Kava and Minister of Lands* [1974-1980] Tonga LR 55).

B. The evidence for the plaintiff

[5] Mrs Vaihu called four witnesses. The first was the Plaintiff who told the Court that the land was registered in his name in 2006. A copy of the deed of grant was produced as Exhibit P1. The Plaintiff explained that the land had previously been registered in the name of his uncle Siaosi in January 1987 (Exhibit P3). In 1986 Siaosi wrote to the Minister of Lands from Hawaii, when he was living, vesting control of the land in his elder brother Pakola (Exhibit P2). In October 2004 Siaosi again wrote to the Minister (Exhibit P4) applying to surrender the land (in accordance with the provisions of Section 54 of the Land Act), with a view to its regrant to the

Plaintiff (Pakola's son) in accordance with the provisions of Sections 87 and 88 of the Act. On 15 February 2005 a Section 54 (2) surrender notice was published in the Tonga Chronicle (Exhibit P6) requiring any person claiming to be the legal successor to lodge his claim to the surrendered land. It is not in dispute that no claim to the land was made other than by the Plaintiff and, after its reversion to the Crown, by operation of Section 53(3), it was allocated to the Plaintiff the following September.

[6] The Plaintiff told the court that he and Siaosi went to the land in October 2004, shortly before the letter of surrender was delivered to the Ministry of Lands. They spoke to Sione and his wife Losa (the Second Defendant). According to the Plaintiff, Siaosi advised Sione that he was intending to give the land to the Plaintiff. The Plaintiff told me that Sione had agreed with pleasure to this proposal. He explained that he had been married twice but still had no children : "the children for whom we were given the land have all grown up".

[7] The Plaintiff told the court that after he received the Deed of Grant in 2006 he again visited the land. By then Sione had died and the property was being occupied by Sione's brother Hateni and his family. Shortly after, one of Hateni's sons, Sikulu, approached him and asked for the land. After it became clear that Hateni and his family were not prepared to move off the land the Plaintiff went to see his lawyer.

[8] Cross-examined by Mr Kaufusi, the Plaintiff agreed that there were substantial buildings on the land, that the land appeared to have been filled in above the water table and that a number of fruit bearing trees had apparently been planted (see Defendants' photographs 1 – 5). He did not dispute that Samiu had originally held the land as part of his allotment.

[9] The next witness, Latu Koloamatangi (Latu), told me that she remembered that the land was part of her grandfather's tax allotment. Her uncle Samiu inherited it from his father. At some point the land was subdivided and Siaosi was given the land in question. It was then registered in his name. According to this witness she was present in about 1972 when Sione came to see Siosi's mother 'Aioema to ask permission to bring his adopted children and wife to live on the land. 'Aioema told them that they could come and live there for a while to allow the children to go to school on Tongatapu. Sometime later Sione came to see her mother Sita and again asked about the land. He asked to be given it, as he had heard that Siaosi had gone away and would not be returning. According to this witness, Sione was sent away after he had been told that the land of 'Aioema's children would never be given up.

[10] In cross-examination this witness maintained that the land had not been improved in the 1960's and nobody was living there at that time. Although the land was eventually used for relatives to stay on it was "clearly Siaosi's land before he registered it in 1987".

[11] The next witness was Sione Fifalati Latu (Latu) who told the court that he was a grass cutter who has lived next to the land since the 1970's. He remembered that Sione's family lived on the land which was part of Samiu's tax allotment. Sione and Hateni had both lived there but had now died. The third defendant, Tevita Tonga, also lived there with some other unknown persons, including school children. He

agreed that the land had been swampy and had been improved by Sione and his family who had also built the house which is now standing there.

[12] The last witness for the Plaintiff was Penitani Ulakai (Penitani) who told the court that he accompanied Siaosi and the Plaintiff when they visited the land in 2004. He overheard part of a conversation between Siaosi and Sione in which Siaosi told Sione that he intended to give the land to the Plaintiff. According to this witness Sione agreed to leave but asked for time to remove his belongings. In cross-examination he agreed that he did not hear Sione say that he was happy about it as although he had been twice married, he had no son.

C. The evidence for the defendants

[13] Mr Kaufusi explained that the original Defendant had been Hateni but that he died after the proceedings were commenced in 2009. The First and Second Defendants, husband and wife, are Hateni's son-in-law and daughter. The Second Defendant is Sione's widow (and second wife). The Third Defendant, as already noted, is Hateni's son.

[14] Put briefly, the Defendant's case is that Sione and his family were given permission to move onto the land by the then registered owner Samiu. With his consent they had improved the land and erected buildings, including a substantial house, upon it. It was submitted jointly and alternatively that the Plaintiff was estopped from asserting his claim to the land and that the Minister erred in registering the land in the Plaintiff's name because it was not "available" for grant within the meaning of Sections 43 and 88 of the Act (and see e.g. *Vai v 'Uliafu & anor*. [1989] Tonga L.R. 56).

[15] The first defence witness was Tevita Tonga Fakateli (Tevita) the third defendant. Tevita told me that he was born in 1964 and first came to the land in about 1975, at the beginning of his studies. In common with his other close relatives he came from Ha'apai. "A few of my brothers came before, I am one of three groups that came". "The previous groups who came were my brothers and my aunty's children". This witness told the court that when he came to the land the house on posts had gone. There was a concrete slab which was still wet. He also said, however, that the present house on the land was not built until 1983 to 1984.

[16] Tevita told the court that Samiu was in the habit of visiting the land. He came to share food and for financial reasons: "if we did not have money he would ask for tongan artifacts like tapa cloth. He wanted to sell them for money, for alcohol." Asked in cross-examination about the arrangement under which the family came to live on the land, Tevita said that Sione and Hateni went to Samiu and asked his permission to "come and stay on the land." He conceded that he was not present when the arrangement was made in about 1967. He was only three years old then and had been told about it later. Although clearly hearsay, this evidence was admitted under the Land Court's recognized exception to the hearsay rule (see *Tafa v Viau anors* [2006] Tonga LR 125).

[17] According to Tevita, the first time that he became aware that there was a problem about the land was in 2009 when the Plaintiff came and told them to leave.

He did not know that the land had been registered in the Plaintiff's name until 2010. He was not aware of any discussions with Samiu about registering the land in Sione's or Hateni's name. Samiu was often drunk. He conceded that neither Sione nor Hateni had ever sought to have the land registered in their names. None of the Defendants had tried to register the land either: "we were still waiting for the court case."

[18] The second defence witness was 'Aunofo Fakateli ('Aunofo) who gave evidence along the lines of an affidavit sworn by him in October 2010 and which was admitted by consent. Much time and effort can be saved by adopting this practice as a means of giving evidence in chief.

[19] 'Aunofo told the court that he is 77 years of age. Sione and Hateni were his brothers. "We came from Kotu Ha'apai then Sione made an arrangement with Samiu to give us a piece of land for the children and family from Kotu to come and live on for their study here in Tonga". "This piece of land was allocated and gave it to the family". Later he said "the allegation of the Plaintiff is not true for it is the allotment of Samiu and he came to Hateni and Sione to eat, and he was given money for giving them this allotment. This family cannot build if they live temporary".

[20] In response to further questions 'Aunofo said that the land had been given to them in 1967. The understanding was for Sione to own the land, however no "paper arrangement" was entered into. He admitted knowing that a tax allotment should be registered but explained that steps were not taken to register it because "Samiu told us that we could stay there".

[21] Questioned by the court, 'Aunofo said that Samiu used to visit the land asking for money or artifacts. Sometimes, he would not come for a month. He was coming to the land regularly right up to the time of his death in April 1984. He used to ask for money for drinks.

[22] The third defence witness (Manase Tu'itavuki – Manase) (who also swore an affidavit in October 2010) told the court that he understood that the land was given by Samiu to "Sione and his brother Hateni for they are coming from Ha'apai together with children to study here in Tonga". He also told the court that he had helped to build the house on the land.

[23] Defence witnesses 5 and 7 did not add to the defence case. Defence witness 6, Losaline Sauesi, the Second Defendant, told the court that she was Sione Sauesi's widow; she had married him in 1996. She still lived on the land.

D. Submissions

[24] After the close of the defence case both counsel asked for time to file written submissions. On 10 June 2011 Mr Kaufusi filed his submissions. He submitted that it was clear that the Defendants had occupied and built on the land since 1967 with the permission of Samiu. In these circumstances the land was not available for registration in the Plaintiff's name. Mr Kaufusi relied on *Ongolea v Finau* [2003] Tonga L.R. 147 for the proposition that "with the exception of a person in occupation as a squatter, the land [is] not available for allotment if it [is] occupied". He also relied on *Tafa v Viau anors* [2006] Tonga LR 125 and 287 for the proposition that before registering the land, the Minister is required to take steps "which must be

reasonable in the particular circumstances, to ascertain claims that might be an impediment to a grant or make it unavailable". Mr Kaufusi suggested that it was clear that the Minister had either made insufficient enquiries to ascertain the true position or had made a mistake in allowing the land to be registered in the Plaintiff's name. Therefore (relying on *Havea* – supra) the Defendants were entitled to have the registration cancelled.

[25] Mrs Vaihu also filed a helpful submission. She pointed out that the Defendants had made no attempt to register the land and that they had not responded to the Section 54 notice. She suggested that there was nothing to show any intention by Samiu to do any more than allow Sione and his family to occupy the land to enable the children to attend school. There was nothing to suggest that the present occupants of the land (with the exception of the Second Defendant) had ever been given permission to occupy it and they were therefore squatters; accordingly, the land was indeed available and therefore properly registered. So far as the Second Defendant was concerned, it was conceded that she had acquired the right, as Sione's widow, to stay on the land for the rest of her life.

E. The principal facts

[26] As conceded by Mrs Vaihu in her closing submissions, there is no reason to doubt that Sione came onto the land with the permission of the then registered holder, Samiu. I accept 'Aunofo's evidence that this was in about 1967. I also accept the evidence that at that time the land was swampy and liable to flood, that over the next several years the land was improved by being filled in, that fruit bearing trees were planted and that several houses were built on the land, including those that are still standing. It is obvious that these works all required expenditure by those occupying the land.

[27] Having heard and seen him, however, I also accept the evidence of the Plaintiff that at about the time of Sione's death he was approached by one of Hateni's sons Sikulu and was asked for the land. I also accept PW2 Latu's evidence that she was present, in about 1972, when Sione came to see Aioema, Siaosi's mother, and was told that he could occupy the land together with his adopted children. I accept Latu's evidence that in about 2000 Sione again came, this time to her mother Sita, and asked to be given the land, but was refused.

[28] As has been noted in paragraphs [6] and [12], the Plaintiff and Penitani told me that they spoke to Sione at the land shortly before it was surrendered by Siaosi. I accept this evidence to be true.

F. The principal legal issues

[29] In my opinion, this case raises three main legal questions:

(a) How far is the Plaintiff estopped from asserting his right to the occupation of the land by reason of assurances given by Samiu to Sione or to be inferred from Samiu's conduct towards Sione?

(b) Was the land "available" to be registered in the Plaintiff's name in 2006?
(c) Is there any ground for ordering the cancellation of the registration of the land in 2006?

[30] In *Fakatava v Koloamatangi & anor* [1974-1980] 15 the Supreme Court, in a very short judgment, stated that "the law of estoppels" may prevent undeserved loss. In the following years two distinct forms of estoppel have been recognized. The first is a statutory estoppel which is to be found at Part VII of the Evidence Act (Cap 15). This provision has been relied on both by the Land Court (see e.g. *Vai v 'Uliafu* – supra) and by the Privy Council (see *Matavalea v Uata* [1989] Tonga L.R. 100). The Courts have also recognised and relied on equitable or promissory estoppel (see e.g. *O.G. Sanft & Sons v Tonga Tourist and Development Co. Ltd* [1981-1988] Tonga L.R. 26 and *Veikune v To'a* [1981-1988] Tonga L.R. 138). As explained in these judgments, while an estoppel may prevent an allotment holder from taking possession of the land, the estoppel does not itself create any form of title; only an equity and a licence are conferred (see also *Matavalea v Uata* [1989] Tonga L.R. 101).

[31] In view of the consequences that flow from the recognition of an estoppel it is obviously crucial that the representations which are said to have led to the creation of the estoppel should precisely be defined. A party should not be estopped on an ambiguity (*Legione v Hately* (1983) 152 CLR 406).

[32] The witnesses for the Defendants, not surprisingly, gave varying accounts of what it was precisely that was asked of Samiu by Sione and what it was that was granted. As pleaded, the Defendants claim that Samiu gave the land to Sione (and Hateni) "to develop, live on and own" whereas some of the witnesses seemed to suggest that the land was merely lent for the use of Sione and the children who were coming to Tongatapu from Ha'apai to pursue their studies.

[33] With the passage of time and the death of the principals it is my view that the exact nature of the arrangement between Samiu and Sione is impossible to determine. The facts, however, as accepted in paragraph [26] above taken together with the limitations imposed by the Land Act do, in my opinion, define the limits of the estoppel.

[34] It will be remembered that under the Land Act an allotment can only be acquired under the provisions of Part IV Division I. Land cannot be granted verbally and an attempt to sell it is illegal (Section 13). Secondly, the Land Act, in Division VII of Part IV lays down exactly how allotments are to devolve on the death of the registered holder. No agreement could be made by Samiu which would avoid these provisions. As it happened, the land devolved on Siaosi in 1987, following Samiu's death in 1984. I was not told anything about the way this came about and in the absence of any challenge to that devolution by operation of the Act, assume the transaction to be beyond challenge. The point, however, of these considerations is this: the principles of equity can only be applied where they are not in conflict with the Act. Even supposing there was evidence (which there is not) that Samiu had undertaken to surrender the allotment with a view to its regrant to Sione under the practice referred to in *Tafa v Viau anors* (supra at page 137 paras 42 and 43) there

was no way in which Samiu could prevent a challenge to a grant of the allotment to Sione by Samiu's statutory heir as defined in Section 82 of the Act.

[35] In my opinion the Defendants' claim that Sione acquired a legal, as opposed to an equitable, interest in this land is unsustainable. How far an equity has survived his death, and how best it can be satisfied are questions to which it will be necessary to return.

[36] The Defendants' alternative submission is that the land was not 'available' to be registered in the Plaintiff's name because there was a house built on the land. Support for this argument comes from *Vai* (supra p.63) in which the Court found:

> "as a fact that the land was not available … because a house had been built on the land."

Later (on page 64 – 410) the court said:

> "while it may be one thing to consider as "available" land which a person is occupying as a squatter without any form of leave, it would not be right to include in "available" land plots occupied by people with the leave of the estate owner or his agents".

[37] Since it is plain that a squatter may well be living in a solidly constructed house on the land, the mere fact that there is a house on the land cannot, of itself, lead to the conclusion that the land is therefore "unavailable". The existence of a house may suggest an equity but in my opinion it cannot on its own affect the statutory rules for the devolution of allotments. It is also worth bearing in mind that buildings in Tonga are not generally regarded as forming part of the realty, but are regarded as items of personal property (see *Kolo v Bank of Tonga* [1997] Tonga L.R. 181.)

[38] When there is a house found to have been erected on the land, it will be necessary to enquire into the way the house came to be there. It will also be necessary to establish whether the house can reasonably conveniently be removed or whether compensation will have to be paid in lieu of removal.

[39] In my opinion the Defendants' contention that the land was not available for registration in the Plaintiff's name simply by virtue of the fact that a house has been erected thereon is unsustainable. With respect to my learned predecessor, I am of the opinion that his reading of *Vai* referred to in *Ongolea* (supra) at page 151 line 220, is incorrect.

[40] The third fundamental question is whether there is any ground for ordering the cancellation of the registration of the land in 2006.

[41] It is unfortunate that the Defendants did not join the Minister of Lands in these proceedings. The result is that nothing is known about the enquiries which may or may not have been made prior to the decision to register the land in the Plaintiff's name. The only alleged error which the Defendants are able to point to is the registration of the land, when it was "unavailable" because a house was erected upon it and was being lived on by the owners of the house. For the reasons I have given

however, I do not find that these facts on their own must inevitably result in a finding that the land is unavailable. An example may illustrate the point.

[42] A kind-hearted landowner is approached by a friend whose own property has, for some temporary reason, become uninhabitable. The friend requests permission to build a house for his family on the landowner's land and promises that as soon as his land again becomes available for habitation he will take down the house and move back home. The landowner grants his friend a licence on those terms. The landowner dies and the licencee reneges on his promise. This is just one scenario in which it is obvious that a detailed enquiry would have to be held before a decision is taken to prevent the heir moving onto the land. If properly carried out, the result would be the removal of the licencee, not the exclusion of the heir.

[43] In the absence of anything suggesting that reasonable enquiries were not made by the Minister in this case, I decline to apply *Tafa v Viau anors* [2006] Tonga LR 287 (CA) and do not quash the registration.

[44] Having reached the conclusions that the Defendants have not shown that Sione acquired any rights under the Act and that the Minister has not been shown to have acted mistakenly in registering the land in the Plaintiff's name, the remaining question is the extent of the equity that must be satisfied.

[45] I think it probable that Sione and his family thought, erroneously, that they would be able to stay on the land as long as they wanted. This conviction grew as the years went by and their right to continue in occupation was not challenged. After living on the land from about 1967 to 1984 they decided to build the house which is obviously not a temporary structure. As 'Aunofo said "this family cannot build if they live temporary".

[46] In my view, the original purpose to which the land was dedicated was to allow the children to come from Ha'apai to be educated. Until his death Samiu used to come to the land and receive cash and kind; this suggests that he did not think that he had parted with possession of the land. After Samiu's death, with his heir Siaosi absent overseas, Sione and his family began to regard the land as their own. There was nothing, apart from the law, of which they were quite likely ignorant, to discourage their opinion. I accept that it was a shock when, in 2004, Siaosi suddenly arrived and laid claim to the land.

[47] In my view, Sione and Hateni acquired the right to live on the land as long as they and their wives survived and until the youngest of their children came of age. I believe that the improvement of the land was for their own benefit as well as the benefit of the reversioner. I find that the house was built in the mistaken impression that they would always be allowed to stay. While a better house was obviously for their own benefit I believe that it would be unjust for its value to be lost.

[48] The result is that the court declares that the Second Defendant and any children of Sione and Hateni who have not yet come of age are allowed to remain on the land. When the Second Defendant passes away and the youngest child comes of age (whichever is later) the land will revert to the Plaintiff's possession. The house and other buildings can be removed by Sione and Hateni's family or alternatively they should be compensated for by the Plaintiff for their value. The precise manner in

which this operation is to be carried out may need to be supervised by the court and therefore there will be liberty to apply for further directions.

[49] I acknowledge the invaluable contribution made by Mr Assessor Blake to these proceedings.

Australia and New Zealand Banking Group Limited v Paunga anor

Supreme Court, Nuku'alofa
Scott CJ
CV 39/2010

12 August 2011

Civil debt – garnishee order – Supreme Court had the power to make the order

The defendant did not dispute that he owed money to the plaintiff. The plaintiff wanted to attach the defendant's salary and summonsed the defendant to show cause why sums accruing to the garnishee not be attached to satisfy the judgment debt. The defendant submitted that the judgment debt should not be satisfied by garnishee proceedings.

Held:

1. The Supreme Court's power to garnish was beyond doubt. The amount of money which should actually be deducted by the garnishee from the defendant's fortnightly wages was a separate question which had yet to be answered.

Statutes considered:

Interpretation Act (Cap 1)
Magistrates' Court (Amendment) Act 13/1995
Supreme Court Act (Cap 10)

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff	:	Mrs Tupou
Counsel for the defendant	:	Mrs Taufateau
Counsel for the garnishee	:	Ms Mailangi

Decision

1. This is a Summons by the Plaintiff to the Defendant for him to show cause why sums accruing to the Garnishee not be attached to satisfy a Judgment debt obtained by the Plaintiff on 27 May 2009.

2. Mrs Taufateau does not dispute the Judgment debt but submits that it may not be satisfied by garnishee proceedings.

3. The power of the Supreme Court to garnish is somewhat circuitously derived from the Magistrates' Court (Amendment) Act 13/1995, Section 3 and Section 4 of the Supreme Court Act (Cap 10).

4. Mrs Taufateau first submits that the effect of attaching the debtor's salary would be harsh and oppressive and would result in the breach of the anti-slavery clause 2 of the Constitution. Since the court has a discretion to limit the amount of the periodical deductions to ensure that no under hardship results, I do not accept this submission.

5. Mrs Taufateau next suggested that Order 32 Rule 2(d) of the Supreme Court Rules had not been complied with. In view of the fact that the Garnishee is not a financial institution I reject this submission.

6. Mrs Taufateau next referred me to Section 10(e) of the Interpretation Act (Cap 1) which requires rules and Regulations to be published in the Gazette. She suggested that there was nothing to show that the Supreme Court Rules 2007 had in fact been gazetted. In the absence, however, of any evidence either way I apply the presumption of regularity *Omnia praesumuntur rite esse acta* and also reject this submission.

7. In my opinion the Supreme Court's power to garnish is beyond doubt. The amount of money which should actually be deducted by the garnishee from the Defendant's fortnightly wages is a separate question which has yet to be answered.

In the matter of Schaumkel

Supreme Court, Nuku'alofa
Scott CJ
RG 259/2011

30 August 2011

Nationality – application to have son registered as Tongan subject – discussion about statutory interpretation and retrospectivity – application granted

Paul David Schaumkel (the applicant) applied for the registration of his son Peter Denzel Paul Schaumkel (the son) as a Tongan subject. The applicant was born in Invercargill, New Zealand on 19 December 1958. He was the legitimate son of Peter Schaumkel who was born in Tonga on 23 January 1931 and both Peter Schaumkel's parents were also born in Tonga. On 14 September 1981 the applicant's father Peter was naturalized as a New Zealand citizen. By operation of the Nationality Act (Cap 59) (the Act) as it then stood (until amended by Act 3 of 2007) he thereby ceased to be a Tongan subject. On 5 November 2010 the applicant filed an application to have himself registered as a Tongan subject relying on the fact that at the time of his birth in 1958 his father was still a Tongan subject. The applicant's registration as a Tongan subject was approved. In 2001 the applicant married 'Ana Latai 'Alaiva'a who was born at Nuku'alofa on 13 February 1978 and was a Tongan subject. Their son, Peter Denzel Paul Schaumkel (the subject) was born in Auckland, New Zealand on 23 December 2002. The application was opposed and it was argued that since there was no mention of a Tongan mother in the Act and since the applicant's father was not born in Tonga, the law, as it stood on the day the son was born, did not allow for his registration as a Tongan subject. Furthermore, Parliament did not intend, and the Constitution did not permit, the amended Act to operate retrospectively.

Held:

1. The plain wording of the section, unless for some reason that meaning could not be followed, was to provide that any person born abroad, whenever born, whether before or after the commencement of the amended Act, should be deemed to be a Tongan subject if he or she has or had a Tongan parent who was either Tongan by birth or become Tongan by naturalization.
2. The Nationality Act's operation (as amended) was prospective rather than retrospective. The court did not consider that its dependency on antecedent facts, namely birth before the commencement of the amended Act, made the Act retrospective.

3. If the Act was applied retrospectively so as to deprive persons of rights which they already possess, for example rights to land, then that application would be unconstitutional. If the Act was being applied prospectively without any retrospective removal of rights then that application was unobjectionable.
4. The court granted the application sought and declared that Peter Denzel Paul Schaumkel born 23 December 2002 was entitled to registration as a Tongan subject.

Cases considered:
Bennett v Bennett [1989] Tonga LR 45
Edwards v Kingdom of Tonga [1994] Tonga LR 62
Fulivai v Kaianuanu [1924-1961] Tonga LR 178 (PC)
Master Ladies Tailors v Minister of Labour and National Service [1950] 2 All ER 525
R v Christchurch (Inhabitants) (1848) 12 QB 149

Statutes considered:
Divorce (Amendment) Act 1988
Nationality Act (Cap 59)
Nationality (Amendment) Act 1935

Regulations considered:
Nationality (Re-Admission) Regulations 2007

Counsel for the applicant : Mr Fa'otusia
Counsel for the Crown : Mr Kefu

Ruling

1. This is an application by Paul David Schaumkel (the Applicant) for the registration of his son Peter Denzel Paul Schaumkel (the son) as a Tongan subject.

2. The Applicant was born in Invercargill, New Zealand on 19 December 1958. He is the legitimate son of Peter Schaumkel who was born in Tonga on 23 January 1931. According to Vava'u Birth Certificate 67/31 both Peter Schaumkel's parents were also born in Tonga.

3. It seems that prior to 1935 there may have been no statutory definition of who is a Tongan subject. The first available definition is Section 2 of the Nationality (Amendment) Act 11 [or 12?] of 1935 which provides that:

> "(a) any person born in Tonga of Tongan parentage" shall be deemed to be a Tongan subject.

4. The situation prior to 1935 is governed by *Edwards v Kingdom of Tonga* [1994] Tonga L.R. 62 in which the Court of Appeal ruled that, absent any statutory provision to the contrary, the common law was to be applied. The Court held that since Mr

Edwards had been born in Tonga he "owed natural allegiance to the Sovereign of Tonga and … was therefore a Tongan for the purpose of nationality". Because of Clause 20 of the Constitution, no subsequent law could remove Mr Edwards' right to the nationality conferred on him by birth.

5. Applying *Edwards*, there is no reason to doubt that the Applicant's father Peter, was, by birth a Tongan subject.

6. On 14 September 1981 the Applicant's father Peter was naturalized as a New Zealand citizen. By operation of Section 4(1) of the Nationality Act (Cap 59) (the Act) as it then stood (until amended by Act 3 of 2007) he thereby ceased to be a Tongan subject. As already noted, the Applicant had already been born before this event occurred.

7. On 5 November 2010 the Applicant filed an application to have himself registered as a Tongan subject. He relied on the fact that at the time of his birth in 1958 his father was still a Tongan subject. In 1958 the relevant part of Section 2(a) of the Act, as it then stood, read as follows:

> "The following persons shall be deemed to be Tongan subjects-
> (a) any person born in Tonga of Tongan parentage and the first generation abroad :
>
> Provided" [not applicable]

8. In November 2010 the relevant part of Section 2 of the Act, which had again been amended by the Nationality (Amendment) Act 2007, read as follows:

> "The following persons shall be deemed to be Tongan subjects –
> (a) any person born abroad of a Tongan father ;
> (b) any person born abroad of a Tongan mother ;"

9. On 5 November 2010 the Applicant's registration as a Tongan subject was approved (RG 311/2010). It is not necessary to decide whether the 1935 provision or the 2007 provision was applied since, in both cases, the Applicant clearly qualified for registration.

10. On 8 December 2001 the Applicant married 'Ana Latai 'Alaiva'a who had been born at Nuku'alofa on 13 February 1978. It is not disputed that 'Ana (the mother) was and remained at all relevant times, a Tongan subject. Their son, Peter Denzel Paul Schaumkel (the subject of this application) was born in Auckland, New Zealand on 23 December 2002.

11. The present application was filed on 2 May 2011. The Applicant relied on both subsections (b) and (c) of Section 2; he pointed out that his son had been born outside Tonga in 2002 of a mother who was, at the time, a Tongan subject and of a father who became a Tongan subject in 2010.

12. Mr Kefu very firmly opposed the application. He relied on the Act as it stood in 2001 when the son was born and submitted that the 2007 amendment was not retrospective.

13. In 2001 the relevant part of Section 2 of the Act read as follows:

> "The following persons shall be deemed to be Tongan subjects-
> (a) …
> (b) any person born abroad of a Tongan father who was born in Tonga".

14. Mr Kefu, in careful written submissions, argued that since there was no mention of a Tongan mother in the Section and since the Applicant's father was not born in Tonga, the law, as it stood on the day the son was born, did not allow for his registration as a Tongan subject. Furthermore, Parliament did not intend, and the Constitution did not permit, the amended Act to operate retrospectively.

15. Mr Fa'otusia also filed detailed and helpful written submissions. Put simply, Mr Fa'otusia rejected the suggestion that the amendment was retrospective and emphasised that the previous version of Section 2 had been repealed and replaced; accordingly it was no longer the law.

16. The starting point for the interpretation of legislation must always be what is called in *Maxwell on the Interpretation of Statutes* (12 Edn Chapter 2) "The Primary Rule":

> "If there is nothing to modify alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences".

17. Applying the primary rule to the section as it now stands (as set out in paragraph 8 above) it will be noted:

> (i) that the use of the word "shall" implies futurity;
> (ii) that the words "any person born" are not qualified by any limiting expression such as "following the commencement of this Act";
> (iii) that the word "Tongan" is used without any qualification such as "a Tongan-born" father or mother; and
> (iv) that naturalized Tongan subjects are not excluded.

18. In these circumstances, I would hold that the plain wording of the section, unless for some reason that meaning cannot be followed, is to provide that any person born abroad, whenever born, whether before or after the commencement of the amended Act, shall henceforth be deemed to be a Tongan subject if he or she has or had a Tongan parent who was either Tongan by birth or become Tongan by naturalization.

19. Mr Kefu suggests that such an interpretation of the section is excluded because it would give retrospective effect to the amended Section.

20. As *Maxwell* (page 215) points out:

> "It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication".

In Tonga there is the further restriction imposed by Clause 20 of the Constitution:

> "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws".

21. In *Fulivai v Kaianuanu* [1924-1961] Tonga L.R. 178 the Privy Council explained that:

> "It is clear that Clause 20 does not forbid the passing of any laws which affect rights existing at the time of their enactment. It would of course be rather unusual if it had done so, because almost all legislation affects the rights of some person or other in the community. If the Legislature was precluded from passing any enactment that affected the rights of anyone existing at the time, its law making powers would be severely restricted and limited in a most unusual manner. Clause 20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted".

22. The Privy Council went on to say :

> "All that has been done [in this case] is to enact that in future the line of descent shall be altered in certain circumstances and that the new line of descent shall be ascertained by reference to certain events that happened in the past. In our opinion legislation of this character does not fall within the meaning of the term "retrospective legislation".

23. This approach is exactly that adopted in *Master Ladies Tailors v Minister of Labour and National Service* [1950] 2 All E.R. 525 in which Somervell L.J. at 527 B said:

> "The fact that a prospective benefit is in certain cases to be measured by or depends on antecedent facts does not necessarily … make the provision retrospective".

The Court quoted Lord Denman CJ who in *R v Christchurch* (*Inhabitants*) (1848) 12 QB 149 had said:

> "… we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its' action is drawn from time antecedent to its passing".

24. *Master Ladies* was cited with approval in Tonga in *Bennett v Bennett* [1989] Tonga L.R. 45 in which it was held that the Divorce (Amendment) Act 1988 which substituted a 2 year for the previous 5 year separation period was not retrospective, even though part of the period of separation pre-dated the commencement of the amended provision.

25. In the present case I take the view that the Act's operation (as amended) is prospective rather than retrospective. For the reasons given I do not think its dependency on antecedent facts namely birth before the commencement of the amended Act, makes the Act retrospective.

26. Mr Kefu placed heavy reliance on the words of the Court of Appeal in *Edwards*. At page 64 line 100 the Court stated:

> "But a person's nationality is determined at the date of his birth …"

In my view these words are not to be taken to mean that a person's nationality is *finally* or *once and for all* or *conclusively* to be determined at the date of his birth. Were that the case then there would be no such thing as naturalization or forfeiture of nationality. In my opinion the words should be taken to express the rule that in assessing a person's nationality, the starting point is his nationality at the time of birth. Such an assessment does not prevent that person subsequently gaining another nationality either in addition to, or in substitution for, that already held.

27. In paragraphs 53 to 64 Mr Kefu advanced three further arguments against the Act being applied retrospectively. He suggested, first, that the effect of the repeal of Sections 4 to 7, if so applied, would be to restore rights under the Land Act to those deprived of their rights by the operation of the repealed Sections. Such a situation is not before me for full argument and I offer no more than an opinion on the submission. An Act will usually have many consequences. If the Act is applied retrospectively so as to deprive persons of rights which they already possess, for example rights to land, then that application will be unconstitutional. If, as in the case of this application, the Act is being applied prospectively without any retrospective removal of rights then that application is unobjectionable. It is, in any event, the applicability of Section 2 of the Act which is now in question, not Section 17.

28. Mr Kefu secondly suggested that if the repeal of Sections 4 to 7 of the Act was applied retrospectively then there would be no need for the Nationality (Re-Admission) Regulations 2007. In my view there is nothing in the 2007 Amendments to suggest that the loss of citizenship which occurred prior to the repeal of the Sections was to be undone. The new Section 17 is prospective and successful applicants obtain fresh Tongan citizenship, not the former citizenship (with associated rights as they then stood) which they formerly lost.

29. In paragraph 64 of his submissions Mr Kefu suggested that if the Court ruled against his contentions there might be the result that visa fees already paid would have to be refunded. Such a repayments are sometimes a consequence of Court rulings but I am not aware of any case where this has been considered a good enough reason not to interpret the law in the way the Court considers correct.

30. Mr Kefu's final submission was that:

> "… the Crown's legal position should be adopted and maintained because not only is that position the legal position, this position maintains consistency and certainty. In other words it would be very disruptive for government and the public to suddenly change its legal position regarding the 2007 Amendment".

With the greatest respect, my view is that by granting this application the court is not applying the legislation retrospectively and if applications of a similar kind have been refused on the grounds of retrospectivety then they have been wrongly refused. Consistency is desirable but only when the policy being applied is correct. If the consequences of interpreting the law are deemed by Government to be sufficiently "disruptive" then the law can be amended. The present ruling only applies to the registration of persons as Tongan subjects. It may possibly have some bearing on land and other matters but is in no way determinative of those other, as yet unraised issues.

31. I grant the application sought and declare that Peter Denzel Paul Schaumkel born 23 December 2002 is entitled to registration as a Tongan subject.

Jonesse v The Crown

Court of Appeal, Nuku'alofa
Scott P, Burchett, Salmon, and Moore JJ
AC 8/2011

19 September 2011; 30 September 2011

Sentencing – appeal against sentence – crown conceded sentence excessive compared to the captain – appeal allowed and sentence reduced

Mr Jonesse, the appellant, was the managing director of the Shipping Corporation of Polynesia Limited the owner of the MV Ashika. He had been in that position for one year. After the sinking of the MV Ashika, he was charged and convicted after trial before a jury on a charge of manslaughter by gross negligence, five counts of sending an unseaworthy ship to sea and an offence of forgery and knowingly dealing with a false document. He received a five-year sentence on the manslaughter charge and lesser sentences on the other charges, all to be served concurrently. The appellant appealed against conviction and sentence, however the Crown was prepared to concede that at worst the appellant's blameworthiness was no greater than that of the captain of the vessel and that his sentence should be no greater than that imposed on the captain. In the light of the concession the appellant withdrew the appeal against conviction. The court had to determine whether, in the light of the Crown's concession, the sentence of five years with no suspension of any part of that term should be substituted by a lesser sentence and suspension of a substantial part.

Held:

1. The crown conceded that the sentence was excessive and that the appropriate sentence was that imposed on the captain of the vessel. The crown also conceded that it was difficult for a person with no background knowledge of shipping to go behind the certificate of seaworthiness issued by the appropriate authority.
2. The court was satisfied that the sentence imposed was manifestly excessive particularly in relation to the sentences imposed on other offenders. Consequently the appeal against sentence was allowed. The sentence imposed in the court below was vacated and replaced with a sentence of three years and six months, the last three years to be suspended for three years. The appellant has already served six months of his sentence so was entitled to immediate release from prison.

Counsel for the appellant : Mr Niu
Counsel for the respondent : Mr Sisifa

Judgment

[1] This is an appeal against conviction and sentence arising out of the tragedy of the sinking of the M V Ashika. Mr. Jonesse was charged and convicted after trial before a jury on a charge of manslaughter by gross negligence, five counts of sending an unseaworthy ship to sea and an offence of forgery and knowingly dealing with a false document. He received a five-year sentence on the manslaughter charge and lesser sentences on the other charges, all to be served concurrently.

[2] When this matter came before this court we were advised by Counsel that the Crown was prepared to concede that at worst the appellant's blameworthiness was no greater than that of the captain of the vessel and that his sentence should be no greater than that imposed on the captain. In the light of this concession Mr. Niu for the appellant withdrew the appeal against conviction.

[3] It is of course for this court to determine whether in the light of the Crown's concession the sentence of five years with no suspension of any part of that term should be substituted by the lesser sentence and suspension of a substantial part, imposed on the captain of the Ashika.

[4] Mr. Jonesse was the managing director of the Shipping Corporation of Polynesia Limited the owner of the Ashika. He had been in that position for one year. He had previously held administrative positions in New Zealand companies but had not been involved in a company with shipping interests. The ferry Ashika was at the relevant time the principal asset of the company. The company also employed a captain to manage the onshore interests of the company and of course the captain of the vessel itself. The position of the onshore captain was vacant at the relevant times.

[5] The sentencing judge noted that Mr. Jonesse was the controlling mind of the company and that the company itself was in shambles regarding safety aspects required by law. The Ashika was purchased from Fiji and Mr. Jonesse was involved in the purchase. The judge considered that the vessel must have been obviously unseaworthy even to a person without shipping experience however when it arrived in Tonga it was inspected and eventually given a certificate of seaworthiness by the Department of Marine. On its fifth voyage the ship sank with a large loss of life. The judge in the court below considered that the court should send a clear message to other companies and individuals that they must not behave as the defendant company had done in this case and if they did, they did so at their peril. He considered that a prison sentence was entirely appropriate to deter others and punish the appellant and his company.

[6] Mr. Niu for the appellant acknowledged that Mr. Jonesse had overall responsibility for the company but pointed out that it had a captain to look after the shore operations and a captain to look after the ship at sea. He noted that three surveyors had signed a report covering their areas of inspection and had made recommendations as to work which should be done. The acting director of Marine read the report and issued a certificate of seaworthiness. Mr Niu emphasized that Mr.

Jonesse had no previous experience of shipping and that there was no admission from him that he knew that the ship was unseaworthy. Council emphasized that Mr. Jonesse had been without employment for over a year that his convictions meant that he was unlikely to be employed again in positions comparable to those which he had formerly held. His wife and children had returned to New Zealand and Mr Jonesse would have to serve his term of imprisonment without the comfort of visits from family members. He submitted that in the circumstances the term of imprisonment imposed was excessive particularly in relation to the sentences imposed on others charged with offences relating to the sinking of the ferry.

[7] The Crown conceded that the sentence was excessive and that the appropriate sentence was that imposed on the captain of the vessel subject to the amendment to that sentence which the Crown sought in an appeal which we heard following this one. This will have the effect that Mr. Jonesse will be entitled to immediate release when this judgment is handed down. The crown also conceded that it was difficult for a person with no background knowledge of shipping to go behind the certificate of seaworthiness issued by the appropriate authority.

Conclusion

[8] We are satisfied that for the reasons outlined by Counsel the sentence imposed was manifestly excessive particularly in relation to the sentences imposed on other offenders. Consequently we allow the appeal against sentence, vacate the sentence imposed in the court below and replace it with a sentence of three years and six months the last three years of that sentence to be suspended for three years. As indicated above our understanding is that the appellant has served six months of his sentence so that he will now be entitled to immediate release from prison.

Liu v R

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 13/2011

20 September 2011; 30 September 2011

Criminal law – trafficking and keeping a brothel – appeal against conviction and sentence – appeal against conviction dismissed – suspended final three years of sentence – dismissed in all other respects

The appellant was convicted after trial before a judge alone of four counts of trafficking a person contrary to section 24 of the Transnational Crimes Act 2005, one count of keeping a brothel contrary to section 80 of the Criminal Offences Act, and two counts of trading in prostitution contrary to section 81 of the Criminal Offences Act. The appellant was sentenced to 10 years imprisonment, on each of the four counts of trafficking, six months imprisonment in respect of the count of keeping a brothel and five years imprisonment on each of the two counts of trading in prostitution. All sentences were to be served concurrently, and no part thereof to be suspended. The appellant sought that the convictions be quashed or alternatively that the sentences of imprisonment be reduced and or suspended.

Held:

1. The appeal against conviction was dismissed. The court did not consider that the verdicts of guilty were against the weight of the evidence and, even though there was some concern with some of the content of the judgment and the Judge's approach, the court did not conclude that the evidence was unsatisfactory or that there had been a miscarriage of justice.
2. The maximum sentence under the Transnational Crimes Act was 25 years imprisonment. The charges were not the most serious of their kind but they were nonetheless deserving of a severe sentence. The court considered that the sentence should have been suspended for a portion of it. The fact that the accused was a first offender at the age of 42 justified suspension. Therefore, the court ordered that the final three years of the sentence be suspended for three years. In all other respects the appeal against sentence was dismissed.

Case considered:

R v Connell [1985] 2 NZLR 233 (CA)

Statutes considered:
Crimes Act 1961 (NZ)
Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)
Transnational Crimes Act 2005

Counsel for the appellant : Mr Niu
Counsel for the respondent : Mr Sisifa

Judgment

[1] The appellant was convicted after trial before a judge alone of four counts of trafficking a person contrary to section 24 of the Transnational Crimes Act 2005, one count of keeping a brothel contrary to section 80 of the Criminal Offences Act, and two counts of trading in prostitution contrary to section 81 of the Criminal Offences Act. The appellant was sentenced to 10 years imprisonment, on each of the four counts of trafficking, six months imprisonment in respect of the count of keeping a brothel and five years imprisonment on each of the two counts of trading in prostitution all sentences to be served concurrently, and no part thereof to be suspended.

[2] The appeal seeks that the convictions be quashed or alternatively that the sentences of imprisonment be reduced and or suspended.

The appeal against conviction

Factual background

[3] There are two complainants in this case, Chunjuan Du (Du) and Hong Yu Yang (Hong). Both are women. Du is 34 years of age and Hong is 31. Both come from poor families in China. Both women met with the appellant in China at different times and were persuaded to come to Tonga to work for the appellant as waitresses in the appellants bar restaurant.

[4] The complainants say that when they arrived in Tonga they were told by the appellant that there was no immediate employment available in the restaurant. They say that the appellant forced them to work as prostitutes against their will. The appellant agrees that there was no immediate restaurant work for the complainants but says that this was due to circumstances beyond her control. She denies requiring the complainants to work as prostitutes.

[5] The complainants: also say that if they refused to work they would be beaten with a broom handle or struck with the appellant's hand. Again these allegations are denied by the appellant. The complainants say that they were sometimes locked in the house where they lived with the appellant, although they acknowledged that in fact the doors could be opened from the inside but said that in any case they were too frightened and too unfamiliar with the Tongan language to move far from the house. The appellant denies any restriction on them leaving the house.

[6] The complainant Du upon payment of an amount of money to the appellant left the appellants house after about three weeks and went and lived elsewhere in Tonga. The complainant says that payment of the money persuaded the appellant to release her passport which she had been holding. The complainant Hong was with the appellant for a longer period of time and in fact worked for two weeks in a restaurant, which the appellant and her partner later opened. She also left the appellant once she was able to obtain her passport. The appellant denied all wrongdoing.

The Judgment in the Supreme Court

[7] The Supreme Court judgment has some unusual features. After recording the charges contained in the indictment the judge referred at some length to studies carried out on behalf of "various bodies" concerning trafficking and related issues. This section of the judgment includes some examples of people trafficked in the UK. It sets out what various studies show and concludes with a definition of trafficking taken from a United Nations protocol.

[8] The judgment then sets out the essential elements of the offences contained in the indictment. It then proceeds in a more conventional way to summarize the prosecution case and the defence case. It summarizes the evidence of the two complainants. In a section headed "Conclusion" the judge again incorporates comments on the international studies but importantly makes this comment "On the question of credibility I find the victims' evidence to be preferred as against the defendant and her witnesses. The defendant was not a truthful witness, all the facts reveal the victims were exploited for sexual purposes from day one this was planned and premeditated". At no stage does the Judge refer to the onus of proof in criminal cases or to the Crown's duty to prove each element of the crime beyond reasonable doubt.

The grounds of appeal

[9] The grounds of appeal may be summarized, as follows:

1. The judge accepted the evidence of the complainants because they fell within the findings of the studies referred to above which had been introduced as evidence by the judge without any opportunity for challenge by the defence.
2. The complainants lied on oath concerning being locked in the house where they were staying with the appellant.
3. The complainants failed to complain at the earliest opportunity. A witness to whom one of the complainants said a complaint was made denied that this was so.
4. The judge should have cautioned himself on the danger of convicting the appellant on the uncorroborated evidence of the complainants.
5. The verdict was contrary to the weight of the evidence and unsatisfactory.

The Law

[10] Neither counsel referred to authority regarding the duties of a judge hearing a criminal case without a jury. We have been unable to find any useful authorities in the UK but have found a decision of the New Zealand Court of Appeal which is on point. Before referring to that case it is useful to set out the provisions of section 17(1) of the Court of Appeal Act which provides:

> "The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that no substantial miscarriage of justice has occurred."

[11] S 385(1) of the New Zealand Crimes Act 1961 is in similar terms. In *R v Connell* [1985] 2 NZLR 233 at 237 the New Zealand Court of Appeal, when dealing with the duties of a judge sitting alone on a criminal trial, noted that a demonstrably faulty chain of reasoning would lead to the court holding that there had been a miscarriage of justice.

[12] Later on the same page the court said:

> "But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice: a concise account of the facts; and a plain statement of the judge's essential reasons for finding as he does. This should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond a reasonable doubt. When the credibility of witnesses is involved, and key evidence is definitely accepted or definitely rejected it would almost always be advisable to say so explicitly."

Consideration

[13] Applying the above authority to the present case there is no doubt that the judge has set out the ingredients of the charge and there was no challenge by Counsel for

the Appellant as to the manner in which this had been done. It is clear that the Judge gave an adequate account of the complainants' evidence and in his summary of the appellant's case an adequate account of her evidence and the particularly relevant witnesses called by her. He made it very clear that he preferred the evidence of the complainants to that of the appellant and her witnesses. The trial judge, who is able to see and hear the witnesses, and assess their demeanour, is in a much better position to make such an assessment than judges on appeal. The credibility finding constituted his essential reason for his findings of guilt.

[14] We have concern with the emphasis that the judge placed on international case studies but we do not accept the appellants claim that the studies were instrumental in the findings of guilt. It was completely unnecessary for the judge to include this material in his judgment. His task was to focus on the provisions of the Transnational Crimes Act 2005 and sections 80 and 81 of the Criminal Offences Act. In this respect he made no effort to analyse the evidence against the ingredients of each charge. However having read the transcript of evidence we are satisfied that if the evidence of the complainants is accepted the ingredients of each charge are established. We regard it as good practice for a Judge in a judge alone trial to remind himself of the standard of proof and the onus on the Crown but again, once the credibility of the complainants is accepted, it is clear that the case has been proved beyond reasonable doubt.

[15] We have carefully considered the allegations that the complainants lied on oath in the manner suggested by Counsel. We do not consider that the evidence as recorded clearly establishes that they did so. As to the evidence of Mr. Wu, to whom one of the complainants said she made a complaint, his evidence is inconclusive as to whether in fact such a complaint was made. As to the alleged delays in making a complaint we consider that the explanation given for this by the complainants is credible. They were both in a strange country. Neither spoke the language and they had been told by the Appellant that she had friends in the Police and the Chinese Embassy. There is no legal requirement for the evidence of the complainants to be corroborated. In this respect Counsel relied on section 11 of the Evidence Act. In our view that section, which applies to sexual offences, is not relevant to the charges in this case nor does it require corroboration of the evidence of complainants in such cases. In any case the evidence of each complainant corroborated that of the other.

[16] We do not consider that the verdicts of guilty were against the weight of the evidence and despite our concern with some of the content of the judgment and the Judge's approach we are not drawn to the conclusion that the evidence was unsatisfactory or that there has been a miscarriage of justice.

[17] For all of the above reasons the appeal against conviction is dismissed.

The appeal against sentence

[18] The grounds of the appeal against sentence relied again on questions of credibility and lack of corroboration. It was submitted that the sentences should reflect the danger of relying on the complainants' evidence. These issues cannot be a ground for challenging the sentences imposed. Of more relevance is the fact that the appellant is a first offender 44 years of age with a 20-year old daughter in China. The

appellant is said to be in poor health with a heart condition but this does not seem to be confirmed by a detailed report from a doctor at the Friendly island Medical Clinic. We were presented with medical reports which show that the appellant has been suffering from depression since she entered prison. This however is being treated at Vaiola Hospital.

[19] In his sentencing notes the judge referred to sentences in UK cases. The cases mentioned which concerned similar and much more serious offending in the UK ranged from 40 months imprisonment to 23 years in a particularly bad case. The Crown submitted that there was no justification for a reduction in sentence. We are not satisfied that the 10 year sentence imposed was manifestly excessive. The maximum sentence under the Transnational Crimes Act is 25 years imprisonment. Although these charges are far from being the most serious of their kind they are nonetheless deserving of a severe sentence. We consider however that the Judge should in this case have suspended a portion of the sentence. The fact that the accused is a first offender at the age of 42 justifies such a step. We accordingly order that the final three years of the sentence be suspended for three years. In all other respects the appeal against sentence is dismissed.

R v Pomale

Court of Appeal, Nuku'Alofa
Burchett, Salmon, and Moore JJ
AC 10/2011

19 September 2011; 30 September 2011

Sentencing – suspension of sentence of imprisonment – suspended for three and half years – statutory maximum suspension was three years – reduced suspension to three years

The Supreme Court sentenced the respondent to five years of imprisonment, part to be suspended for 3½ years, so that he was to serve 18 months starting from 1 April 2011. From this, the Crown appealed on the basis that it exceeded the allowable discretion under s 24 of the Criminal Offences Act (Cap 18) because the suspension exceeded three years. Section 24 provides that "It shall be lawful for the Court when imposing a sentence of imprisonment to suspend the whole or part of such sentence for any period up to three years".

Held:

1. The Court considered the Crown's contention was unanswerable. Accordingly, the appeal was allowed; the sentence imposed was set aside and the following was substituted:
   - i The respondent was sentenced to 4½ years imprisonment in total;
   - ii The respondent was to serve 18 months imprisonment starting from 1 April 2011;
   - iii The remaining three years imprisonment was suspended for three years.

Case considered:
Misinale v R [2000] Tonga LR 322

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr Sisifa
Counsel for the respondent : Mr Pouono

Judgment

[1] This Crown appeal (which is not opposed) raises a short point of sentencing law in Tonga.

[2] There is in the Kingdom statutory provision for the suspension of the whole or part of a sentence, but in limited circumstances. To that end, s 24(3)(a) of the Criminal Offences Act (Cap 18) provides:

> "It shall be lawful for the Court when imposing a sentence of imprisonment to suspend the whole or part of such sentence for any period up to 3 years."

[3] The case being one where the principles stated in *Misinale v R* [2000] Tonga LR 322, it was accepted, did warrant suspension, Shuster J sentenced the Respondent to 5 years of imprisonment, part to be suspended for 3½ years, so that he was to serve 18 months starting from 1 April 2011. From this, the Crown appeals on the basis that it exceeds the allowable discretion under s.24 because the suspension exceeds 3 years.

[4] The Court considers the Crown's contention is unanswerable. Accordingly, it allows the appeal; sets aside the sentence imposed and order made below, and substitutes the following.

In place of the sentence and order of the Supreme Court:

i The Respondent is sentenced to 4½ years imprisonment in total;
ii The Respondent is to serve 18 months imprisonment starting from 1 April 2011;
iii The remaining 3 years imprisonment is suspended for 3 years.

R v Tuputupu

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 11/2011

19 September 2011; 30 September 2011

Sentencing – suspension of sentence of imprisonment – statutory maximum suspension was three years – reduced suspension to three years

See *R v Pomale* at page 54 of this volume for similar facts.

Held:

1. The Court considered the Crown's contention was unanswerable. Accordingly, the appeal was allowed; the sentence imposed was set aside and the following was substituted:
   (a) On Count 1 the Respondent is sentenced to 3 years imprisonment;
   (b) On Count 2 the Respondent is sentenced to one year imprisonment;
   (c) On each of Counts 3, 4, 5 and 6, the Respondent is sentenced to 3½ years imprisonment;
   (d) All sentences are to be concurrent;
   (e) The Respondent is to serve 6 months imprisonment from 1 April 2011, the remaining 3 years of his concurrent sentences being suspended for 3 years.

Case considered:
R v Pomale [2011] Tonga LR 54

Counsel for the Crown : Mr Sisifa
Counsel for the respondent : Mr Pouono

Judgment

[1] This Crown appeal (which is not opposed) raises the same point of sentencing law as was raised in *R v Pomale* [the decision is reported at [2011] Tonga LR 54], the decision in which is also being handed down today. The reasons in that matter are to be read as if also incorporated in these reasons, although the actual sentences are not identical.

[2] In this matter, there are six counts, on which sentences were imposed as follows:

Count 1 – 3 years imprisonment;
Count 2 – 1 year imprisonment;
Count 3 – 4 years imprisonment;
Count 4 – 4 years imprisonment;
Count 5 – 4 years imprisonment and
Count 6 – 4 years imprisonment.

All the sentences were made concurrent, and the learned judge suspended 3½ years of the 4 years effective sentence, so that six months would be served from 1 April 2011.

[3] As the suspension ordered was beyond power, the appeal is allowed; the sentences imposed and orders made are set aside; and this Court substitutes the following:

(a) On Count 1 the Respondent is sentenced to 3 years imprisonment;
(b) On Count 2 the Respondent is sentenced to one year imprisonment;
(c) On each of Counts 3, 4, 5 and 6, the Respondent is sentenced to 3½ years imprisonment;
(d) All sentences are to be concurrent;
(e) The Respondent is to serve 6 months imprisonment from 1 April 2011, the remaining 3 years of his concurrent sentences being suspended for 3 years.

Wolf anor v Strauss anor

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 14/2010

19 September 2011; 30 September 2011

Civil procedure – application to stay proceedings to have the proceedings heard in a German court – application dismissed

Franz and Gudrun Strauss, the respondents (the plaintiffs in the original proceedings), lent Juergen and Brigetta Wolf, the appellants, two amounts (EUR 10,000 and EUR 180,000) in 2006. The respondents allege that the loan monies had not been repaid in accordance with the loan agreements, and they were entitled to judgment for the entire amount of the loans plus interest. The appellants applied for an order that the proceedings be stayed on the basis that any proceedings to recover the sums lent should be heard and determined in a German court. The Supreme Court dismissed the application because the alleged agreement to provide the loan was silent as to the place of trial and the property purchased was located in Tonga. The appellants sought an order that Tonga was not the appropriate forum to hear the matter, that it should be heard in Germany, and the order of the Supreme Court should be set aside.

Held:

1. The first step in determining such an application was to ascertain whether the Supreme Court of Tonga was an inappropriate forum or the *forum non conveniens* because there was another forum which was clearly more appropriate. If there was a clearly more appropriate forum elsewhere, the second step was to consider whether the Supreme Court should nonetheless exercise its discretion against staying the proceedings because it was in the interests of justice to allow the plaintiffs to continue the proceedings in Tonga.
2. The features that pointed to the German courts being the appropriate forum were:
    - the law governing the loan agreements was German law. A German court could more readily ascertain and apply German law.
    - it was likely the evidence concerning the circumstances in which the loan agreements were entered into and breached (as alleged) will relate to events in Germany together with the fact that the written terms of the agreements were in German.
    - the respondents as potential witnesses, resided in Germany.

- there was evidence which suggested one of the appellants, Brigitta Wolf, had a limited command of English (this had subsidiary significance).

3. None of these matters appear to have been considered by the judge and they should have been. This was an appealable error. As error was demonstrated, it was appropriate for the Court of Appeal to exercise the discretion which should have been exercised by the learned judge.
4. The features that pointed to the German courts not being the appropriate forum were:
   - the appellants, as potential witnesses, resided in Tonga.
   - the monies advanced under the loan agreements were used to acquire a property in Tonga.
   - the only assets of the appellants which might be available to satisfy any judgment debt were the assets they acquired in purchasing the Tongan property (the Seaview). Therefore, if there was a judgment to be enforced, it would need to be enforced in Tonga.
5. If this matter was heard in a German court, and the respondents (as plaintiffs) were successful and they then brought proceedings to enforce the judgment of the German court in the Supreme Court of Tonga, the respondents could not be assured that the enforcement litigation would not be vigorously defended and every point taken. At the very least, it would take time and expense to take the necessary additional steps to sue on the foreign judgment in Tonga to enforce it in the Kingdom.
6. The appellants did not demonstrate that the German courts were a clearly or distinctly more appropriate forum than the Supreme Court of Tonga, which the appellants must do to demonstrate that the Supreme Court was a *forum non conveniens* so that the proceedings in that Court should be stayed. Even if the Court was satisfied the German courts were a clearly or distinctly more appropriate forum, the Court would use its discretion, and would not stay the Supreme Court proceedings as it would not be in the interests of justice to do so.
7. The appeal was dismissed with costs.

Cases considered:

Gough Finance Limited v Westpac Bank of Tonga [2004] Tonga LR 279
Henry v Geoprosco International Ltd [1976] QB 726
Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460

Statutes considered:

Civil Law Act (Cap 25)
Registration of Foreign Judgments Act (Cap 14)

Counsel for the appellants : Mrs Stephenson
Counsel for the respondents : Mr Niu

Judgment

Introduction

1. This is an appeal by Juergen and Brigitta Wolf filed on 27 July 2010 from an order of Shuster J of 21 June 2010. Franz and Gudrun Strauss commenced proceedings against the appellants on 3 December 2009 in the Supreme Court of Tonga. As the plaintiffs (and now the respondents in this appeal) they alleged they had lent the appellants two amounts (EUR 10,000 and EUR 180,000) in 2006, the loan monies had not been repaid in accordance with the loan agreements, and they were entitled to judgment for the entire amount of the loans plus interest. It appears not to be an issue in these proceedings (at least at this interlocutory stage) that the monies had been lent and not repaid in the way contemplated by the parties at the time of the loans.

2. The appellants applied, in effect, for an order that the Supreme Court proceedings be stayed on the basis that any proceedings to recover the sums lent should be heard and determined in a German court. It was the dismissal of that application by Shuster J by an order of 21 June 2010 that has given rise to this appeal. His Honour determined the matter should be heard in Tonga "*because the alleged agreement to provide the Defendant with his loan in EUROS is silent as to the place of trial. Further the property purchased by the Defendant is located here in the Kingdom of Tonga.*"

3. We can proceed on the basis, at this interlocutory stage, that the following is uncontroversial. The respondents reside in Dortmund, Germany. The appellants are business people who operate the Seaview Restaurant and Lodge ("the Seaview") and reside in Nukualofa, Tonga though they are citizens of Austria.

4. The appellants seek an order that Tonga is not the appropriate forum to hear this matter, that it should be heard in Germany and the order of Shuster J of 21 June 2010 should be set aside.

CONSIDERATION ON APPEAL

5. Before considering whether the primary Judge erred, it is convenient to discuss the principles which should be applied in determining whether proceedings in a court in Tonga should be stayed because the legal controversy between the parties more appropriately should be heard in a court of another country. We should immediately observe that an application of the type made to Shuster J in the present case does not raise a question of whether the Supreme Court of Tonga has jurisdiction to hear the dispute (it does have jurisdiction in this case because, we assume, the defendants were present in Tonga when the initiating process was served and were therefore subject to the Supreme Court's jurisdiction). Rather the question is whether the Supreme Court should exercise an undoubted discretion it has to stay the proceedings on the basis that they should be heard and determined elsewhere. The first step in determining such an application is to ascertain whether the Supreme Court of Tonga is an inappropriate forum or the *forum non conveniens* because there is another forum which is clearly more appropriate. If there is a clearly more appropriate forum elsewhere, the second step is to consider whether the Supreme Court should

nonetheless exercise its discretion against staying the proceedings because it is in the interests of justice to allow the plaintiffs to continue the proceedings in Tonga.

6. The leading authority on *forum non conveniens* is *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. The law was summarised by Lord Goff of Chieveley at 476 —478:

> (a) The stay will only be granted on this ground where the court is satisfied that there is some other available forum which has competent jurisdiction where the case may be tried more suitably for the interests of all parties and the ends of justice.
>
> (b) The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. The evidential burden, however, rests on the party who asserts the existence of certain matters that will assist in persuading the court to exercise its discretion.
>
> (c) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In all the English cases where a stay has been granted, there has been another clearly more appropriate forum.
>
> (d) The court will first look to see what factors indicate that another forum would be more appropriate or is a forum "with which the action had the most real and substantial connection", including the availability of witnesses, the law governing the relevant transaction and the places where the parties respectively reside or carry on business.
>
> (e) The stay will ordinarily be refused if the court concludes there is no other available forum which is clearly more appropriate.
>
> (f) The stay will ordinarily be granted if the court concludes that there is some other available forum clearly more appropriate to hear the matter. However the stay may nonetheless be refused if, having regard to the interests of justice, it is appropriate for the stay not to be granted.

7. The authorities identify other matters in addition to those just referred to in 6(d) above including where the relevant events occurred. The principles in *Spiliada* apply in Tonga. As to their application see, for example, the judgment of Ford CJ in *Gough Finance Limited v Westpac Bank of Tonga* [2004] Tonga LR 279. His Honour observed at 282:

> The discretion is to be exercised having regard to the common-law principles that have been developed in this area of the law but foremost amongst the considerations must

always be the "*forum conveniens*", as it has been historically referred to, and the overall interests of justice.

8. We now turn to the question of whether the primary judge erred in the exercise of his discretion. His reasons for dismissing the appellants' application were set out at the beginning of this judgment. They were extremely brief. In our respectful opinion, the reasons do not disclose that the primary judge engaged in the evaluation of some features of this case which the authorities establish should be considered. One feature of some significance (and it was and is common ground between the parties) is that the law governing the loan agreements is German law. There is little room to doubt that a German court can more readily ascertain and apply German law. This factor points to the German courts as being the appropriate forum. That is not to say, however, that what is German law cannot be proved in the Supreme Court of Tonga and applied in this matter to the facts as ultimately found.

9. Another factor pointing to the German Courts being the appropriate forum is that it is likely the evidence concerning the circumstances in which the loan agreements were entered into and breached (as alleged) will relate to events in Germany together with the fact that the written terms of the agreements are in German.

10. Another factor pointing in the same direction is that the respondents as potential witnesses, reside in Germany. Yet another is that there is evidence which suggests one of the appellants, Brigitta Wolf, has a limited command of English though we would see this as a factor of subsidiary significance.

11. None of these matters appear to have been considered by the learned primary judge having regard to his reasons. They should have been. This is an appealable error. As error has been demonstrated, it is appropriate for us to exercise the discretion which should have been exercised by the learned primary judge.

12. We have already set out factors which point to the German courts as the appropriate forum. On the other hand factors which suggest the German courts are not the appropriate forum include the fact that the appellants, as potential witnesses, reside in Tonga, the monies advanced under the loan agreements were used to acquire a property in Tonga and, as far as the evidence presently goes, the only assets of the appellants which might be available to satisfy any judgment debt are the assets they acquired in purchasing the Seaview. That is, if any judgment is to be enforced, it will need to be enforced in Tonga. The appellants were not able to say they had assets in Germany which would be available to satisfy any judgment of the German courts.

13. In the common law world (and elsewhere), statutory provisions are commonly found enabling the registration of a foreign judgment and, so registered, the judgment is to be treated as having a status analogous to that of a judgment of a domestic court and as being enforceable as such. In addition and apart from statute, under the common law the beneficiary of a foreign judgment can sue on that judgment in a domestic court though there are limits on the circumstances in which this can happen: see Halsburys Laws of England; 4th ed, volume 8, Conflict of Laws, paras 715 and following.

14. The fact that any judgment obtained in this matter in a German court would, as the evidence presently stands, have to be enforced in Tonga was emphasised by the

respondents in the appeal as demonstrating that the German courts were not the appropriate forum. There is obvious force in this argument. It is fortified by the fact that the *Registration of Foreign Judgments Act* CAP 14 and related subordinate legislation do not provide for the registration of judgments of German courts which would enable their immediate enforcement once registered.

15. Indeed, the respondents' argument went further They submitted that to the extent that, under the common law, a foreign judgment might be recognised and sued on in the Supreme Court of Tonga, the common law would not apply because there were no gaps to fill (see s 4 of the *Civil Law Act* CAP 25) having regard to the field of operation of the *Registration of Foreign Judgments Act* CAP 14. We doubt that the fact that the *Registration of Foreign Judgments Act* CAP 14 has no application to judgments of German courts would, of itself, limit the right of the beneficiary of such a judgment to enforce it, under the common law, by proceedings in the Supreme Court of Tonga: see *Henry v Geoprosco International Ltd* [1976] QB 726 at 751. However we acknowledge that if this matter was to be heard in a German court, the respondents (as plaintiffs) were successful and they then brought proceedings to enforce the judgment of the German court in the Supreme Court of Tonga, the respondents could not be assured that the enforcement litigation would not be vigorously defended and every point taken. At the very least, it would take time and expense to take the necessary additional steps to sue on the foreign judgment in Tonga to enforce it in the Kingdom.

16. One last matter should be mentioned. When this appeal first came before the Court of Appeal in April 2011, we raised with counsel for the appellants the possibility that a relevant consideration in determining the appeal might be whether or not, under German law, the appellants had an arguable defence. As things presently stand (and assuming facts which might be gleaned from the documentary and other material before us are proved at trial), the respondents' claim has the appearance of a straightforward action seeking the recovery of a debt. If the law of Germany enables the recovery of debts in much the same way as Tongan law (in the absence of proof to the contrary, foreign law can, in certain circumstances, be presumed to be the same as the domestic law: see for example, Cross on Evidence, 7th ed at par 71005) then it is not readily obvious that a defence of substance could be raised by the appellants. Ultimately whether a defence can be raised will emerge at any trial whether in Germany or Tonga. However it is of some significance that the only response of the appellants' counsel about the existence of a defence when raised again during the hearing of the appeal in September 2011, was that she was then unable to articulate a defence under German law.

17. In our opinion, having regard to the mix of considerations referred to in the preceding paragraphs (other than the last paragraph), the appellants have not demonstrated that the German courts are a clearly or distinctly more appropriate forum than the Supreme Court of Tonga, which the appellants must do to demonstrate that the Supreme Court is a *forum non conveniens* so that the proceedings in that Court should be stayed. Even if we were satisfied the German courts are a clearly or distinctly more appropriate forum, we would as a matter of discretion, not stay the Supreme Court proceedings as it would not be in the interests of justice to do so. The considerations raised by the respondents in resisting the appeal and the stay

application point in this direction as does the matter discussed in the preceeding paragraph. Unless the appellants have a defence of substance under German law, there is little to be gained in requiring the proceedings to be heard in a German court and, potentially, doing so would result in significant further delay and additional expense. It is not in the interests of justice for that to occur.

260 18. The appeal should be dismissed with costs.

Shipping Corporation of Polynesia Ltd v R

Court of Appeal, Nuku'alofa
Scott P, Burchett, Salmon, and Moore JJ
AC 9/2011

19 September 2011; 30 September 2011

Appeal against sentence – company convicted of manslaughter by negligence and sending an unseaworthy ship to sea – no power to make fines payable to organisations not impacted by the offence – total offending should be treated as equivalent of one offence - $1,000,000 fine imposed on the manslaughter charge was upheld and other penalties vacated and replaced with fines of 100 pa'anga on each charge - orders requiring payments to the Tonga Maritime Polytechnic Institute and the Tonga Women's Crisis Centre vacated

In late 2009 the MV Princess Ashika sank with the loss of many lives. The vessel was owned by the Shipping Corporation of Polynesia Limited. In due course along with a number of individuals the company was charged with offences arising from the sinking. The charges were manslaughter by negligence and five charges of sending an unseaworthy ship to sea. The company was tried by a judge and jury and was found guilty on all charges. The company was fined 1 million pa'anga on the manslaughter charge and 200,000 pa'anga on each of the five charges of sending an unseaworthy ship to sea. The judge ordered that out of the fines imposed certain sums were to be paid to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre for what were undoubtedly worthy causes. The company appealed against the sentences. The appeal was lodged out of time but leave was granted by Chief Justice Scott acting in his capacity as President of the Court of Appeal.

Held:

1. Section 25 of the Criminal Offences Act provided that the court may make orders for compensation but only to persons injured or suffering loss as a result of the offence and only in addition to, or in substitution for, any other punishment. The payments ordered to be made to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre were not permitted by this section. There were no other provisions in the Act which would enable an order to be made that a portion of a fine be paid to individuals or organizations, or indeed other than to the Crown. Nor did the Court have the power to direct that the Crown allocate a portion of fines imposed in a particular manner. The purposes of the

judge's orders in this respect were very worthy but they had no statutory or other jurisdictional basis so the appeal relating to those payments was allowed.

2. The court concluded that the judge's sentence required review first in order to consider the relevance of the company's accounts and secondly to consider whether the offences were so closely related that the judge was in error to impose separate and substantial fines for each of the charges.

3. As to the first of these issues, the court considered that there was no doubt that the financial position of the company was a relevant factor to take into account in sentencing. The means of the offender were relevant to the impact that a fine will have. However this was a case where the consequences of ignoring significant defects in the seaworthiness of a vessel needed to be made clear. The judge was right in saying that a strong message must be sent to other companies and individuals.

4. The manslaughter charge and the charges of sending an unseaworthy ship to sea were connected with each other in time and common purpose and the court considered it was reasonable to treat all the acts as one offence for the purposes of sentencing. The court held that it was appropriate to impose a fine of 1 million pa'anga on the manslaughter charge but, because of the conclusion that it was a case where the course of conduct required that the total offending be treated as being the equivalent of one offence, the court imposed nominal fines only on the remaining charges.

5. The fine imposed on the manslaughter charge in the Supreme Court was upheld. The penalties imposed on counts 2, 3, 4, 5 and 6 were vacated and replaced with fines of 100 pa'anga on each charge. The orders requiring payments to the Tonga Maritime Polytechnic Institute and the Tonga Women's Crisis Centre were vacated.

Cases considered:

ACCC v Dataline 244 ALR 300

Director of Public Prosecutions v Merryman [1973] AC 584

Statutes considered:

Criminal Justice Act 2003 (UK)

Criminal Offences Act (Cap 18)

Counsel for the appellant	:	Mr Fa'otusia
Counsel for the respondent	:	Mr Sisifa

Judgment

[1] In late 2009 the MV Princess Ashika sank with the loss of many lives. The vessel was owned by the Shipping Corporation of Polynesia Limited. In due course along with a number of individuals the company was charged with offences arising from the sinking. In the case of the Shipping Corporation the charges were manslaughter by negligence and five charges of sending an unseaworthy ship to sea. The company was tried by a judge and jury and was found guilty on all charges. The company was fined 1 million pa'anga on the manslaughter charge and 200,000 pa'anga on each of the five

charges of sending an unseaworthy ship to sea. The company has appealed against these sentences. The appeal was lodged out of time but leave has been granted by Chief Justice Scott acting in his capacity as President of the Court of Appeal.

[2] The grounds of appeal may be summarized as follows:

(i) The judge failed to consider section 26(1) of the Criminal Offences Act and the fine on count one was excessive.

(ii) The judge should have considered the financial position of the company and its lack of ability to play the fine of $1,000,000.

(iii) As to the counts relating to sending an unseaworthy ship to sea, it is claimed that the fines imposed were in excess of those permitted by the legislation. Counsel acknowledged at the hearing that the Shipping Act had been amended and the relevant maximum fine increased.

(iv) The judge ordered that out of the fines imposed certain sums were to be paid to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre for what are undoubtedly worthy causes. It is claimed that the judge had no power to order these payments.

(v) It is claimed that the judge failed to take into consideration the differences economically between Tonga and the UK when using as guidance a UK decision regarding corporate manslaughter.

(vi) The fines were unjust considering the financial position of the appellant.

[3] The judge rightly described the facts of the sinking of the Princess Ashika as "horrific". He said, and again we agree, that in the public interest the court must send a strong message to other companies and individuals that they must not behave as the defendant company did in this case. He said that a very heavy fine was appropriate in order to deter others and to effectively punish the defendant company and its CEO.

[4] Mr Fa'otusia for the appellant company emphasized the points raised in his Notice of Appeal and submitted that the appellant did everything it was obliged to do by law. He told us that the book value of the company's assets was only 61,000 pa'anga and later produced company accounts which confirmed this. He said that the company was no longer trading and was winding down. He submitted that the judge should have fixed a fine for the total offending and then divided that fine between the charges. As to the amounts that the judge ordered to be paid as compensation he noted, that s 25 of the Criminal Offences Act allows compensation to be paid to injured individuals and that such payments were ordered in addition to any fine imposed. He submitted there was no jurisdiction to order compensation to be paid out of a fine.

[5] Mr. Sisifa for the Crown said that he was not aware of any provision enabling a court to order that a portion of a fine should be paid to any person or body and that the judge had no power to order the payments in the way he did to the Polytechnic Institute and to the Women's Crisis Centre. The jurisdiction to order compensation

applies only to individuals affected by the crime. Mr Sisifa acknowledged that the financial state of the company was a relevant factor in determining the amount of a fine but it is only one of the factors to be taken into account. He noted that the judge in fact was given the accounts so that he was aware of the financial state of the company. He submitted that the fines imposed were appropriate in the circumstances of the case.

Consideration

[6] The first ground of appeal referred to section 26 (1) of the Criminal Offences Act. That section provides for the imprisonment of a person who does not pay a fine. We cannot see that that section has any relevance in this case. A corporation cannot of course be imprisoned. The second ground of appeal claimed that the judge should have considered the financial position of the company and its lack of ability to pay the fines imposed. In fact we understand that accounts were made available to the judge after the sentencing hearing had been completed, and indeed this is apparent from the sentencing notes. It is not however clear from those notes what use the judge made of the accounts. The accounts have been made available to us and will be referred to later in this judgment. We will also deal later with the claim that the fines were unjust considering the financial position of the appellant.

[7] It is clear from a recent amendment to the Act that the fines imposed in relation to the counts of sending an unseaworthy ship to sea were in fact less than the maximum permitted. It is clear from section 25 of the Criminal Offences Act that the court may make orders for compensation but only to persons injured or suffering loss as a result of the offence and only in addition to, or in substitution for, any other punishment. The payments ordered to be made to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre would not be permitted by this section, and we are not aware of any other provision in the Act which would enable an order to be made that a portion of a fine be paid to individuals or organizations, or indeed other than to the Crown. Nor does the Court have the power to direct that the Crown allocate a portion of fines imposed in a particular manner. Obviously the purposes of the judge's orders in this respect were very worthy but they have no statutory or other jurisdictional basis so that the appeal relating to those payments will have to be allowed.

[8] The final ground of appeal was the claim that the judge failed to take into consideration the differences economically between Tonga and the UK when using as guidance a UK decision regarding corporate manslaughter. We can find nothing in the judge's decision that justifies this ground. The judge makes no reference to UK decisions regarding corporate manslaughter. We will however refer to the level of fines imposed in the UK and we are conscious of the great difference between the economies of the two countries.

[7] We have concluded that the judge's sentence requires review first in order to consider the relevance of the company's accounts and secondly to consider whether the offences are so closely related that the judge was in error to impose separate and substantial fines for each of the charges.

[8] As to the first of these issues there is no doubt that the financial position of the company is a relevant factor to take into account in sentencing. In the UK the Criminal Justice Act 2003 s 164 provides for the financial circumstances of a defendant to either increase or decrease the amount of the fine so that a wealthy defendant may pay a larger fine than a poor one. There is no such statutory provision in Tonga but the principle has been generally adopted. Obviously the means of the offender are relevant to the impact that a fine will have. The Sedition of Banks on Sentence at p 556 notes, referring to the Magistrates Court sentencing guidelines in the UK, that defendants in cases of corporate manslaughter and health and safety offences are frequently companies with huge annual turnovers and the aim should be for any fine to have an equal impact on rich and poor. Financial penalties must relate to the company's means. A decision of the Federal Court in Australia is of relevance in this matter. In *ACCC v Dataline* 244 ALR 300 the Court considered a penalty imposed on a company in liquidation. The Court made it clear that the financial state of the company was just one of the factors to be taken into account. At para 20 the Court said:

> "Additionally, a court may impose a penalty on a company in liquidation if to do so would clearly and unambiguously signify to, for example, companies or traders in a discrete industry that a penalty of a particular magnitude was appropriate (and was of a magnitude which might be imposed in the future) if others in the Industry sector engaged in the same or similar conduct."

It is clear from the accounts of the company which were made available to us that the assets of the company are very limited and we were advised from the bar that the company was in the process of being wound down. However this is a case where in our view the consequences of ignoring significant defects in the seaworthiness of a vessel need to be made clear. The judge was right in saying that a strong message must be sent to other companies and individuals.

[9] It is a principle of sentencing that the court must consider, in a case where a defendant has been convicted of a number of offences, whether those offences were part of the one course of conduct. As Lord Diplock said in *Director of Public Prosecutions v Merryman* [1973] AC 584 at 607 "where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise", they should be regarded as one activity or one offence. Where this is the case and the sentence is one of imprisonment the court will impose concurrent sentences. Where fines are imposed it is necessary to apply the same principle in determining, the appropriate fine or fines. We consider this is just such a case. The manslaughter charge and the charges of sending an unseaworthy ship to sea are connected with each other in time and common purpose and we consider it is reasonable to treat all the acts as one offence for the purposes of sentencing.

[10] This leaves for consideration the question of the appropriate fine. At page 556 of Banks on Sentence it is said that in the UK, the offence of corporate manslaughter,

because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine in the UK will seldom be less than 500,000 pounds and may be measured in the millions of pounds. We must consider the difference between the economies of the two countries. There is no doubt that this offending was extremely serious and deserves a very significant penalty. We have decided that it is appropriate to impose a fine of 1 million pa'anga on the manslaughter charge but, because of our conclusion
220 that this is a case where the course of conduct requires that the total offending be treated as being the equivalent of one offence, we will impose nominal fines only on the remaining charges.

[11] The fine imposed on the manslaughter charge in the Supreme Court is upheld. The penalties imposed on counts 2, 3, 4, 5 and 6 are vacated and are replaced with fines of 100 pa'anga on each charge. The fines are to be within 30 days of the date of this decision. The orders requiring payments to the Tonga Maritime Polytechnic Institute and the Tonga Women's Crisis Centre are vacated.

Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale anors

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 3/2011

21 September 2011; 30 September 2011

Land law – effective regrant of lease by the Minister – invalid under the Land Act – set aside

On 18 September 1924, one Uatesoni Sauaki received a grant of a town allotment on a Crown estate in the village of Folaha. In 1970, Sauaki agreed to lease one area out of his allotment to the appellant church for a church building, and another area for associated uses. He continued to live on the remaining one third of the allotment. In 1982, with the consent of Cabinet and due registration, the two leases were surrendered and two fresh leases granted, each for a term of 80 years. Sauaki died in 2003 leaving no widow and no heir who could take his allotment, the result being a reversion to the Crown as provided by the Land Act, subject to s.58 (iii), which provided that where there was no heir and where the allotment reverts to the holder of the hereditary estate or to the Crown as the case may be, then the holder of the hereditary estate or the Minister, as the case may be, shall be bound by the terms of the lease; and receive the rental due. Without any notice to the appellant, in 2007, the two areas held under the leases were made the subject of grants respectively to the first and second respondents. The first and second respondents argued that the grants by the Minister were "subject to" the leases. However, payments of the rent by the appellants had been handed over by the Treasury to the respective new grantees who were registered as lessors in the Register of Leases; so that they had not taken subject to the existing leases, but rather as de facto assignees of them.

Held:

1. The Land Act was a complete code and no estate, right, title or interest could be created except in accordance with the provisions of the Act. Parliament took care to regulate leases very strictly, and in particular the Act did not permit any complete disposition of the lessor's interest in a lease of an allotment. The Minister purported to exercise a power not available under the Act.
2. The Minister acted beyond his powers in making a regrant. The orders of the Land Court should be set aside, and the grants to the First and Second Respondents be declared invalid and set aside; the Minister was ordered to

cancel forthwith the said grants and to delete the names of the First and Second Respondents as lessors, with the result that the position is governed by s.58 (iii). The costs of the Appellant in this Court and the Land Court must be paid by the Respondents jointly and severally.

Cases considered:

OG Sanft & Sons v Tonga Tourist and Development Co. Ltd [1981-1988] Tonga LR 26

Tafa v Viau [2006] Tonga LR 287

Statute considered:

Land Act (Cap 132)

Counsel for the appellant	:	Mr Niu
Counsel for first and second respondents	:	Mr W Edwards
Counsel for third respondent	:	Mr Sisifa

Judgment

[1] This is a land case of some novelty and difficulty. It should be noted at the outset that Scott CJ, who decided it below, was not assisted by submissions from the Minister of Lands whose actions were impugned. For some reason, the Minister's submissions were delivered only later. The Land Act is in large measure a Code, and when questions arise in respect of the Minister's actions under it, the Court is entitled to expect guidance through its interlocking provisions from those who have developed a detailed knowledge of it.

[2] The facts of the matter are straight forward, although unfortunately not all the documents were available at the hearing. Further documents were provided by consent upon the appeal, throwing light on some obscurities in the case. In brief outline, the following are the circumstances:

(a) On 18 September 1924, one Uatesoni Sauaki received a grant, which was duly registered, of a town allotment on a Crown estate in the village of Folaha. The town allotment was larger than would be granted today, because the present limitations in respect of area were not adopted until 1927, and only for grants after that year.

(b) In 1970, Sauaki agreed to lease one area out of his allotment to the Appellant church for a church building, and another area for associated uses. He continued to live on the remaining one third of the allotment. Buildings were erected and improvements carried out by the Church.

(c) In 1982, with the consent of Cabinet and due registration, the two leases were surrendered and two fresh leases granted, each for a term of 80 years.

(d) Sauaki died in 2003 leaving no widow and no heir who could take his allotment under s.82 of the Land Act, the

result being a reversion to the Crown as provided by s.82(g) and s.83 of the Land Act, subject to s.58 (iii), which provides:

"Where there is no heir and where the allotment reverts to the holder of the hereditary estate or to the Crown as the case may be, then the holder of the hereditary estate or the Minister, as the case may be, shall

(i) be bound by the terms of the lease;

(ii) receive the rental due as provided by this Part of this Act."

(e) Without any notice to the Appellant, in 2007, the two areas held under the leases were made the subject of grants respectively to the First and Second Respondents, an action which it is not disputed is unique since the Land Act as it stands became law in its present form.

[3] Counsel for the First and Second Respondents argued that the grants by the Minister were "subject to" the leases. But this highlights the unfortunate obscurity in the facts left by the Third Respondent's failure to provide a submission when required. For in truth it transpires that payments of the rent have been handed over by the Treasury to the respective new grantees who were registered as lessors in the Register of Leases; so that they have not taken subject to the existing leases, but rather as de facto assignees of them. The Minister who, by s.58(iii), is "bound by the terms of the lease" appears to have treated the new grants as entitling him to rely on the new grantees as bound to fulfil those terms, and to pay over to them "the rental due" which the statute specifies, in the same subsection, that he "shall receive". There is nothing in the Land Act which could justify this approach.

[4] The general propositions stated by the Privy Council in *O.G. Sanft Sons v Tonga Tourist and Development Co. Ltd* [1981-1988] Tonga LR 26 at 33 that "[i]n respect of Tongan land, the Land Act is a complete code", and: "No estate, right, title or interest can be created [except] in accordance with the provisions of the Act", are basal to an understanding of the Act's operation. The word "except", which we have added in square brackets, does not appear in the Tonga Law Report we have cited, but we have checked and find it was in the original decision of the Privy Council. For completeness, we note, too, that "once a leasehold interest has been validly created", the decision accepts it may be subjected to particular legal incidents such as mortgages, but that is not relevant to this case.

[5] With these considerations in mind, we turn again to s.58 of the Land Act. Where there is a widow entitled upon the death of the registered holder, subs.(i) specifies she shall be "bound by the terms of the lease" for the relevant period and "shall receive the rental due", being personally liable to the hereditary estate holder or the Minister for any rental payable under the grant held by her late husband for the allotment. Failing a widow, the heir is subject to similar provisions under subs.(ii). But despite these detailed provisions concerning the lease in differing circumstances, there is no provision for such a regrant as has been attempted here. Indeed, the extent of the gap

in that respect is emphasised by the unauthorised steps the Minister has taken concerning the rent he receives, and his apparent abrogation of his functions as the party bound in the deceased lessor's place.

[6] Had Parliament intended land in this situation to be capable of regrant during the currency of the existing lease, it is not conceivable that it would have failed to set out the rules governing the regrant as it has set out the rules governing other aspects of the continuing effect of the lease.

[7] Parliament has taken care to regulate leases very strictly, and in particular the Act does not permit any complete disposition of the lessor's interest in a lease of an allotment. The Minister here purported to exercise a power not available under the Act.

[8] For these reasons, we have concluded that the Minister acted beyond his powers; the orders of the Land Court should be set aside, and the grants to the First and Second Respondents be declared invalid and set aside; the Minister is ordered to cancel forthwith the said grants and to delete the names of the First and Second Respondents as lessors, with the result that the position is governed by s.58 (iii). The costs of the Appellant in this Court and the Land Court must be paid by the Respondents jointly and severally. Land which has reverted to the Crown or an hereditary estate holder does not provide an exception to the rule stated by this Court in *Tafa v Viau* [2006] Tonga LR 287 at 292-293.

Vaitu'ulala v 'Iongi

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 17/2010

22 September 2011; 30 September 2011

Civil procedure – application to set aside judgment by consent – argument was lack of authority of solicitor – application dismissed

The Court of Appeal made a judgment by consent. One of the parties has applied for that to be set aside on the ground that counsel who had been appearing for him when the consent judgment was made, had no authority to agree to the settlement embodied in the consent judgment.

Held:

1. There were three issues. The first was whether the Court of Appeal had power to set aside orders regularly made and made by consent. The second was whether, in exercising any such power, the Court should, as a matter of discretion, set aside the orders. The third was whether counsel for the appellant lacked authority to agree to the settlement and consent to the orders.
2. The general rule was that if counsel was briefed to appear for a party in litigation, then counsel had implied authority to conduct the litigation as counsel thinks fit (though plainly he or she must do so having regard to the interests of the client) and had authority to settle or compromise litigation without express instructions to do so. However, counsel had no authority to settle on specific terms if counsel had express instructions which would preclude the settlement on those terms.
3. The court found that the appellant's counsel had authority to settle on the terms reflected in the orders of 13 April 2011 and there was no basis for setting aside those orders. The application to set them aside was dismissed with costs.

Case considered:
Tu'ivai v R (2007) Tonga LR 31

Counsel for the appellant : Mr Niu
Counsel for the respondent : Mr W Edwards

Judgment

[1] This is an application to set aside a consent judgment of the Court of Appeal. The application is by the appellant, 'Alifeleti Vaitu'ulala, and is made on the basis that counsel who had been appearing for him in the appeal when the consent judgment was made, had no authority to agree to the settlement embodied in the consent judgment.

[2] The relevant facts can be briefly stated. With one qualification, it is unnecessary to set out the underlying facts which gave rise to the litigation in the Supreme Court or the details of the claims which had been made and were the subject of the judgment of the Supreme Court. The appellant and the respondent, Sitiveni 'Iongi, had business dealings concerning the operation of a quarry. This gave rise to a commercial dispute between them which led to litigation. The appellant was the plaintiff in the Supreme Court. His claim was dismissed. The respondent was the defendant and also counterclaimed. His counterclaim was successful and he obtained judgment against the appellant in the sum of $162,000 plus interest and costs. Judgment in that sum was given on 17 August 2010.

[3] The appellant appealed against that judgment. The appeal was listed for hearing in the April 2011 sittings of the Court of Appeal. At the hearing of the appeal, the Court of Appeal raised questions with counsel for the respondent as to whether the judgment below was correct. This led to an overnight adjournment of the appeal to enable settlement discussions to take place. When the appeal next came before the Court of Appeal the following day, we were informed by counsel for both sides that the case had been settled and we were asked to make orders by consent disposing of the appeal. We did so which included setting aside the judgment of the Supreme Court awarding the respondent $162,000 as damages and substituting an award of damages of $62,000.

[4] The appellant now says his counsel had no authority to agree to an order requiring him to pay damages of $62,000. His application to set aside the consent judgment is supported by an affidavit he swore on 26 August 2011. The affidavit traverses a number of matters of detail concerning the operation of the quarry pointing, on the appellant's version of the facts, to a result which would entitle him to be paid money by the respondent and seeking to demonstrate that he had no liability to pay the respondent $62,000. One factual issue raised in the affidavit concerns a stockpile of gravel extracted by the appellant which, so the appellant contends, was apparently sold by the respondent who retained the proceeds. We mention this only because the stockpile, its sale and the disbursement of the proceeds was not an issue raised by the appellant in his statement of claim nor in his defence to the respondent's counterclaim at the trial in the Supreme Court.

[5] In his affidavit, the appellant says the following about the instructions he had given counsel appearing for him in the appeal:

> 30. I therefore [after the judgment against him for $162,000] instructed my then counsel Mr Vuna Fa'otusia, to appeal the decision of the Court and to inform me when the appeal would be held so that I would be sure to be present at the

> hearing. He told me that the Court of Appeal session was around July 2011. My wife and I then prepared and we left Tonga in November 2010 intending to return in May 2011.
>
> 31. The appeal was however held in April 2011 and my counsel had not informed me of it at all, but what was worst of all was that he made a settlement without my knowledge or consent with counsel for the respondent which resulted in the Court of Appeal making the consent orders on 13 April 2011 as follows: [The orders of the Court of Appeal are set out]
>
> 32. Not only did counsel fail to inform me of the appeal or of the negotiation for settlement, he failed to inform me of the consent orders ...

[6] This application raises three issues. The first is whether the Court of Appeal has power to set aside orders regularly made and made by consent. The second is whether, in exercising any such power, the Court should, as a matter of discretion, set aside the orders in this matter. The third (which is caught up with the second) is whether counsel for the appellant lacked authority to agree to the settlement and consent to the orders.

[7] We are prepared to assume that in a case such as the present in which it is alleged counsel had no authority to agree to a settlement and the consent order, we have power to set aside orders regularly made. It may be necessary, in another case, to examine this question in detail if the Court of Appeal is repeatedly asked, in the future, to set aside orders regularly made for the same or similar reasons. We acknowledge that in other and quite different circumstances we have power to set aside our orders and this matter was discussed in *Tu'ivai v R* (2007) Tonga LR 31.

[8] The general rule, as a matter of law, is that if counsel is briefed to appear for a party in litigation, then counsel has an implied authority to conduct the litigation as counsel thinks fit (though plainly he or she must do so having regard to the interests of the client) and has authority to settle or compromise litigation without express instructions to do so: see generally Halsbury's Laws of England, 4 ed, Vol 3(1), Barristers, para 517 and following. That is not to suggest it is not a regular and desirable practice for counsel to get express instructions to settle on particular terms before doing so. It has been, in our experience and knowledge of practices of the bars of common law countries, usually the case that counsel does get those express instructions. But these practices do not derogate from the legal rule that counsel has general authority to conduct and settle litigation notwithstanding the absence of particular instructions to settle on specific terms.

[9] There is, however, a qualification to this legal rule, namely counsel has no authority to settle on specific terms if counsel has express instructions which would preclude the settlement on those terms, such as express instructions not to settle at all or express instructions not to settle on specified terms which are different from those that are proposed (for example express instructions not to settle for less than a specified sum). There is precedent which suggests counsel's apparent authority to

compromise cannot be limited by instructions, not even the withdrawal of instructions, unknown to the other party: Taylor v Cogswell (1965) 109 S.J. 495. But it is unnecessary for us to consider whether this is correct because, on the appellant's own affidavit, it is not apparent that counsef appearing for him in the appeal before us had express instructions which prevented him from agreeing to the terms on which the appeal was settled and the consent orders which were made.

[10] Accordingly, the appellant's counsel had authority to settle on the terms reflected in our orders of 13 April 2011 and there is no basis for setting aside those orders. The application to set them aside should be dismissed with costs.

[11] We should conclude with an observation. The appellant may feel genuinely, aggrieved by this result. But these legal rules concerning the implied authority of counsel serve a wider public purpose. Unless such rules exist and are applied, there is a real risk that the administration of justice will become bogged down by claims of disaffected or disgruntled litigants complaining that settlements agreed to by their counsel were not authorised. Experience tells us that it is not uncommon for litigants to reflect on settlements earlier reached and persuade themselves days, weeks or months later that they could have done better. If there are not rules which limit the circumstances in which settlements can be undone, there is a very real risk that the whole process of litigation will become unmanageable by the courts. That is not in the public interest.

Estate of Wong anor v Commercial Factors Ltd

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 6/2011

22 September 2011; 30 September 2011

Civil proceedings – Orders made restraining inervenor and respondent from disposing of any proceeds of sale until judgment was delivered in the substantive matter

Orders made restraining inervenor and respondent from disposing of any proceeds of sale until judgment was delivered in the substantive matter.

Counsel for the appellants : Mrs P Tupou
Counsel for the respondent : Mr Harrison QC
Counsel for the intervenors Fund Management Ltd and Tourist Services Ha'apai Ltd : Mr Niu
Counsel for the intervenor Uta'atu : Mr Stephenson

The Court orders:

1. We grant leave to Fund Management Ltd and Tourist Services Ha'apai Ltd and also to the receiver, Christine Uta'atu, to intervene in appeal AC 6 of 2011.

2. Until judgment is delivered in AC 6 of 2011, Christine Uta'atu be restrained from disposing of any proceeds held by her arising from the sale of the appellants' interest in lease 5404 and the related sale of buildings, fixtures and fittings (together "the Lease and related property").

3. Until judgment is delivered in AC 6 of 2011, Commercial Factors Limited be restrained from disposing of the proceeds of sale arising from any further sale of its interest in the Lease and related property.

Fund Management Ltd anor v Uta'atu

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 16/2010

30 September 2011

Land law – unregistered caveat – was not capable of creating interest in land – appeal dismissed

The respondent (the court appointed receiver (for Commercial Factors) of property including lease number 5404) applied to remove a caveat lodged against the lease by the appellants. The Chief Justice granted that application and dismissed an application by the appellants for an extension of the caveat. The appellant appealed that decision.

Held:

1. Clause 7 of the 1998 agreement refers to a caveat having been registered. It was clear that this was not the case. The court were of the view that if the document clearly created an interest in the leasehold land a caveat could later be lodged to protect that interest. Taken literally the words used in clause 7 suggested that the registration of the caveat would secure the repayment. Clearly that was not so. There was no other provision in the agreement that would create an interest in the leasehold land. Accordingly the court held that clause 7 was not capable of creating an interest that would support a caveat.
2. The appeal was therefore dismissed with costs to the respondent.

Counsel for the appellants	:	Mr Niu
Counsel for the respondent	:	Mr Stephenson
Counsel for the intervenor applicant	:	Mr R Harrison SCQC

Judgment

[1] This is an appeal from a decision of the Chief Justice dated 20 August 2011 given as president of the Land Court. The respondent who was the court appointed receiver of property including lease number 5404 applied to remove a caveat lodged against the lease by the appellants. The Chief Justice granted that application and dismissed an application by the appellants for an extension of the caveat.

[2] At the hearing in the Land Court Commercial Factors was not separately represented. When we commenced hearing the appeal on 23 September Commercial

Factors did not seek representation. During the hearing of an associated appeal in *Wang v Commercial Factors* Mr. Harrison appeared for the respondent and sought leave on behalf of his clients to make submissions on this appeal. We therefore resumed the hearing on 28 September and heard submissions from him and in reply from Mr. Niu.

Background

[3] Lease 5404 is in respect of the land upon which a hotel has been built. Dr. Wang was the lessee under this lease. In 1998 the appellants entered into an agreement with Dr. Wang to protect money owing to them under an agreement relating to a different property. The 1998 agreement included the following paragraph:

> "7. To further protect payment of the liquidated damages as aforesaid, a caveat has been registered on the leasehold property owned by the guarantor at Fua'amotu, Kingdom of Tonga to secure the repayment of this guarantee."

[4] At the time of the signing of the agreement no caveat had been registered on the property.

[5] In February 2003 the appellants obtained judgment by default in the Land Court against Mr. Wang for the monies purportedly secured by the 1998 agreement. In August 2003 the appellant's registered a caveat on lease 5404. The document recorded the provision in the 1998 agreement that the caveat be registered and went on to refer to the judgment mentioned above. The caveat was noted on the lease.

[6] In March 2004 the Appellants may an application for a writ of distress and for orders approving the sale of lease 5404 by tender. That application was granted and the order made by the court contained the following clauses:

> "5. This order shall be registered in accordance with section 131 of the land act.
>
> 6. A copy of this order and a copy of the judgment order dated 13 February 2003 shall be forwarded to the Minister of lands in accordance with section 160 of the same act.
>
> 7. For the purpose of registration of these orders it shall be sufficient in terms of sections 131 and 132 of the land act, for the plaintiffs to deliver to the Minister of lands a photocopy only of the said lease number 5404 (due to the unavailability to the plaintiffs of the original)."

[7] We understand that the property was advertised for sale by tender but no applications to purchase were received.

[8] To complete the history of the applicant's proceedings an application to set aside the judgment was made in March 2005 and was heard by the Supreme Court in

February and March 2008. The proceedings were dismissed and that decision was upheld on appeal by this Court. We understand that the appellant has been attempting to finalize costs on the proceedings and that this is still outstanding.

[9] Commercial factors were another major creditor of Dr. Wang. They applied for summary judgment against the estate of Dr. Wang (he having died) and his widow. They also sought the appointment of a receiver to enforce the judgment. Judgment was entered and the receiver Christine Uta'atu appointed on 8 April 2011. Application for extension of time of the caveat was made in May 2011 and in June the respondents made application to remove the caveat.

Discussion

[10] Mr. Niu conceded that to succeed he must establish that the clause in the 1998 agreement supported the caveat. Central to that issue is the wording of section 137 of the Land Act. Subsections (1), (2) and (4) are particularly relevant. They provide as follows:

> "(1) Any person claiming to be interested under any will, settlement or trust deed or any instrument of transfer or transmission or under and unregistered instrument or otherwise howsoever in any leasehold land may lodge a caveat with the Minister to the effect that no disposition of such leasehold land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed or until notice shall have been served on the caveat may be expressed or until notice shall have been served on the caveator or unless the instrument of disposition be expressed to be subject to the claim of the caveator as may be required in such caveat or to any conditions conformable to law expressed therein.
>
> (2) A caveat may be in the form contained in Schedule XI and shall be verified by the oath of the caveator or his agent and shall contain an address within the Kingdom at which notices may be served.
>
> ....
>
> (4) So long as any caveat shall remain in force prohibiting the transfer or other dealing with any leasehold land the Minister shall not enter in the register any memorandum of any transfer or other instrument purporting to transfer or otherwise deal with or affect the land in respect of which the caveat may be lodged."

[11] The form in schedule XI assists interpretation. It requires that the document "state nature of the interest and the grounds on which such claim is founded". The

Chief Justice held that this section requires that there be proof of an interest in the leasehold land and by reference to authority recorded that a caveat is merely a notice of a claim which may or may not be a valid one. We agree with these findings.

[12] Turning then to clause 7 of the 1998 agreement we note the following problems. First it refers to a caveat having been registered. It is clear that this was not the case. Nevertheless we are of the view that if the document clearly created an interest in the leasehold land a caveat could later be lodged to protect that interest. Taken literally the words used in clause 7 suggest that the registration of the caveat would secure the
120 repayment. Clearly that is not so. There is no other provision in the agreement that would create an interest in the leasehold land. Accordingly we hold that clause 7 is not capable of creating an interest that would support a caveat.

[13] The appeal is therefore dismissed with costs to the respondent.

R v Vea

Supreme Court, Nuku'alofa
Shuster J
CR 126/2011

13 October 2011

Sentencing – grievous bodily harm against his son – guilty plea – five years imprisonment

On 24 March 2011 the defendant picked up a metal torch and he threw it at his eight year old son. The torch hit the son's head and the defendant then walked over and slapped the son on his right cheek. The victim was taken to hospital the following day where he underwent surgery for a depressed skull fracture and was kept in hospital for 19 days. The defendant pleaded guilty to grievous bodily harm. He appeared for sentencing.

Held:

1. The court considered all the facts of the case, the contents of the PSR, the Medical and Psychiatric Report, the fact that the defendant pleaded guilty at the first available opportunity, and the fact the defendant fully co-operated with the police and the court, and he apologized to his victim.
2. The starting point for an attack on an eight year old boy with a not guilty plea after trial warranted an immediate custodial sentence of six/seven years.
3. The defendant was sentenced to five years in prison, the last twelve months of which was suspended conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment.

Counsel for the Crown : Mr Tu'utafaiva
The defendant appeared in person

Judgment

The defendant appears for sentencing – having pleaded guilty on arraignment on 19th July 2011; to an indictment, alleging a single count of grievous bodily harm, involving an apparent unprovoked attack on his eight year old son, which involved his son being hospitalized for 19 days, and operated on, for a depressed skull fracture - under general anesthetic.

On arraignment on 17th July 2011 the defendant was told he would be given full credit for his early guilty plea and, the case was adjourned for the preparation of a PSR. The defendant was remanded in custody for the preparation of the PSR in view of the nature and the seriousness of the offence and his past record of offending

It should be noted that the defendant is NOT a first time offender, but he had fully admitted his part in the offending to the police and the court. In due course a medical and psychiatric report was requested from the Viola Hospital and that report has been considered in sentencing today.

THE BRIEF FACTS – as accepted

The facts revealed that on 24th March 2011 the defendant was involved in an incident when he had an argument with his wife when he was preparing to go to work as a security guard. The Crown says the defendant was angry after the argument with his wife.

The defendant whilst he was still angry turned his attentions towards his eight year old son he shouted at him to stop playing, and to go and learn his multiplication. The Crown say it is not clear if the defendant's son was disobedient towards his father. All of a sudden, the Crown say the defendant picked up a metal torch and he threw it at the complainant. The torch hit the complainants head with a loud thud. The Crown say, the defendant then walked over and he slapped the victim on his right cheek.

According to the Crown the complainant became dizzy he fell unconscious due to the loss of blood from where the metal torch had struck his head.

At first the complainant's mother treated the complainant at home he was not taken to hospital until the following day. The complainant was kept in hospital for 19 days and he underwent surgery for a depressed skull fracture.

The defendant was arrested and to his credit he fully co-operated with the police and with this court, by pleading guilty at the first available opportunity

On 13th October 2011 the defendant appeared for sentencing.

Having considered all the facts of the case, including the contents of the PSR – the Medical and Psychiatric Report - considering the fact that the defendant pleaded guilty at the first available opportunity and, the fact the defendant fully co-operated with the police and with this court – and has apologized to his victim.

Having heard from the defendant in person and noting that he is NOT a first time offender. I told the defendant in open court that my starting point for an attack on an eight year old boy causing injuries as described in the medical report on a Not Guilty plea after trial warranted an immediate custodial sentence of six/seven years [6/7yrs] imprisonment on a NG plea.

Taking everything into account, the defendant is sentenced as follows:-

Count 1 – The defendant is sentenced to **FIVE YEARS** in prison – The last **TWELVE** months of which, is suspended conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment

NOTES - OBSERVATIONS

I take into account the defendant pleaded guilty at the first available opportunity but I also note the defendant has three previous convictions for assault, and one involved an assault on his daughter the other an assault on his wife.

I take into account the report from Doctor Mapa Puloka and his recommendation that the defendant needs constant clinical monitoring and medication as a form of treatment. According to Dr Puloka the prognosis is relatively poor since the defendant's abnormal behavour is entirely dependant on the nature of the environment and, the Psychosocial support the defendant has at the time. I take into account the defendants service with the armed forces in Iraq, and, his deteriorating violent behaviour since returning from Iraq. I also take into account his prognosis as a person subject to - **INTERMITTENT EXPLOSIVE DISORDER.**

I agree with Doctor Mapa Puloka that the defendant should serve his sentence in the hospital wing of Hu'atolitoli prison. This is to be a deterrent sentence, applying the principles enunciated in **Crown –v- Cunningham**

The five year sentence of imprisonment - with the last year suspended is to run from 19th July 2011

A copy of this order is to be served on the prison authorities and also the probation service.

R v Pou'uhila

Supreme Court, Nuku'alofa
Shuster J
Cr 204/2011

14 October 2011

Sentencing – forgery and theft – two years imprisonment suspended for three years

The defendant appeared for sentencing after pleading guilty to an indictment that alleged two counts of [1] forgery and [2] theft committed in June of 2011. The defendant was not a first time offender and had two prior convictions recorded against him.

Held:

1. The defendant was sentenced to two years in prison for each count. That sentence of imprisonment was suspended for three years conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment.
2. The defendant was ordered to pay $500 compensation to the complainant at the rate of $50 each week.

Counsel for the Crown
The defendant appeared in person

Judgment

The defendant appears for sentencing - having plead guilty on first arraignment on 16th September 2011; to an indictment, alleging two counts of [1] forgery and [2] theft committed in June of this year.

On that date the facts were opened and agreed, and the case was adjourned for the preparation of a PSR and, the defendant was remanded on bail for sentencing to14th October 2011 at 14.00.

It was a condition of the defendant's bail that he co-operate in the making of a PSR – it should be noted that the defendant is NOT a first time offender in that he has two prior convictions recorded against him.

On 14th October 2011 the defendant appeared for sentencing. Having considered all the facts of the case, including the contents of the PSR and considering the fact

that the defendant pleaded NOT guilty and having heard from the defendant in person and noting the defendant has a previous conviction for dishonesty

The defendant is sentenced as follows:-

Count 1 - The defendant is sentenced to **TWO YEARS** in prison – but that sentence of imprisonment is suspended for 3 years conditional upon the defendant-keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment – which starts from today's date.

Count 2 - The defendant is sentenced to **TWO YEARS** in prison – but that sentence of imprisonment is suspended for 3 years conditional upon the defendant-keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment – which starts from today's date.

The defendant is ordered to pay $500.00 compensation for the money he stole from the complainant's bank account **{LEMOTO FETU'U}** in count two of the indictment. The defendant was unable to pay the $500.00 compensation immediately, he is ordered to pay the sum at the rate of $50.00 each week.

Each payment of $50.00 is to be made to the Supreme Court Office by 12.00 on Friday of each week. The first payment is due by 12.00 on Friday 21st October 2011- in default of payment three months in prison. The defendant can pay more than $50.00 each week, but he cannot pay less than $50.00 each week and payments must be regular until the $500.00 is paid in full.

The defendant will perform 120 hours of Community Service cleaning up the sea shore and the grass edges on public road as ordered by the Probation Service. I certify I have warned the defendant about committing any further offences during the perod of his suspended sentence – and of the consequences of failing to pay his compensation or perform his CSO as ordered by this Court. This is to be a deterrent sentence, applying the principles enunciated in **Crown –v- Cunningham**

A copy of this order is to be served on the defendant as a fine notice.

In the matter of Funganitao

Supreme Court, Family Jurisdiction, Nuku'alofa
Scott CJ
FA 152/2010

27 October 2011

Adoption – applicants were resident in New Zealand – grandparents of child – application not granted

The child was born in Auckland, New Zealand. His mother was born in Tonga in 1992. The mother's parents have applied to adopt the child. The male applicant was 58 and the female applicant was 63. The male applicant emigrated to New Zealand in 1973. He and his wife married in New Zealand in 1988. They were permanent residents and own the house in which they are living. They lived with the mother.

Held:

1. The applicants, the natural mother and the child were all Tongan citizens, but they were all permanently resident in New Zealand. Therefore, it was more appropriate for any adoption or guardianship application to be made within that jurisdiction.
2. The courts were not supportive of applications for adoption by grandparents and such application should not be granted save in exceptional circumstances.
3. The female applicant was 60 years older than the child and her husband was only slightly younger. Neither of the applicants was working and they were dependent on welfare benefits. Where there was a very great age gap between the child and the applicants there must be concern that adoption was not in the best interests of the child. Perhaps a guardianship order could be a more suitable alternative.
4. Even though the Court's jurisdiction was not excluded by the applicants' residence, the reality of their residential status and the nature of the relationship between the child and the applicants suggest that the order as sought not be made.

Cases considered:

AB (an infant), Re [1949] 1 All ER 709
Parker v Pearce (1985) 4 NZFLR 150

Counsel for the Crown : Ms Kautoke
Counsel for the applicants : Mr Kaufusi

Ruling

1. This is an application for adoption. The child was born in Auckland, New Zealand. His mother was born in Tonga in 1992. The applicants are the mother's parents.

2. From the papers before me in emerges that the male applicant is aged 58 while the female applicant is 63. The male applicant emigrated to New Zealand in 1973. He and his wife married in New Zealand in 1988. They are permanent residents and own the house in which they are living. Their only child is the natural mother.

3. The natural mother is now 20 and when interviewed was a student. She lives with her parents, the applicants.

4. After hearing the application, which was forcefully supported by Mr Kaufusi I indicated that I would not make the order sought. I now state my reasons.

5. Although the applicants, the natural mother and the child are all Tongan citizens it is plain to me that they are permanently resident in New Zealand. In my opinion, therefore, it is more appropriate for any adoption or guardianship application to be made within that jurisdiction.

6. Secondly, the courts have frowned on applications for adoption by grandparents and it has been said that such application should not be granted save in exceptional circumstances (*Re AB (an infant)* [1949] 1 All ER 709 and see also *Parker v Pearce* (1985) 4 NZFLR 150).

7. Thirdly, the female applicant is 60 years older than the child and her husband is only slightly younger. It appears that neither of the applicants is working and that they are dependent on welfare benefits. Where there is a very great age gap between the child and the applicants there must be concern that adoption is not really in the best interests of the child. Perhaps a guardianship order may be a more suitable alternative.

8. Mr Kaufusi several times emphasised that the parties were Tongan; therefore, be submitted, they had a right to make this application. In my view however although this Court's jurisdiction is not excluded by the applicant's residence, the reality of their residential status and the nature of the relationship between the child and the applicants suggest that the order as sought not be made.

R v Malekamu anor

Supreme Court, Nuku'alofa
Shuster J
Cr 68 and 71/2011

24-27 October 2011

Sentencing – both accused found guilty of murder – first time offenders – life imprisonment

The jury found the two accused guilty of murder on 27 October 2011. The court informed both defendants that there were two sentences for the crime of murder which were fixed by law: (1) death or (2) life imprisonment.

Held:

1. The two accused were first time offenders. Both were sentenced to life imprisonment.

Counsel for the Crown	:	Mr Sisifa and Miss Macomber
Counsel for the defendants	:	Mr Tu'utafaiva

Jury verdict

At the conclusion of the summing up in this case both defendants were placed in the hands of the jury for their deliberations at 12:50 on 27th October 2011.

The jury retired to consider their verdicts at 12:51 on 27th October 2011

The jury indicated to my Associate that they had reached a verdict and returned to court at 14:40 hours.

On their return to court - and in open court the jury foreman was asked if the jury had reached a verdict upon which they were all agreed in respect of count one in indictments CR69 and 71 of 2011 - the jury foreman replied they had.

The jury foreman asked if he could speak first - before going any further the foreman indicated that all of the jury had had found the first defendant GUILTY of MURDER.

The court asked the foreman if that was the true verdict of all. The jury foreman replied- Yes it was and the first defendant was - convicted on court one - in the indictment in file CR68-201 1.

The court asked if the jury had reached a verdict on the second defendant on which they were all agreed the jury foreman replied yes. The court asked did the jury find the second defendant guilty or not guilty on the first count of murder in file CR 71 -2011 the foreman replied- GUILTY and the second defendant was convicted.

The court is satisfied that they were both unanimous verdicts.

The jury was thanked for their part in these proceedings the court appreciated their service to the community and the criminal justice system.

The court informed both defendants that there were two sentences for the crime of murder which are fixed by law - they are (1) death or (2) life imprisonment.

40 The court asked Crown Counsel Mr. Sisifa for their views on sentencing, Mr. Sisifa indicated it was discretionary and perhaps a Probation Service Report should be obtained.

Mr. Sisifa indicated they were first time offenders. The Court said that it was unnecessary to obtain a Probation Service Report because the sentence for murder was fixed by law and Mr. Tu'utafavia agreed.

Accordingly both convicts were sentenced to LIFE IMPRISONMENT for the crime of murder starting from today's date.

Counts two and three - are to be left to lie on the file, and are to be marked - Not to be proceeded with without the leave of this Court or the Court of Appeal.

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R v Tameilau

Supreme Court, Nuku'alofa
Shuster J
Cr 157/2011

14 November 2011

Sentencing – indecent assault on two girls aged 14 and 15 – guilty plea – three year sentence suspended – fine of $1000 per victim

On 7 October 2011 the defendant pleaded guilty to four counts of indecent assault on two young girls aged 14 and 15. The defendant was a first time offender.

Held:

1. The starting point for the offence involving a sexual attack on a victim of tender years by a man of 45 years of age, was a sentence of between 36 and 40 months imprisonment based on a not guilty plea.
2. The defendant was sentenced to three years in prison suspended for three years conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension. The defendant was also fined $1000 for each of his victims to be held on trust until they reach the age of 18. He was to pay it at the rate of $80 per fortnight.

Counsel for the Crown
Counsel for the defendant : Mr Tu'utafavia

Judgment

The defendant appears for sentencing today - having pleaded guilty on first arraignment on 7th October 2011; to an indictment, alleging four counts of Indecent assault on two young girl, aged 14 and 15 years of age.

On 07th October 2011 the case was adjourned for the preparation of a Pre-Sentence Report and the defendant was remanded on conditional bail for the preparation of that report. It was a condition of the defendant's bail that he co-operates in the preparation of that PSR.

It should be noted that the defendant - is a first time offender, and to his credit he had fully admitted his part in offending - to the police, and to this Court on arraignment.

The brief facts

The prosecution claims the facts revealed that in 2006 at Kolomotu'a the defendant was involved in an incident when he kissed his FIRST victim's face and he fondled her bottom and her vagina without her consent over a considerable period of time.

The prosecution claims the facts also revealed that in April 2011 at Kolomotu'a the defendant was involved in an incident when he kissed his second victim's face and he fondled her bottom and her vagina without her consent as per the Statement of Offences.

After a complaint was made to the child's mother, the matter was reported to the police and the defendant was arrested. The defendant admitted the facts as agreed, to the police and to this court. The defendant told the court that he had apologized to both of his victims and the apology - has been accepted by the victims family and he told the Court that he is making amends for his actions

On 14th November 2011 the defendant appeared for sentencing. Having considered all the facts of the case, including the contents of the PSR and various letters of support. I have considered the fact that the defendant pleaded guilty and, the fact the defendant co-operated with the police and with this court – and that he has apologized to his victims.

Having heard from counsel, and the defendant in person and noting he is a first time offender. I told the defendant my starting point for this type of serious offending- involving a sexual attack on a victim of tender years, by a man of 45 years of age, three times the victims age, is a sentence of between 36-40 months imprisonment – that sentence would be based on a NOT guilty plea.

After considering all the facts the defendant is sentenced as follows:-

Count 1 – The defendant is sentenced to **THREE YEARS** in prison – however the whole sentence is suspended – for a period of three years conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment. Further, the defendant is fined $1,000.00 of which THE SUM OF $1,000.00 is to be paid by way of compensation via the Supreme Court - to his victim 'ALO'I FO'OU KISEPI. That sum of $1,000.00 is to be held in a trust fund – monitored by the Supreme Court until the child reaches the age of 18.

Count 2 – The defendant is placed on Probation for three years with a condition he keep in touch with the Probation Officer and complete any course his Probation Officer thinks necessary.

Count 3 – The defendant is sentenced to **THREE YEARS** in prison – however the whole sentence is suspended conditional upon the defendant keeping the peace and being of good behaviour and committing no further offending during the period of the suspension of the sentence of imprisonment. Further, the defendant is fined $1,000.00 of which THE SUM OF $1,000.00 is to be paid by way of compensation via the Supreme Court to his victim MILIKA FINAU. That sum of $1,000.00 is to be held in a trust fund – monitored by the Supreme Court, until the child reaches the age of 18.

Count 4 – The defendant is placed on Probation for three years with a condition he keep in touch with the Probation Officer and complete any course his Probation

Officer thinks necessary. [It should be noted the defendant has voluntarily completed the ordinary Salvation Army Courses and that is to his credit].

The sentences are to be served concurrently with each other.

The defendant told this Court he was unable to pay the $2,000.00 compensation order by 16.00 hours today, so the defendant is ordered to pay the sum of $80.00 per fortnight, until the payment of $2,000.00 is made in full.

Each payment of $80.00 [compensation] is to be made to the Supreme Court Registry by 12.00 on the Friday - each fortnight. The defendant's first payment of $80.00 is due on 30th November 2011 - by 12.00 - in default of payment the defendant will serve nine months imprisonment.

The defendant can pay more than $80.00 each fortnight - but he cannot pay less than $80.00TOP each fortnight, and his payments must be regular.

For the avoidance of doubt, the $1,000.00 compensation is to be paid to EACH complainant - by way of compensation for her distress / injuries as a result of these charges.

I certify I warned the defendant of the consequences of committing any further offences during the period of his suspended sentence, and, of the consequences of failing to pay his compensation, or, failing to comply with "Instructions of a Probation Officer."

This is to be a deterrent sentence, applying the principles enunciated in the case of *Crown v Cunningham.*

A Copy of these sentencing remarks are to be served on the defendant, and the Probation Service.

Bigue v Latu anors

Supreme Court, Nuku'alofa
Scott CJ
CV 148/2009

1 December 2011

Contract law – claim of breach of contract – contract attempted to evade the provisions of the Business Licenses Act 2002 - contract was illegal and therefore unenforceable – judgment for the defendants

In May 2006 the plaintiff and the first defendant entered into a tenancy agreement for the plaintiff to lease a shop from the defendant. The plaintiff moved into the shop shortly after signing, and paid the TOP $15,000 and renovated the shop, building some living quarters at the rear. On 29 December 2006 a second agreement was signed, which was intended to complement the first agreement, not replace it. The sum of TOP$21,600 was substituted for the previous sum of TOP$15,000 and two paragraphs were added. Paragraph 4 stated that "the tenant pays $100 every month to the landlord for using his name to license the store". A dispute arose between the plaintiff and the first defendant and the first defendant told the plaintiff to vacate the store. When the plaintiff refused to vacate, the first defendant called the police, the second defendant. The plaintiff was forced to vacate. The plaintiff's claim was for damages for breach of contract by the first defendant. He also claimed general damages in tort against the second defendant police officer and against his employer, The Kingdom. While much of the evidence was directed at the questions of whether the plaintiff or the first defendant had breached the agreement, the crucial question which emerged was whether the agreement between the plaintiff and the first defendant was, in fact, illegal.

Held:

1. The Business Licenses Act 2002 provided that every foreign business person in the Kingdom carrying on a business activity must hold a valid business license, and that a business license was not transferable. It further provided that any person who carried on a business activity without a business license committed an offence.
2. The court held that paragraph 4 of the second agreement, which effectively replaced paragraph 6 of the first agreement in December 2006, was an agreement to evade the provisions of the Business Licenses Act 2002 and as such was illegal.
3. Having reached the conclusion that the contract was unenforceable, it followed that no remedy arose from its breach. The court was not

impressed with the first defendant who seemed to have difficulty keeping to the truth and the court favored the plaintiff's account of what happened. But neither sympathy nor merit affected the rule that *in pari delicto potior est conditio defendentis* (in a case of mutual fault the circumstances of the defendant are better.)

4. There was judgment for the defendants.

Cases considered:

Holman v Johnson (1775) 1 Cowp 341
Levy v Yates (1838) 8 A&E 129

Statute considered:

Business License Act 2002

Counsel for the plaintiff : K Piukala
The first defendant appeared in person
Counsel for the second and third defendants : Mr Kefu

Judgment

[1] The plaintiff is a Chinese national who told me that he had a visa to work in Tonga expiring in November 2011. He has never, at any material time, had a business license issued to him under the provisions of the Business License Act 2002.

[2] The First Defendant is the owner of shop premises at Nukunuku. She is a Tongan national who told me that she held a business license to operate the shop until 2009.

[3] In May 2006 the Plaintiff and the First Defendant entered into a tenancy agreement (Exhibit P1). Under the agreement the First Defendant agreed to let the shop to the Plaintiff. Paragraph 6 of the agreement states:

> "6 – the [First Defendant] will help the [Plaintiff] get the permission from the government all the necessary paper to let the tenant running the store and the [Plaintiff] should pay all the charges during the first two and half years period of their agreement."

[4] Under Paragraph 3 of the same agreement the Plaintiff was:

> "allowed to make renovation and any addition to the store, also build a room and park one vehicle inside the premise at any time upon signing of this agreement."

[5] Under paragraph 2 of the same agreement it was agreed that upon signing, the Plaintiff would pay the Defendant a lump sum of TOP $15,000 for the first 2 ½ years rent and thereafter would pay rent at the rate of TOP $600 per month.

[6] The Plaintiff told me that he moved into the shop shortly after signing the agreement, that he paid the TOP $15,000 and that he renovated the shop and built some living quarters at the rear.

[7] On 29 December 2006 a second agreement (Exhibit P2) was entered into. It appears that this second agreement was intended to complement the first agreement, not replace it. Relevantly, the sum of TOP$21,600 is substituted for the previous sum of TOP$15,000 and two paragraphs 4 and 9 were added. Paragraph 4 states:

> "the tenant pays $100 every month to the landlord for using his name to license the store".

Paragraph 9 states:

> "If the tenant happens to do something wrong, the business will be closed until the problem is solved. When the problem is solved, then the business opens again."

[8] It appears that the arrangement worked satisfactorily until about April 2009. The Plaintiff told me that he had paid the TOP $21,600 to the Defendant. He also told me that he had spent TOP $88,000 on renovating the shop and building on a dwelling. He did not know why only TOP$26,000 was claimed in paragraph 7 (iv) of the Statement of Claim.

[9] The plaintiff told me that in April 2009 he made a complaint to a lawyer about an invoice which he received from the Commissioner of Inland Revenue. He complained that he had paid the Plaintiff a total of TOP$ 2075 for tax for the years 2006 and 2007 but that apparently the First Defendant had not forwarded this sum to the Commissioner. After he made the complaint to the lawyer there was an exchange of correspondence between the parties. On 29 April 2009 the First Defendant came to the shop and told him to vacate.

[10] The Plaintiff told me that when he refused to vacate, pointing out that he had an agreement, had spent substantial sums on the premises and had done nothing wrong, the First Defendant telephoned for the police. The Second Defendant arrived at the shop shortly thereafter and he was forced to vacate.

[11] The Plaintiff's claim is for damages for breach of contract by the First Defendant. He also claims general damages in tort against the Second Defendant police officer and against his employer, The Kingdom.

[12] Much of the evidence was directed at the questions of whether the Plaintiff or the First Defendant had breached the agreement, whether the Plaintiff's wife had indeed threatened the Second Defendant with a shovel, whether the Second Defendant (who is related to the First Defendant by marriage) was acting as her agent when the Plaintiff was forced to leave the shop, or whether he was only there to keep the peace. The question which however emerged and upon which I called for submissions from counsel, was whether the agreement between the Plaintiff and the First Defendant was, in fact, illegal.

[13] In *Holman v Johnson* (1775) 1 Cowp. 341, 343 Lord Mansfield explained that:

> "The principle of public policy is this: *ex dolo malo non oritur actio* (out of fraud no action arises). No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* (out of an illegal or immoral consideration) or the *transgression of a positive law of this country* [emphasis added] then the court says he has no right to be assisted. It is upon the ground the court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff".

[14] The "positive law" of Tonga relevant to this case is the Business Licenses Act 23/02. Section 4 states that:

> "Subject to this Act, every foreign business person in the Kingdom carrying on a business activity shall hold a valid business license"; and

Section 13 states that:

> "A business license is not transferable"; and

Section 19 states that:

> "Any person who carries on a business activity without a business license commits an offence."

[15] In my opinion the circumstances in this case are similar to those in *Levy v Yates* (1838) 8 A&E 129 in which the court refused to enforce a contract since "the agreement could not be carried into effect without a contravention of the law", that is, without the grant of license. In the present case the Plaintiff carried on business without having a license "using [The Defendant's] name to license the store" see paragraph 4 of Exhibit P2".

[16] In my view paragraph 4 of the second agreement, which effectively replaced paragraph 6 of the first agreement in December 2006 was an agreement to evade the provisions of the Business Licenses Act 2002 and as such was illegal.

[17] Mr. Piukala suggested that the license arrangement between the parties could somehow be severed. I do not agree; in my opinion without the aim of evading the requirement for the Plaintiff to be licensed there would have been little purpose in entering into the agreement at all.

[18] Having reached the conclusion that the contract was unenforceable, it follows that no remedies arise from its breach. I have some sympathy for the Plaintiff who made a very poor investment. I was not impressed with the First Defendant who seemed to have difficulty keeping to the truth. I was also inclined to favor the

Plaintiffs account of what happened on 29 April 2009. But neither sympathy nor merit affect the rule that *in pari delicto potior est conditio defendentis* (in a case of mutual fault the circumstances of the defendant are better.)

[19] There will be judgment for the Defendants.

Digicel Tonga Ltd v Leha'uli anor

Supreme Court, Nuku'alofa
Scott CJ
AM 31/2011

16 December 2011

Civil procedure – unliquidated damages - formal proof required in Magistrates' Court – no judgment by default available

The respondents commenced proceedings against the appellant in March 2009 alleging breach of contract. In April 2009 the action was discontinued following settlement. In August 2009 fresh proceedings were commenced by the respondent's next of kin complaining of the same matters which had been advanced in the earlier proceedings. The defence claimed that there was no privity of contract between the parties and that the plaintiffs had no *locus standi* and that they were estopped from bringing the action. The Magistrate allowed the respondents to be substituted for the next of kin and allowed the appellant to file an amended defence. The Magistrate's ruling was unsuccessfully appealed by the appellant. On 11 November 2009 the amended defence was filed; it also included a counterclaim. On 2 May 2011 the appellant filed an application for judgment in default of defence to the counterclaim. It was supported by an affidavit. An affidavit in answer was filed on 4 May 2011. The respondents' case was, first, that the correct practice in the Magistrates' Court was not to append a counterclaim to a statement of defence but to commence separate proceedings for that claim. It was accepted that no defence had been filed to the counterclaim but it was argued that the practice of applying for (and being awarded) judgment in default of defence was unique to the Supreme Court; in the Magistrates' Court formal proof was required. On 10 August 2011 the Magistrates' Court upheld the respondents' submissions. The appellant appealed against the ruling.

Held:

1. There was a clear distinction between liquidated and unliquidated damages. The former was in the nature of a debt or, in other words, a specific sum of money which could be calculated with mathematical precision to be due. Unliquidated damages must however be assessed by the court. The mere naming of a definite figure did not convert an unliquidated demand into a liquidated claim.
2. Whether in the Supreme Court or in the Magistrates' Court an unanswered counterclaim in the form lodged by the appellant would not lead to judgment for the sum claimed since it was clear that notwithstanding the

inclusion of the figure "$5000" the claim was for unliquidated damages and required a hearing to take place.

3. The decisive question was not whether a counterclaim should be separately commenced, but whether in the absence of a filed defence to the counterclaim as filed, the appellant was entitled to judgment for the amount claimed.

4. The court held that the appellant was not entitled to judgment for the amount claimed. The appeal was dismissed.

Cases considered:

Amon v Bobbett 22 Q.B.D 543
Byrne v Brown (1889) QBD 657
Knight v Abbott (1883) 10 QBD II

Statutes considered:

Magistrates' Courts Act (Cap 11)
Magistrates' Courts (Amendment) Act 10/2006

Rules considered:

Magistrates' Courts (Civil) Rules 2007
Supreme Court Rules 2007

Counsel for the appellant	:	Mrs D Stephenson
Counsel for the respondents	:	O Pouono

Judgment

1. Two different documents entitled "Agreed Facts" are on the file. Unfortunately, several of the documents referred to in the "Agreed Facts" are not before me, including an English translation of the summons in the Magistrates' Court which commenced the present proceedings.

2. In summary, the Respondents commenced proceedings against the Appellant in March 2009 (CV 91/09). They alleged breach of contract. In April 2009 the action was discontinued following settlement but in August 2009 fresh proceedings (CV 271/09) were commenced by the Respondent's next of kin complaining of the same matters which had been advanced in CV 91/09.

3. A Statement of Defence was apparently filed by the Appellant on 24 August 2009. According to a ruling delivered by the Magistrate in October 2009 the Defence claimed that there was no privity of contract between the parties, that the Plaintiffs had no *locus standi* and that they were estopped from bringing the action.

4. In his ruling the Magistrate allowed the Respondents to be substituted for the next of kin and allowed the Appellant to file an amended Defence.

5. It appears that the Magistrate's ruling was unsuccessfully appealed by the Appellant but I was not provided with any of the documents relating to that appeal and the appeal reference was not provided.

6. On 11 November 2009 the Amended Defence was filed: it also included a Counterclaim.

7. On 2 May 2011 the Appellant filed an application for judgment in default of defence to the counterclaim. It was supported by an affidavit of even date.

8. An affidavit in answer was filed on 4 May 2011. The Respondents' case was, first, that the correct practice in the Magistrates' Court was not to append a counterclaim to a statement of defence but to commence separate proceedings for that claim. It was accepted that no defence had been filed to the counterclaim but it was argued that the practice of applying for (and being awarded) judgment in default of defence was unique to the Supreme Court: in the Magistrates' Court formal proof was required.

9. On 10 August 2011 the Magistrates' Court upheld the Respondents' submissions. The Appellant now appeals against that ruling.

10. As will be seen from comparison of the Magistrates' Courts (Civil) Rules 2007 and the Supreme Court Rules 2007 the requirements of the two courts for the filing of pleadings are quite different. In the Supreme Court proceedings are commenced by writ and statement of claim (RSC 0.6) and a party wishing to defend or counterclaim must file a statement of defence (0.8 r.3) and /or a counterclaim (0.8. r.4). Where no defence is filed then the plaintiff is entitled to judgment in default (0.14). A counterclaim is regarded as an independent action (*Amon v Bobbett* 22 Q.B.D 543, 548) and therefore a party wishing to defend a counterclaim must file a defence to the counterclaim (0.8 r 4(2)). In Magistrates' Courts, by contrast, the only pleadings which must be filed are the Summons (Rule 5).

11. In the Magistrates' Court the only provision for further pleadings is contained in Rule 9 which is subject to Section 66 of the Magistrates' Courts Act (Cap 11). This means that a Magistrate is free to hear a case, when appropriate, without any written statement of defence before him, whether to a claim, or to a counterclaim. While it has been found, as a matter of convenience, desirable for both parties to give written particulars of their case, unless so ordered by Rule 9 such written particulars (whether entitled "Defence" or not) are not compulsory.

12. A special provision relating to claims for damages should also be noted. Under Rule 7(2)(b) if the defendant, though duly served, fails to appear then:

> "If the plaintiffs claim is for an unliquidated amount or for any reason the amount needs to be proved, the court may accept affidavit evidence instead of requiring oral testimony".

This Rule is complementary to section 65 of the Act.

13. In the present case the counterclaim was for "breach of contract in the sum of $5000". The breach was said to be the commencement of proceedings CV 271/09 in breach of clause 1.6 of the terms of settlement of action CV 91/09 which breach was said to be "injurious to the name, image and reputation" of the Defendant.

14. There is a clear distinction between liquidated and unliquidated damages. The former is in the nature of a debt or, in other words, a specific sum of money which

can be calculated with mathematical precision to be due. Unliquidated damages must however be assessed by the court. The mere naming of a definite figure does not convert an unliquidated demand into a liquidated claim (*Knight v Abbott* (1883) 10 QBD II).

15. In the Supreme Court failure to file a defence will entitle the Plaintiff to enter judgment for the sum claimed in the case of a liquidated sum. (0.14 r3(1). Where, however, the claim is for unliquidated damages, judgment can only be entered with damages to be assessed (014 r 3(2)).

16. Whether in the Supreme Court or in the Magistrates' Court an unanswered counterclaim in the form lodged by the Appellant in this case would not lead to judgment for the sum claimed since it is clear that notwithstanding the inclusion of the figure "$5000" the claim is for unliquidated damages requiring a hearing to take place.

17. In paragraph 2 of her grounds of appeal filed on 18 August 2011 counsel for the appellant relied on Section 59(3) for the proposition that the rules of procedure in civil cases shall be the same as those in the Supreme Court. With respect, counsel appears to have overlooked the amendment of section 59(3) by section 17 of the Magistrates' Courts (Amendment) Act 10/2006. Even had this amendment not been made, for the reasons given I am of the view that the Supreme Court Rules would not have assisted the Appellant.

18. As there is no specific requirement for additional pleadings beyond the summons in the Magistrates' Courts Rules 2007, there is no fixed rule for the filing of a counterclaim. Rule 3(2) of the Rules gives a wide discretion to the Chief Magistrate and a Magistrate. There is much to be said for the general principle that all disputes between the parties relating to one subject-matter should be dealt with at the same time (*Byrne v Brown* (1889) QBD 657, 666-7). Whether commenced separately as a claim or added to a defence as a counterclaim the issues raised by the Defendant should be dealt with at the same time as the claim. I do not read the Magistrate's 10 August 2011 ruling as saying anything to the contrary. In any event, the decisive question in this appeal is not whether a counterclaim should be separately commenced but whether in the absence of a filed defence to the counterclaim as filed, the Appellant was entitled to Judgment in the amount claimed. For the reasons already given, I hold that the question must be answered in the negative.

19. The appeal is dismissed.