

playing of Rugby League Football inside the Kingdom of Tonga and also outside the Kingdom, insofar as it relates to the Tonga national team and players eligible to represent Tonga.

- [2] The plaintiffs are all officers on the board of directors of the TNRL.
- [3] The first defendant and second defendant hold the positions of president and chairman, respectively, on the board of directors.
- [4] The evidence suggests that the TNRL has a history of dysfunction dating back a number of years and involving prior court proceedings. There is little to suggest that the situation is improving.
- [5] The immediate catalyst for this action was a dispute over whether changes made to the Rules of the TNRL (the Rules) in 2012 affecting the election of officers were valid. The causes of the plaintiffs' dissatisfaction run deeper than that. In short, the plaintiffs believe that the second defendant, and others supporting him, has usurped the role of the board and mismanaged the affairs and the finances of the TNRL and used its money for improper purposes without board approval.
- [6] This case has proceeded in two parts reflecting two causes of action in the original statement of claim. The first cause of action concerned the validity of the changes to the Rules to which I have referred, the effect of which was that the president, chairman and secretary of the TNRL would hold their positions for a period of 4 years and not be subject to annual election, as is the case with all other officers. That matter came before Cato J for hearing in December 2014 at which

time consent orders were made, declaring the changes to the Rules invalid and cancelling them. The court's ruling included:

The TNRL Constitution registered in September 2008 is declared to be the valid Constitution of the Society effective from 10 August 2012.

All Officers for the Tonga National Rugby League will vacate their positions at each Annual General Meeting and elections for all Officers of the Tonga National Rugby League will take place at each Annual General Meeting in accordance with clause 7 of the Constitution of 2008...

It is ordered that the registration of the amended Constitution on 1 March 2013 be cancelled in whole, and that the cancellation of the Constitution is in accordance with section 21 (4) of the Incorporated Societies Act, Cap 28 Vol 1 Laws of Tonga.

[7] Despite the ruling, which required the election of officers to take place "at each Annual General Meeting", the evidence is that the elections were last held on 1 March 2013. I will return to what can be done about that.

[8] It is the second cause of action, in what is now an amended statement of claim, with which this ruling is primarily concerned. The second cause of action alleges that the first and second defendants have breached the Rules and the Act and have acted in a manner which is contrary to the interests of the TNRL and its members. The complaints are serious, wide ranging and particularised. For the purposes of providing context for what follows, what is alleged in general terms is that:

[8.1] The second defendant and others supporting him (notably the former secretary, Mr. Lopeti 'Uhatafe, and present treasurer, Mr.

Matani Mataele) have failed to call meetings of the board as required by the Rules, have excluded the board members from meetings concerning the affairs of the TNRL, have caused the TNRL to incur financial obligations without board knowledge and have failed to provide any information to the board about the financial affairs of the TNRL despite repeated requests.

[8.2] The second defendant and others have failed to account for money received for or on behalf of the TNRL, have never obtained any approval of the board for payments of expenses or accounts using TNRL funds and have used the money of the TNRL for improper purposes for the benefit of, *inter alia*, the second defendant and the first defendant. The plaintiffs allege that the money of the TNRL has been taken in circumstances amounting to theft.

[8.3] The second defendant and others have failed to provide an audit of the finances of the TNRL for any of the years 2012, 2013, 2014, and 2015 which is required under the Rules and in the 2012 year the members in annual general meeting were presented with a false financial report. The report was false in that it was presented as having been audited when it was not and it materially misstated the financial position of the TNRL.

[8.4] The second defendant and others have not arranged for the filing of annual financial statements of the TNRL with the Registrar of Incorporated Societies as required by section 23 of the Act for the years 2012, 2013, 2014, 2015.

[8.5] That in breach of a memorandum of understanding between the Government of Tonga and the TNRL, pursuant to which the Government provided TOP\$250,000 to the TNRL to be used for player allowances at the 2013 Rugby League World Cup, the first and second defendants and others caused the TNRL to fail to comply with the grant conditions and disbursed the money for purposes other than for players' allowances.

[9] I heard evidence from all of the plaintiffs along with another director, Taniela Inukiha'angana. An affidavit of a former director, Lupeni 'Otuhouma, was admitted into evidence also. Surprisingly, given the serious allegations that have been made against them, the first defendant and second defendant did not give evidence and they did not call any witnesses to give evidence on their behalf either. Whilst Mr. Tu'utafaiva did cross-examine the plaintiffs and Mr. Inukiha'angana, most of the plaintiffs' evidence is effectively unchallenged. The first and second defendants have chosen to rely upon legal defences. They contend that the plaintiffs have no standing to bring this action and that even if the plaintiffs have standing the court has no power to make the orders that are sought.

[10] There has been some delay in the issue of this ruling. This is because counsel advised me that there was a real prospect of settlement and that I should withhold my ruling to allow the parties the opportunity to explore that further. There have been a number of appearances of counsel before the court where I was advised that the discussions were ongoing and settlement was likely. However, on 28 April 2016 the plaintiffs filed an application for injunction which complained that without board approval the treasurer of the TNRL, Mr. Matani Mataele, had

withdrawn TOP\$8,000 from the ANZ bank account of the TNRL to reimburse expenses he claimed had been incurred on behalf of the TNRL by the second defendant, Mr. Stan Moheloa. The plaintiffs sought orders restraining the defendants or anyone on their behalf from withdrawing money from the account of the TNRL without board approval, removing the defendants and Mr. Mataele as signatories on the bank account and for repayment of money drawn from the account without the board's approval. The matter came before me on 29 April 2016 when I was advised that settlement was no longer likely and after hearing from counsel I made orders that included the following:

The defendants, their servants, agents or employees (including any Officer of the Tonga National Rugby League Inc) are restrained from:

Withdrawing any money from any bank account of the Tonga National Rugby League Inc (including but not limited to its account with ANZ Bank Account No.1100142); or

Applying any money belonging to or received by or on behalf of the Tonga National Rugby League Inc for any purpose including (but not limited to) the payment of any debt or obligation of the Tonga National Rugby League Inc:

without first obtaining authorisation to do so by a valid resolution of the Board of Directors of the Tonga National Rugby League Inc.

[11] Against that background I now turn to consider the facts. I have set out the facts in some detail. I have done this for two reasons. First, the totality of the evidence had to be considered to address the defendants' principal defence that the plaintiffs have no standing. Secondly, I consider it important that the members of the TNRL are fully aware of the matters that have been put before the court in

relation to the affairs of their society so as to inform their future decisions.

The facts

[12] As I have noted, all the plaintiffs are directors of the TNRL. The first named plaintiff, Mr. Siliveinusi Taumoepeau, has been a director since 2007. He was appointed vice president at an annual general meeting on 10 August 2012. He was subsequently re-elected at the next annual general meeting on 1 March 2013. Following 10 August 2012 Mr. Taumoepeau had requested a meeting of the board. The Rules provide that the board should meet at least once monthly but this does not occur. Mr. Taumoepeau produced email correspondence between himself, Mr. Moheloa and the then secretary, Mr. Lopeti 'Uhatafe, during September and October 2012, when he drew Mr. Moheloa's attention to the requirements of the Rules. Mr. Moheloa advised in an email of 26 September 2012 that he was busy and that various people, including Mr. 'Uhatafe, were away but that he would advise a date for a meeting when he learned when the secretary was expected to return. Mr. Taumoepeau received a challenging response from Mr. 'Uhatafe on 2 October 2012 asserting that for 15 years he had convened the board meetings. Mr. 'Uhatafe said that he and others were busy with the preparations for 2013 Rugby League World Cup. One of the plaintiffs' complaints is that the board was excluded from the World Cup preparations. Mr. 'Uhatafe also asserted that Mr. Taumoepeau would not be entitled to vote at the next annual general meeting and that the president and vice president were not members of the board. This final comment was unexplained.

- [13] A board meeting was convened on 16 November 2012. Mr. Moheloa invited a former director, Mr. 'Afofa Ta'ai, to participate in the meeting and allowed for the appointment of two new directors which the plaintiffs say was contrary to the Rules. It was at this meeting also that Mr. Moheloa proposed the changes to the Rules which became so contentious. The proposed changes were put to the meeting and passed. In his evidence Mr. Fukofuka said that the changes were passed because the chairman nominated the two additional people to vote and support it at the meeting.
- [14] At this meeting Mr. Taumoepeau asked questions about the finances of TNRL but no information was provided. He said (and there was no evidence to the contrary) that between 10 August 2012 and 1 March 2013 there were never any minutes distributed following board meetings, no accounts approved by the board for payment nor any disclosure to the board of the TNRL bank statements or any other financial information. He said he was not even aware of who was authorized to be a signatory on the TNRL's bank account. Furthermore, there was no appointment of an auditor of the accounts of the TNRL as was required by the Rules or any discussion with the board about that.
- [15] As a result of enquires Mr. Taumoepeau made following the 16 November 2012 meeting, Mr. Taumoepeau learned that from the date of his appointment on 10 August 2012 to the date of the next board meeting on 16 November 2012, Mr. Moheloa and Mr. 'Uhatafe had withdrawn more than TOP\$40,000 from the ANZ bank account of the TNRL without board approval. A statement of the TNRL's ANZ bank account shows regular and, in some cases, large withdrawals from the account in this period and is consistent with Mr. Taumoepeau's evidence.

- [16] On 23 November 2012 Mr. Taumoepeau wrote by email to both Mr. Moheloa and to the president and first defendant, Mr. Semisi Sika, challenging the changes to the Rules on the grounds that they were unconstitutional (as was later proved to be the case). He received no response.
- [17] On 6 February 2013 Mr. Taumoepeau emailed the directors noting that the Rules required the holding of the annual general meeting in the month of February and that the financial statements of the TNRL should be forwarded to the members at least 14 days before the annual general meeting. He received a reply from Mr. Moheloa saying that he had been away and had left it to the office to prepare for the annual general meeting. He gave no date for the holding of the meeting. On 23 February 2013 Mr. 'Uhatafe sent an email to board members attaching what purported to be a "financial report 2012" and the minutes of the 2012 annual general meeting. He advised that the annual general meeting for 2013 would be held on 1 March 2013. The financial report consisted of a statement of income and expenditure, a statement of the financial position and a statement of cash flow for the 12 months to 31 December 2012.
- [18] The annual general meeting was held on 1 March 2013. The minutes of the meeting were produced. The minutes record that officers were elected other than for the positions of president, chairman and secretary. Amongst those elected was Mr. Mataele as treasurer. He has adopted positions hostile to the plaintiffs since his election and has been associated with what the plaintiffs say was the improper use of the TNRL's money. Mr. Taumoepeau said in his evidence that at this meeting there was a strong majority to challenge Mr. Moheloa and Mr.

'Uhatafe in relation to their management of the TNRL. The minutes reflect a growing desire for financial accountability but resistance to this also. There was a motion to nominate an auditor but this was rejected on the basis that the Rules provide for the board to appoint the auditor. The financial report 2012 was presented as an "audited report" but a request for TNRL bank statements to verify information in the report was rejected on the basis that the auditor's comments should suffice. A request was made also for further information about substantial grants received by the TNRL and how they were used, which appear from the minutes to have been deflected on the basis that at least some of the amounts involved were only small.

- [19] Mr. Taumoepeau and other directors were not happy with how things had progressed. Mr. Taumoepeau said that he was being stonewalled and that information was being deliberately withheld. He obtained copies of the TNRL's ANZ bank account statements and compared them with the financial report presented to the members. There were discrepancies. Under the Rules all moneys belonging to or received by the TNRL must be paid into its bank account and all accounts must be passed for payment by the board. The evidence is that these rules have been consistently breached. The evidence is that the bank statements showed total expenditure from the TNRL account of TOP\$93,233.82 in the 2012 financial year compared with the TOP\$159,566.15 shown in the financial report. That is a difference of TOP\$66,332.33. Similarly TOP\$106,333.55 was deposited into the TNRL bank account in the same period yet total income of the TNRL in the financial report was recorded as TOP\$160,203.60. That is a difference of TOP\$53,870.05. The differences were unidentified and unexplained in the financial report. In addition there were expenses recorded as having been incurred by the

TNRL in the financial report such as rent, telephone and communication costs which Mr. Taumoepeau says his enquires revealed were not incurred.

[20] From the TNRL banks statements Mr. Taumoepeau had learned that in the months of November 2012 to February 2013, a period during which there were no rugby league competitions and the office of TNRL was virtually closed, a total of 27 cheque withdrawals totaling more than TOP\$30,000 were made from the TNRL's ANZ bank account. The drawings were not approved by the board and no invoices or receipts were ever produced to the board in respect of them. Whilst he accepted that some expenses would have been incurred, that did not explain either the level or frequency of the withdrawals from the account. Mr. Taumoepeau was able to obtain copies of cheques drawn on the bank account. He learned that a number of withdrawals were made by cash cheques and for large sums. There were cash cheques drawn for TOP\$3,900 on 28 March 2012, TOP\$8,000 on 22 April 2012, TOP\$2,400 on 8 November 2102, TOP\$3,000 on 9 November 2012, TOP\$2,300 on 23 November 2012 and TOP\$7,400 on 31 January 2013. Four of those cheques were drawn on the account in the off-season months. The cheques were signed by Mr. Moheloa and Mr. 'Uhatafe and in most cases presented for payment by Mr. 'Uhatafe. There was also a cheque for TOP\$2,221.83 dated 31 January 2012 drawn in favour of Asco Motors, a company with which Mr. Moheloa is associated.

[21] Mr. Taumoepeau emailed Mr. Moheloa and Mr. Sika on 26 March 2013 calling for a board meeting as a follow-up to the annual general meeting as well as for discussion on the 2013 World Cup preparations

and the finances of the TNRL. A board meeting was arranged for 2 April 2013. At the meeting Mr. Taumoepeau tabled copies of the cash cheques and the bank statements and drew the board's attention to the differences between what was contained in them and the finance report 2012. He said, and I accept, that the treasurer, Mr. Mataele, tried to interfere and block his questions. He questioned Mr. 'Uhatafe as to the identity and qualifications of the auditor from which it became clear that the finance report had not been prepared by an auditor at all. Mr. 'Utahafe, who had presented the report as having been audited, now said that the report writer, who appears to have been a Ms. Kalolaine Tupou, only worked for an audit company but would not give details of the company or the position that she held. He refused to allow the board members to speak with Ms. Tupou either. The plaintiffs' case is that the financial report was presented to conceal how Mr. 'Utahafe and Mr. Moheloa had been using the money of the TNRL. It is not necessary for me to make any such finding. It is sufficient for present purposes that the plaintiffs' concerns as to the content of the financial report and the qualifications of Ms. Tupou were substantial and, in the circumstances, justified. The board meeting of 2 April 2013 was adjourned so that Mr. 'Utahafe and Mr. Moheloa could report back on the issues raised by Mr. Taumoepeau.

[22] On 19 April 2013 Mr. Taumoepeau emailed Mr. Sika to inform him of his concerns about the management of the TNRL finances. Relevantly, in that email he said:

In your capacity as president of TNRL, may I raise with you issues I wish to be addressed in regards to league.

... we feel that there is a lack transparency and accountability in how rugby league is administered which I strongly feel this is solely because of Lopeti 'Uhatafe.

In the last 5 years, the board has tried to give the office of the Treasurer, management, and control of the finances of TNRL, in which Knowlton 'Ita'aehau and Raymond Sika were elected as such. It has been unsuccessful because Lopeti acts in his capacity as Secretary and also Finance Controller. The board has asked numerous times for financial reports to every board meetings but it has not been done. The annual financial report submitted to this year's AGM and the auditor mentioned are both unreliable and untrustworthy.

There are also issues with overseas trips under the guise of TNRL. I have evidence of people traveling to Australia under TNRL sponsorship for league sponsored events, yet they do not have any association with TNRL.

This is a concern as it is a total disregard for the TNRL's Constitution and may be breaches of the Company and Society Acts under which the TNRL operates.

[23] Mr. Taumoepeau was not the only director who was concerned. The other plaintiffs gave evidence confirming what Mr. Taumoepeau had to say and on 23 May 2013 the Hihifo representative on the board, Mr. Molisoni 'Otukolo, wrote to Mr. Moheloa (copying Mr. Sika and others) requesting that a board meeting be convened as a matter of urgency and stating:

According to the Constitution it is a requirement that we meet at least once monthly [clause 9.1]. But I find that there has been requests for meetings from my fellow Board members and no response to those requests. The Constitution clearly states, especially as it is a World Cup year, discussion must be tabled for finances, approval of finances in respect of the World Cup requirements, the sponsorship requirements, the selection procedure, and

other matters. Further, as it is the 25th Anniversary for the TNRL, we have seriously been poor in promoting the opening of the National Championship to recognise our 25 year history.

.. Therefore I kindly ask that a Board meeting be convened. I give notice, knowing that the Vice President has also given notice for a Board meeting to be convened and I am copying him in this email.

[24] Mr. Moheloa's response to that email was defensive. In an email of 23 May 2013, he said that it was uncharacteristic for Mr. 'Otukolo "to question the credibility of rugby league and how it had been running". He said that he did not need to be reminded of the content of the Rules and that Mr. 'Otukolo's reference to them was "petty and trivial". He told Mr. 'Otukolo to raise his grievances at a meeting. Mr. 'Otukolo responded asking that at the next meeting the matters to be tabled include the financial information that had been requested at the last board meeting (a reference to the issues raised by Mr. Taumoepeau) as well as a report on World Cup preparations.

[25] The next board meeting was held on 28 May 2013 and the information that was provided by the chairman and the secretary did not satisfy the plaintiffs. The chairman said that a withdrawal from the TNRL account for TOP\$7,400 on 31 January 2013 was a back payment of salary to Mr. 'Utahafe as a result of an increase in his remuneration from TOP\$300 to TOP\$500 per week. That explanation was unsatisfactory because, as Mr. Taumoepeau notes, a salary increase was never approved by the board nor had it approved the payment of that amount from the account. Other explanations included that the cash cheque of TOP\$2,400 drawn on 8 November 2012 was for payment of legal costs incurred in defending action taken against the

TNRL. It is difficult to see why such a payment would be made in cash and without board approval. Mr. Fangupo described the explanations as bizarre. The meeting concluded on the basis that Mr. Moheloa would have the finances of the TNRL for 2012 audited by an independent and qualified auditor. This has never happened. There was clearly now a serious level of distrust. This is reflected in the evidence of Mr. Fangupo who said as follows:

...I say that Mr. Taumoepeau and a number of Directors, including myself, were not satisfied with the answers given by Mr. Moheloa. In my view it was an attempt to conceal the money that Mr. Moheloa and Mr. Uhatafe were drawing from the account, without permission from the Board and without our knowledge as Board members and for reasons not approved by the Board. I say that those drawings in many instances were not for the TNRL, but were personal drawings made by the Secretary with the assistance of the First Defendant.

[26] Mr. Taumoepeau then made a complaint to the Police which alleged that Mr. Moheloa and Mr. 'Uhatafe had drawn money from the bank account of the TNRL without permission in circumstances that amounted to theft. The complaint was made around the end of May 2013. I am told that it has not been pursued pending the hearing of this action.

[27] The evidence of the plaintiffs was that following the 28 May 2013 meeting there was a failure to produce agendas or minutes for board meetings, there was no disclosure to the board of bank statements or financial information of the TNRL nor were approvals given by the board to the use of money from the TNRL bank account. The evidence of the plaintiffs was that they were not only excluded from any

decisions concerning the finances of the TNRL but also excluded from any involvement in decisions relating to the 2013 Rugby League World Cup. Mr. Taumoepeau said that the board was not informed about what was being done to raise funds for the event, had no knowledge of the finances that had been gathered or how the money of the TNRL was being spent, they were not informed of negotiations that were being undertaken with the Government for financial assistance nor were they invited to functions that were staged for the national team.

[28] There were negotiations with the Government to provide financial assistance for the 2013 Rugby League World Cup. A Sports Grant Agreement was signed between the Government and the TNRL on 1 November 2013 by which stage the World Cup had already commenced. The representatives of TNRL who attended the event included Mr. Moheloa, Mr. Sika and Mr. 'Uhatafe but not the plaintiffs. As a result, Mr. Fangupo was asked to sign the agreement. This was an offer of conditional financial assistance in that the only purpose for which the money could be spent was for players' allowances and the TNRL had imposed upon it strict reporting obligations. The agreement noted that the TNRL's level of compliance with the terms and conditions of the agreement "will impact on any future consideration for conditional financial assistance".

[29] On 1 December 2013 Mr. Fangupo sent an email to Mr. Mataele (copied to Mr. 'Uhatafe, Mr. Moheloa, Mr. Sika and Mr. Taumoepeau) requesting that Mr. Mataele provide the TNRL bank statements for the past 6 months and that he bring them to the board meeting which was scheduled for 4 December 2013. He noted that if Mr. Mataele needed assistance in getting the information he should let Mr. Fangupo know

so he could discuss the matter with the CEO of the ANZ bank, Mr. Owen Thompson. This request for information was repelled. Mr. Sika responded that Mr. Fangupo's request for bank statements showed disrespect to the committee and individuals on it. Mr. 'Uhatafe responded that the president was correct and, cryptically, that a report could be provided but that there was a process for providing such information. He also challenged the right of three of the board members, including Mr. Taumoepeau, to sit on the board.

[30] There followed yet more correspondence on 3 and 4 December 2013 in which Mr. Taumoepeau and Mr. Fangupo sought from Mr. Mataele a report on the 2013 World Cup. When, on 12 December 2013, Mr. Fangupo again wrote to Mr. Mataele asking him how he was progressing with the report and for a draft of it before it was sent to an auditor, Mr. Mataele responded that it was "not an easy job to do the financial report" and that only he, Mr. Moheloa and Mr. 'Uhatafe would be meeting to look at the financial report before it was given to an auditor. He said that there was still a lot of work to do and that Mr. Fangupo's request to see a copy of the draft report "was not a good idea". Mr. Fangupo justifiably regarded this as yet another attempt to hide information from the directors and to exclude them from meetings. On 13 December 2013 he sent an email to Mr. Mataele, Mr. Moheloa, Mr. Sika and Mr. 'Uhatafe (and others) in which he said:

Can you please email me the name of the person who is doing the audit and also minutes from the last Board Meeting as requested.

Can you please explain to me why only Stan, Lopeti, and yourself are the only ones meeting on Monday to discuss Rugby League World Cup Financial Report and no other Board members have been invited to this meeting?

Why is Misi, Nusi and myself not invited to this meeting?

Please remember that we are ALL Board members for TNRL and we must all make decisions together as a collective group on behalf of TNRL Board not as individual groups. I know that Nusi and I did not travel to Rugby League World Cup with you but we are still part of the TNRL Board.

I feel that since my involvement with TNRL as a Board member since elected at AGM in Jan/Feb 2013, I feel that only certain individuals on the TNRL Board are told certain things and the rest are kept in the dark, this needs to stop. ...

Look at what I have just found out in the past 24 hours regarding TRL and BLK verbal agreement for AUD\$100,000 of merchandise. First time I have ever heard about it! Where is that merchandise? and Who is benefiting from using TNRL merchandise?, definitely not the clubs who can't afford a ball and cones for there [sic] team trainings or the referees who turn up every week and never her [sic] rewarded for their efforts etc...

I want to be part of this meeting with you, Stan and Lopeti on Monday and I would like Nusi to be also present. I know that you have had problems with Nusi in the past but lets get over it and move on and work together as a Board moving forward.

Please advise what time meeting is on Monday and venue."

[31] There was no response to that email.

[32] Cash cheques continued to be drawn upon the ANZ bank account without board approval. On 1 December 2013 a cash cheque for T\$3,000.00 was drawn which was presented for payment by Mr. Sika. On the same day another cash cheque for TOP\$3,000.00 was drawn, which was presented for payment by Mr. 'Uhatafe. There were further

cheques in favour of ASCO Motors during January and February 2014, again without board approval.

- [33] On 10 February 2014 an email was sent by 'Onetoto 'Anisi of the Ministry of Internal Affairs to Mr. Moheloa complaining that the TNRL had not provided reports which were a condition of the Government financial assistance for the 2013 Rugby League World Cup. The email stated:

This is NOT the first time to follow up this overdue acquittal report with your end. I hope this time around the acquittal reports will be provided to the Ministry of Finance as stated in the signed agreement.

A legal action will be commenced to recover this, if there's no further progress receive from TNRL on the matter."

- [34] The annual general meeting for 2014 was scheduled for 7 March 2014. On 27 February 2014 Mr. Taumoepeau emailed Mr. 'Uhatafe confirming the date for the meeting. Mr. 'Uhatafe responded that the report on the World Cup was not available and suggested that the AGM be postponed until 28 March 2014. Mr. Taumoepeau emailed Mr. Sika (copying other members of the board) requesting that the meeting proceed as planned. He wrote:

It should be a board decision to delay such meeting and we feel that it is not a good enough reason stated by Lopeti to delay such meeting. The financial report to Gov't for the World Cup was due on the last week of January. Why do we have to delay the AGM because the said auditor for the report is busy, according to Lopeti. If he/she couldn't have made that deadline, why are the rest of the TNRL members have to wait for a report that essentially has no effect on the AGM. If I remember correctly, the TNRL financial report

submitted by Lopeti have not been adopted by the last 2 AGMs. Why shall we wait for a TNRL financial report which I presume might be incomplete and probably inaccurate. Mr. President, you've emphasized in our board meetings how we need to be transparent and accountable as directors of TNRL board. You have led by example but unfortunately I feel that it is not so for our finances, which you are not a part of. I'm sorry Robbie but financial accountability for TNRL is practically zero because we do not know who handles the financial transactions and who actually manages TNRL finances. I, and a lot of other members and directors are looking forward to the AGM next Friday and we do hope that you, Mr. President, will call said meeting as scheduled. Please view this as in the best interest of TNRL and not a critique of any members of TNRL.

[35] The meeting proceeded on 7 March 2014 but no financial reports were presented either in relation to the World Cup or the TNRL finances generally. At that meeting a dispute arose as to the lawfulness of the 2012 changes to the Rules and there was no election of officers and the meeting was adjourned. Following the meeting, Mr. Taumoepeau wrote to Mr. Moheloa on 21 March 2014 asking if Mr. Moheloa would update the directors on the reports on both TNRL and World Cup finances. As he received no response to his email, on 26 March 2014 he sent an email to Mr. Sika in the following terms:

Dear Mr. President,

I and some of the TNRL directors are concerned with the current situation rugby league is in although you have done a tremendous job for league as President which we acknowledge and thank you.

On behalf of these directors may I ask that you specify a time in which the AGM may be re-called. The AGM (held 7th March 2014) was dismissed because there was no TNRL annual audited financial report as well as the

financial report for the 2013 Mate Ma'a Tonga world cup campaign, mainly the grant from Government. Government was due a report 2 months ago. It has been 4 months and yet no words on the status of an audited report supposed to be submitted to the board before submitting such to Government and the AGM.

I enquired with the Chairman of the Board but he has not replied. When the Treasurer was asked when the report will be ready, he answered 'next week'.

Mr. President, because of information and newsbits from the media about the World Cup finances, I'm concerned of this late submission of this report. I hope that a report be a truthful, audited account, according to the MOU signed between TNRL and Government. I am also concerned as it was yourself who tirelessly worked and obtained this grant, and in the hope it won't affect your good standing if this is an unreliable financial report. I wish that the Treasurer would give us a definite schedule of when we might have this report so we can re-call and complete the AGM. Thank you for your time.

[36] Mr. Taumoepeau said he received no response to this email either.

[37] On 3 April 2014 a letter was sent by members of the TNRL to Mr. Sika requesting elections, an audited financial report for 2013 and an audited financial report for the 2013 World Cup. The letter read:

We the undersigned clubs are the Member clubs that participated in the only board approved Competition for 2013. We say that we are entitled to vote at the AGM for 2014.

The AGM was adjourned for you to take legal advice on the Constitution and await the audited report for 2013 and the World Cup.

The following Member clubs have signed this letter requesting that we convene the AGM to complete the remaining items on the Agenda presented

by Lopeti 'Uhatafe, where we want the following matters attended to and finalized as soon as possible:-

1. We want the AGM called and we want nominations for President, Vice President, Chairman, Vice Chairman, Directors, Secretary and Treasurer voted on at the 2014 AGM;
2. We the Members want to address the audited financial report for the World Cup 2014; and
3. We the Members want to address the audited report for the 2013 financial year and the Chairman's report for 2013.

We ask that you urgently table these matters for the TNRL because we want the AGM to be called and re-convened to finish all outstanding matters within 7 days from the receipt of this notice from the Member clubs.

We note that we the undersigned clubs had nominated Siliveinusi Taumoepeau as our candidate for Chairman and Tavake Fangupo as Secretary of the Tonga National Rugby League and we, being the majority clubs entitled to vote on this issue, we want this vote carried out within the time stated herein.

We ask that these things be carried out within the notice period, failing which we will instruct William Edwards to file proceedings with the Supreme Court of Tonga seeking the Orders. Further, we would also seek Orders to call for the election of ALL the OFFICES of the TNRL.

Respectfully signed,

Signed: Taufa Fukofuka
[Kolomu'a Rep]
Kolomu'a Chairman

Signed: Similoni 'Ilaiu
[Mu'a Rep]

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 43 of 2014

Signed: Neo Fe'ao
[Ma'ufanga Rep]

Signed: Siuola Ma'ake
[Houmakelikao Rep]
Captain

Signed: Fitiola Tu'ifua
[Halaloto Rep]

Signed: Sione Kafatolu Ha'angana
[Ha'akame Rep]

Signed: Lupeni 'Otuhouma
[Navutoka Rep]

Signed: Fehoko Tu'ivai
[Fasi Rep] & Womens Rugby
League

Signed: Tevita Pole'o
[Vaini Rep]

[38] On 8 April 2014 a further cash cheque was drawn on the ANZ account of the TNRL, this time for the large sum of T\$19,500. The cheque was signed by Mr. Moheloa and Mr. 'Uhatafe and it appears to have been presented for payment by Mr. Sika. The payment was not approved by the board, nor were any invoices/accounts or other documents presented to the board or to the court to defend it as a valid payment for the purposes of the TNRL.

[39] On 10 April 2014 Mr. Taumoepeau emailed Mr. Sika on the subject of the lack of transparency and accountability in the management of the TNRL. His email reads as follows:

Mr. President,

Ref: transparency and accountability

Referring to the above words, those are words that you spoke of to the TNRL board when you became Pres. of TNRL. I believe that some of the current

directors do not think that the administration of league is transparent and accountable. I and some of the directors feel left out of the decision making thus we felt we are not considered equal in this board, as we are constitutionally bound to. The decision making in TNRL is done by 2 or 3 people whereas it should be the whole board and its members. There has been a lot of differences because only a few directors know what is really going on in the TNRL and not all members.

Since 2009, there have been questions and enquiries about the financial situations and reports for TNRL, reports that should be submitted to the board which they rightfully should know about. Financial reports submitted to AGMs have been unreliable and incomplete and if questioned, answers given are unreliable too.

The few who make decisions for TNRL think they are the 'only' members of the board, disregarding the rest of us who were elected at the AGM. We find out about TNRL decisions after it has been decided without some of us directors.

This has been going on for too long and it should stop. You've mentioned that we work together, but we are not privy to certain financial information that we should know about as board members and as a whole board. We, as a constitutionally elected board do not know the full administration of this board as we are required to. We've heard and knew of the alleged misappropriations of the Gov't grant for MMT, we are still waiting for this report and why has it taken so long to complete an audited report due 2 months ago? Why hasn't there been no mention of any report for the \$60,000 mismanagement....those 2 persons whom you rely on to represent us at the RLIF AGM and to operate league here in the Kingdom....chairman of the board, Stan Moheloa and Lopeti 'Uhatafe, Secretary. It's because of these 2 that we are having arguments and differences about league for years.

To remedy this, it's for you to recall the AGM so the clubs and the members may exercise their TNRL constitutional rights to elect who they think should administer and operate league, short and simple.

This is a grave concern as league has suffered because we do not know who makes the call for league, the TNRL board or the chairman and the secretary and whom they favor."

[40] Mr. Taumoepeau's email did not receive a reply.

[41] On 29 April 2014 Mr. Taumoepeau wrote to Mr. Moheloa as a result of a decision that had been made without consultation with the board to exclude the Kolomu'a Warriors from competition. The email read:

It has come to my attention that there has been unilateral decisions for TNRL made by yourself, Lopeti and Matani without the knowledge of the rest of the TNRL board. This is unacceptable and an affront to those of us board members who were constitutionally elected to represent the league clubs in the board. I had requested earlier in the month for a board meeting to discuss league issues and the incomplete AGM. We would have liked to discuss also the RLIF AGM. It is the board who decides who represents TNRL at this meeting, not a few directors. Most of the voting members of our AGM do not agree with you representing TNRL at the RLIF AGM. You do not represent the majority of the members who should have a say on who represents them in an RLIF meeting. Why aren't other directors advised of these decisions let alone a board meeting which is what you should have done. There is no transparency or accountability in how things are done in league locally. That is why the game has suffered in the past few years because you and a few other directors make decisions without the rest of us who are also entitled to be heard as TNRL board members.

I've also received word that Kolomu'a Warriors has been disqualified from playing. Why? This should have been a board decision not by 2 or 3 people.

Please, for the sake of the game, this is not right. You are punishing the players who are keen to play for unacceptable reasons. Kolomu'a Warriors would like to be heard on why they are disqualified. This is so unfair and I request that Kolomu'a be allowed to explain themselves to the board for any allegations that stipulated this decision by a few.

I hope that we can resolve this through dialogue and if we can have the hearing this week."

[42] Mr. Moheloa responded on the same day and accused Mr. Taumoepeau of discrediting the TNRL and stated:

"Without any doubt you have breached Resolution I and therefore you are suspended from the board and await further decision of the board."

[43] There was no attempt by the defendants to justify Mr. Moheloa's unilateral action in purporting to suspend an elected member of the board.

[44] On 5 May 2014 Mr. Moheloa was sent a letter by the Solicitor General which was a final demand by the Government that the TNRL comply with the conditional financial assistance agreement and provide reports to the Government on the use of its funds for 2013 Rugby League World Cup. The letter pointed out that under clause 3(g) of the agreement the TNRL was to submit, two months after the final day of the tournament, a report on how the financial assistance was utilized "including a financial report with invoices and receipts, and providing any further information on those reports as requested by the Ministry". The Solicitor General noted that the TNRL had failed on its commitments under clause 3(g) despite repeated requests by the Government. He wrote:

As legal advisors to Government we hereby demand that within 21 days of receipt of this demand letter, TNRL must submit the final report in accordance with clause 3(g) of the Agreement. If the final report is not submitted within the 21 days than Government will immediately take legal action against TNRL."

[45] On 28 May 2014 Mr. Taumoepeau wrote to the treasurer asking what was the status of the TNRL and Rugby League World Cup financial reports, which were long overdue. The treasurer responded that "We still wait for the Auditor to complete her work to our report". Later that day Mr. Fangupo emailed Mr. Mataele and asked for the name and contact details of the auditor to impress upon the auditor that it was urgent and serious that the reports to Government and the members be provided. He said that if the auditor was too busy to do the work that he knew of two qualified auditors who were on standby who would do the work at no charge to the TNRL. This email was followed up by another email from Mr. Taumoepeau to Mr. Mataele asking:

Who's the auditor please? If we can advise him/her of the urgency to complete the financial reports for Gov't and League as we await the AGM on these reports too.

[46] In what was now a clear pattern, Mr. Mataele dismissed the request and responded as follows:

Sorry Nusi, you have no business to do that..It up to the chairman and Misi also the treasurer to do that..be patient and wait for the time that we complete the report..why you guys trying for..the auditor is the qualify auditor..thank for your help..but we don't need that...

[47] On 24 June 2014 this action was filed but that is not the end of the relevant narrative. On 14 August 2014 Mr. Fangupo emailed Mr. Sika (but copied Mr. Moheloa and others) about the failure by the TNRL to continue with the 2014 annual general meeting. He asked that the meeting proceed and the agenda be provided prior to the meeting. He said:

We will notify you of the written nominations for persons to be elected into the officers of the TNRL – we will provide you nominations for President, Vice President, Chairman, Vice Chairman, Directors and Secretary. We hope that you would furnish us with your nominations as well ahead of the Meeting.

[48] The 2014 annual general meeting resumed on 14 August 2014. The validity of the 2012 changes to the Rules had not been determined. There was a discussion about the Rules under which the election of officers should be conducted. The matter was put to a vote with the majority voting to hold the election under the Rules as they were prior to the 2012 changes. Mr. Moheloa decided that the elections would have to wait for a court decision and they were therefore not held. As far as the financial report for the TNRL was concerned, Mr. Moheloa apologised to the meeting that it was not ready. The minutes record that:

The Chairman of the board apologizes for not presenting the report. This is due to Auditor being away abroad on study and she has unable to complete the report. There was a letter from the Auditor confirming the above and apologize for her shortfall and will try to get a copy as soon as she could. The meeting obviously concerns with the long delay in providing the report. It was suggested that we should request the auditor to send an interim report as the Government has been waiting for the submission. Mr. Lutui also raised

his concerns with this report as Government is chasing and could go to Court if nothing is done about it?

- [49] The final matter recorded in the minutes was the election of a new secretary to replace Mr. 'Uhatafe who had died. A ballot was held which resulted in tied votes for two candidates. The minutes record that Mr. Moheloa purported to exercise a casting vote. This was challenged as having no constitutional basis in the Rules. The minutes record that Mr. Moheloa asserted a right to have a casting vote and his preferred candidate was declared the victor.
- [50] On 12 December 2014 this action came before Cato J. who after a hearing made consent orders, to which I have already referred, striking down the changes to the Rules.
- [51] Following the issue of the court ruling the annual general meeting was called on 13 April 2015 but again there was no election of officers. This meeting was adjourned because the secretary had failed to give proper notice of the meeting and there was still no audited financial report. A report was handed out at the meeting but this was simply a cash flow report relating to the first three months of 2015.
- [52] In July 2015 Mr. Moheloa accepted from the ANZ bank a letter of offer to extend the TNRL's overdraft facility. The letter of offer is dated 31 July 2015 but it was signed by Mr. Moheloa on 6 August 2015. No board approval was obtained to accept this offer.
- [53] Shortly before this case went to hearing, an auditor's report on the use of the Government grant to the TNRL for the 2013 Rugby League

World Cup was disclosed by the defendants. The key findings in the report are that there was a failure by the TNRL to comply with the conditions of the grant as follows:

Non-compliance with Grant Agreement Section 3(a).

The grant's purpose was for "Tonga Rugby League World Cup player's allowance. It was identified that only 45% (TOP\$111,536) of the total grant was disbursed as allowances. Of the total allowance payment, TOP\$30,376 was paid as allowance to eight staff members. This is not in line with the condition of the fund. Therefore, only TOP\$81,160 complied with the condition of the grant.

Non-compliance with Grant Agreement Section 3 (c).

Under this condition, the fund is not to be used on certain items including alcohol. In vouching expenditures, £497 (TOP\$1,440) was spent on alcohol.

Non-compliance with Grant Agreement Section 3(d).

This condition requires TNRL to "keep and maintain in a proper orderly manner, in accordance with the internationally accepted accounting standards and practice, all administrative and accounting records regarding to the expenditure of the conditional financial assistance awarded under this Agreement." In voucher the expenditure, there were instances where no or partial supporting documents were available.

[54] The audit report provided recommendations as follows:

That the Chairman of the Board and the Board should always ensure that disbursement of funds from any grants with condition, that the condition is adhered to at all times.

That the Board consider reimbursing part of the ground that was not disbursed in accordance with the condition of the grant.

The issue of the plaintiffs' standing

[55] It is convenient to deal with this point now. Mr. Tu'utafaiva's argument was a narrow one. He referred me to an extract from the text by Mark von Dadelszen (2000 Ed) *Law of Societies in New Zealand* at page 152 which was referred to by Mr. Edwards in his opening statement as follows:

Where a wrong is alleged to have been done to an entity the proper plaintiff is the entity itself. If a simple majority of members accepts a transaction which is alleged to be illegal in some way no individual may sue unless what has been done amounts to a fraud on the minority.

[56] Mr. Tu'utafaiva argued that the plaintiffs bring this action as directors of the TNRL and not as members and have not pleaded that the defendants' conduct amounted to a fraud on the minority without which the plaintiffs can have no standing. I do not accept this argument. The extract from von Dadelszen's text has no relevance to this case. It is concerned with the circumstance where the members have by a majority ratified what would otherwise be an illegal act on the part of a society. There is no suggestion that has occurred in this case.

[57] It is well established that members of societies can bring matters to court, either by seeking judicial review or on the basis of an alleged breach of contract (*Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699 [*Gibson v NZ SAR*

Dogs Inc]; *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 181 (HC and CA)). The rights of a member were described in *Turner v Pickering* [1976] 1 NZLR 129 at page 141 as follows:

It seems to be now established that the plaintiff can have enforceable rights of a contractual nature brought about by his membership of a voluntary association, including the right that its affairs will be conducted honestly and bona fide in accordance with its rules. It is no longer necessary for him to be protecting a private right of a proprietary character before he can ask the court to intervene; but public policy still suggests some limitation to exclude interference with associations of a wholly social nature or where it is clear that no legal relationships of any sort were intended between members.

[58] It is not the case that standing to intervene in the affairs of a voluntary association rests only with the members. In deciding whether a person other than a member has standing the court must look at the totality of the circumstances of the particular case. In *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, Cooke P of the New Zealand Court of Appeal said, at page 178:

In cases where an incorporated association is alleged to have acted against its objects but the plaintiff cannot show a contract, we think that all the circumstances have to be considered – case by case or category of case by category of case – in order to determine as a question of mixed law and fact whether or not he or she has sufficient standing. The law or practise relating to limited liability companies is not necessarily a helpful analogy in approaching these cases. The doctrine of ultra vires in company law was evolved mainly to protect investors and creditors. The same considerations are not easily transportable to cases where the raison d'être of an organisation is not to make profits but to promote a certain activity.

[59] The Court's overarching objective is to do justice and remedy conduct of a body which is unlawful and this objective should not be frustrated by technical arguments regarding standing (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 641 per Lord Diplock). One important circumstance where the Court will favour granting standing to a party is where there is no obvious or more suitable or likely party to bring the action (*The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [79]; *Oggi Advertising Limited v Auckland City Council* [2005] NZAR 451 (HC) at [13]). Other relevant factors include the importance of the issues raised and the effect of the issues, not just on the parties, but on the community as a whole. *Finnigan* (supra) and *Church Property Trustees* (supra) are both vivid examples of the application of these principles. This does not mean of course that an applicant will be granted standing in every case. Standing will be refused if he cannot be said to have any real interest in the case or there is a lack of good faith or the issues are unimportant or shown to be clearly frivolous or untenable (*O'Neill v Otago Area Health Board* (HC. Dunedin CP 50/91, 10 April 1992; *Church Property Trustees* (supra) at [69] and [80]).

[60] In this case, the plaintiffs and the defendants are closely associated with each other and with the members of the TNRL by virtue of their positions as officers under the Rules. The Rules provide for the appointment and membership of the board at clauses 7 and 8. Rule 7.1 states the officers of the TNRL are elected at annual general meetings. Rule 7.2 provides that the nominations for officers are to be made by any member except in the case of vacancies under Rule 7.5 which may be filled by the board subject to the appointment being confirmed at the next annual general meeting. Rule 9 sets out the primary duties of the directors and the

board including managing the funds and affairs of the TNRL and to do such acts as are deemed necessary or expedient for carrying into effect the objects of the TNRL. The plaintiffs' interests as directors are therefore closely aligned with those of the members of the TNRL. Furthermore, the plaintiffs have an additional interest in ensuring that the affairs of the TNRL are run honestly and for proper purposes. It is not inconceivable that they might be personally liable to the TNRL and the members for the improper use of the TNRL funds. It is only right that they should therefore be able to take action to protect themselves and prevent or remedy unlawful conduct. Furthermore, as Mr. Edwards pointed out, they may also be personally liable for non-compliance with the requirements of the Act (section 23). As the Court of Appeal said in *Finnigan* (supra) at page 179:

The plaintiffs cannot be dismissed as mere busybodies, cranks or other mischief makers

- [61] What the plaintiffs allege in this case is that the defendants have used their positions to act against the objects of the TNRL, and in particular the obligations contained in Rule 4(a) to foster, develop, extend and govern the game in the Kingdom and Rule 4(d) to apply all income and property of the TNRL "solely towards the promotion of the objects of the [TNRL]". This action cannot be dismissed as a bearing on only administrative or internal management matters.
- [62] Also, whilst the TNRL is a private and voluntary society there is a significant public aspect to this litigation. The TNRL administers the game of Rugby League on a national and international level and the actions that are subject to challenge have had and will continue to have

a significant effect on the future of this game in the Kingdom. The fortunes of the TNRL are of significant interest to a wide segment of the Tongan community. Furthermore, as I have noted, some of the allegations concern the use of public money donated to the TNRL by the Government on terms which have not been honoured and which may affect the ability of the TNRL to obtain further financial support from the Government. Importantly also in my view, if the plaintiffs do not have standing to bring this action the reality is that there may be no effective way to hold directors of the board accountable. The plaintiffs say (and I accept) that despite being officers of the TNRL, there is good reason to believe that the funds of the society have been misused and any information concerning the financial affairs of the TNRL has been withheld from them. At least some of the information provided to the board and the members, such as the 2012 financial report, was misleading and this would not have been discovered but for the actions of Mr. Taumoepeau. The members of the TNRL are heavily reliant upon the board to act honestly and supply them with accurate information concerning its affairs and cannot reasonably be expected to have the inclination or the means to make independent enquires to challenge the information that is provided to them.

[63] For these reasons I am satisfied that the plaintiffs have standing to bring this action.

The relief sought by the plaintiff

[64] In the amended statement of claim the plaintiffs have sought the following:

- [64.1] Interlocutory relief that the first, second and third defendants deliver up financial documents of the TNRL from 1 January 2012 and that the first and second defendants be removed as officers of the TNRL pending further order of the Court.
- [64.2] A declaration that the plaintiffs have the power to appoint a qualified auditor to undertake an audit of the financial accounts of the TNRL from 1 January 2012 to the date of the declaration.
- [64.3] A declaration that the first, second and third defendants account to the members of the TNRL for all finances of the TNRL.
- [64.4] A declaration that the first and second defendants be expelled as officers of the TNRL.
- [64.5] Any further Order that this court deems just and equitable.

Interlocutory relief

- [65] A good deal of Mr. Tu'utafaiva's cross-examination of the witnesses and his legal submissions were directed against the granting of orders that the defendants deliver up financial records of the TNRL and be removed from office pending the hearing. This was unnecessary as the prayer was seeking discovery of documents (which was dealt with during the interlocutory stages of the action) and interlocutory relief for the

removal of the first and second defendants pending the hearing only, which was not pursued. I need not say any more about this relief.

The appointment of a qualified auditor

[66] The plaintiffs seek a declaration that they are able to appoint a qualified auditor to undertake audits of the accounts of the TNRL for each year since 2012. Mr. Tu'utafaiva submits that the power to appoint an auditor rests with the board and not the aggrieved directors and accordingly the court should not make the order in the terms sought.

[67] Rule 9.1 provides that it is the board that shall manage the funds and affairs of the TNRL. The financial year of the TNRL is from 1 January to 31 December each year (Rule 10.1) and Rules 10.2 and 10.3 require that all moneys belonging to or received by the TNRL must be paid into its bank account and all accounts must be passed for payment by the board or a duly appointed sub-committee thereof. There is no suggestion that any such sub-committee was appointed in this case. The obligation of the board to have the accounts of the TNRL audited each year arises from Rule 10.6 which provides:

The book of accounts of the Tonga National Rugby League shall be audited by the Auditor who shall have the power to call for the production of all books, papers, accounts, and documents relating to the affairs of the Tonga National Rugby League at any time.

[68] In Rule 1 "Auditor" is defined as meaning "the Society's Auditor" but there was no evidence that a qualified auditor has ever been appointed to report on the financial accounts of the TNRL since at least since 2012. Rule 15.1 provides:

The Annual General Meeting of the Tonga National Rugby League which is the highest decision making body of the Tonga National Rugby League, shall be held in the month of February, or such time approved by the Board of Directors and endorsed at the Annual General Meeting, in each calendar year to receive the report and audited balance sheet of the Board of Directors for the preceding year and to elect officers. The report of the Board of Directors and the report of the financial statement of the Board shall be forwarded to each Member, Affiliate, Honorary Member or Life Member at least 14 days before the Annual Meeting.

[69] I accept Mr. Tu'utafaiva's submission that the auditor is to be appointed by the board and not an aggrieved director. However the objection he makes is a technical and arid one particularly as he also advises me that the defendants have no objection to the appointment of an auditor. The evidence established that since 2012 no auditor has been appointed in breach of the Rules and whilst the obligation to appoint an auditor rests with the board, any attempts by the plaintiffs to have an auditor appointed have been deflected or resisted. I am satisfied that without the intervention of the court no auditor will be appointed. Accordingly, I intend to direct that an auditor be appointed to report on the financial accounts of the TNRL for the 2012, 2013, 2014 and 2015 financial years.

That the first, second and third defendants account to the members.

[70] Mr. Tu'utafaiva submits that it has not been proved that the defendants fraudulently used the TNRL's money and that there was insufficient evidence for the relief sought to be granted. It is clear to me that the funds of the TNRL have not been managed in accordance with the Rules in a number of significant respects. Specifically, I am satisfied that not all money received for and on behalf of the TNRL has been paid into its

bank account with the ANZ bank, that money of the TNRL has been used for purposes that were not authorised by the board and that Mr. Moheloa has incurred obligations on behalf of the TNRL without board approval also. It is not necessary for me to make any finding as to whether the defendants must account to the TNRL as I understand from Mr. Edwards' memorandum to the Court of 1 April 2016 that this relief is no longer sought in this proceeding.

That Mr. Moheloa and Mr. Sika be expelled as officers of the TNRL

[71] Mr. Tu'utafaiva submits, and I agree, that under the Rules (Rules 8.3 and 21) it is for the board to decide if any member or official has been guilty of misconduct such that they should be expelled. There was no evidence that the matter has in fact been considered and voted on by the board or that the defendants had prevented such a vote from being taken. There was evidence from Mr. Fukofuka that a meeting was called to consider expelling the first and second defendants but that the meeting was adjourned when a fight broke out between Mr. Mataele and another director over another matter. In those circumstances I would not have made the order sought but again understand from Mr. Edwards' memorandum that it is not pursued in this action.

Other relief

[72] The Court may in its discretion award relief that it considers just, notwithstanding that it has not been specifically sought, provided that it is of a kind which arises from the statement of claim and there is no material prejudice to a defendant. The matter falls to be determined

according to the interests of justice (*Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 (CA)). In this case there is a need for the Court to exercise its discretion in two respects.

- [73] First, the Rules require the election of officers each year at the annual general meeting. The orders made by Cato J were clearly predicated on the understanding that this would occur and required all officers to vacate their positions at each annual general meeting. In breach of the Rules and those orders elections have not been held and the officers have not vacated their positions. It is necessary in my view for court intervention, as without it I am satisfied that the issues which divide the board will not be resolved and elections will not be held. Accordingly, the court will make orders for the election of officers to be held on terms to be finalised once I have heard further from counsel.
- [74] Secondly, and as I have already noted, the evidence satisfies me that funds of the TNRL have been used without board approval in breach of the Rules. On 29 April 2016 I made orders to prevent this from continuing. In my view there is a need for those orders to remain in place pending the election of officers to which I have referred and I will so order.
- [75] I have considered whether the granting of this relief will prejudice the defendants in anyway. I am satisfied that it will not. The granting of such relief imposes no obligations on the parties other than to comply with the terms of the Rules.

The result

[76] The plaintiffs are successful to the extent that this Court will make orders:

[76.1] For the appointment of an auditor of the accounts of the TNRL for the 2012, 2013, 2014 and 2015 financial years.

[76.2] Requiring the holding of elections for the officers of the TNRL.

[76.3] Preventing the use of funds of the TNRL pending the hearing of elections for any purpose not authorised by the board.

[77] The specific terms of those orders will be finalised once I have heard further from counsel. Counsel are to confer to see if they can reach agreement and if so should submit a memorandum in writing to the court before the next hearing.

[78] This action will be called before me on Friday, 20 May 2016 at 9am at which time I will hear from counsel as to the terms of the orders that should be made.

[79] At the same time I will hear from counsel as to costs which in the interim I reserve.



A handwritten signature in black ink, appearing to be "O.G. Paulsen".

O.G. Paulsen

NUKU'ALOFA: 11 May 2016

LORD CHIEF JUSTICE