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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 9 of 2019**

BETWEEN:

MELE TEUSIVI 'AMANAKI Plaintiff

-and-

[1] GOVERNMENT OF TONGA
[2] TONGA WEEKLY NEWSPAPER LTD
[3] FAKA'OSI MAAMA
[4] WILLIAM CLIVE EDWARDS Defendants

APPLICATION BY FIRST DEFENDANT TO HAVE THE CLAIM AGAINST IT STRUCK OUT

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN

Appearances: The Plaintiff
Mr T. 'Aho with Ms Tupou for the First Defendant
No appearance for the Second or Third Defendants
Mr W.C. Edwards Snr SC, the Fourth Defendant

Date of hearing: 14 October 2019 and 5 December 2019

Date of ruling: 10 December 2019

The application

1. By Statement of Claim dated 29 March 2019, the plaintiff claims damages, ostensibly for defamation, against each of the defendants for various alleged wrongs arising out of what the plaintiff describes as "false and malicious statements and threats in articles published in the second defendant's newspaper on 20 March 2014, 11 April 2014 and 9 May 2014".

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2. On 29 April 2019, the first defendant ("the government") filed an application to strike out the plaintiff's claim against it on the grounds that it discloses no reasonable cause of action. The other grounds included that:

   (a) the government had no involvement in any of the complained of actions of the second, third and fourth defendants;

   (b) the second defendant ("the company") was a registered company incorporated in accordance with the Companies Act and therefore, was a distinct legal entity and separate from the government;

   (c) the company was responsible for all of its publications;

   (d) the government had no legal duty to interfere with the editorial, publication and operations of the company; and

   (e) the company has been deregistered and is no longer in operation.

3. The application is supported by the affidavit of Mr 'Alifeleti Tu'ihalamaka, Director of Communications at the Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communications, sworn 29 April 2019. He deposes to the circumstances giving rise to the original establishment of the company with the government as the sole shareholder, its internal workings, its demise in 2017, and deregistration on 1 May 2018. He confirmed that the government was not involved in the editorial, daily operations of publications of newspaper.

4. The newspaper company was not a public enterprise under the *Public Enterprises Act*.

The pleaded claims against the government

5. At paragraphs 2 and 3 of the statement of claim, the plaintiff alleges that the government is the owner (meaning 100% shareholder) of the company which was established in June 2012.

6. At paragraph 6, it is pleaded that the second and third (the editor) defendants published articles which defamed the plaintiff.

7. At paragraph 13, it is alleged that following publication of certain of the said articles, the plaintiff wrote to the then Prime Minister as "the Head of the First Defendant" on around 2 and 5 May 2014, copied to other defendants, the Board of Directors of the company and Cabinet Ministers, expressing her concerns in relation to the publications. She alleges that instead of acting on her complaints, the former Prime Minister issued a claim against her for defamation.

8. At paragraph 14, the plaintiff alleges that Mr Edwards, the fourth defendant here and then one of three directors of the company, also commenced proceedings against the plaintiff for defamation. That claim became the subject of proceeding CV 57 of 2018 in this court.

9. At paragraph 15, it is alleged that the former Prime Minister and Mr Edwards acted against the plaintiff because her employer (the Public Service Association) called for the then Prime Minister to resign voluntarily due to alleged unlawful payments of around TOP$32 million by the government to Tongasat, which she describes as being "unjust and unfair and confirmed that they were actuated by ill will, anger and hatred."

10. Paragraph 18 contains the sole material allegation against the government:

> *"The Plaintiff charges and the fact is the Defendants repeatedly published and distributed the "photo" and articles actuated by ill will, anger, hatred, malice and not otherwise and in respect thereof seeks general damages and exemplary and aggravated damages from the Defendants.*
>
> ***Particulars***
>
> *a) The First Defendant has failed their duty as owner and main shareholder of the Tonga Weekly (Newspaper) Ltd and caretaker of the people of Tonga to consider and address the concerns of the Plaintiff when the Second and Third Defendants repeatedly published and distributed in their company's newspaper the defamatory "photo" and statements or materials against the Plaintiff injuring her reputation and character and her family; ..."*

Applicable principles

11. Order 8 rule 8 of the Supreme Court Rules provides:

> ***0.8 Rule 8. Striking out pleading***
>
> *(1) The Court may at any time order that any pleading or part thereof be struck out if—*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be;*
>
> *(b) it is scandalous, frivolous or vexatious;*
>
> *(c) it is unclear, or may otherwise prejudice or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of process of the Court,*
>
> *and may order the action to be stayed or dismissed, or judgment to be entered accordingly.*
>
> *(2) No evidence shall be heard on an application under paragraph (1)(a).*

12. As the affidavit in support only canvasses historical matters pertaining to the company and the factual matters concerning the publications, none of which are at odds with the corresponding allegations in the statement of claim, as required by sub rule (2) above, I have otherwise not had regard to its contents in determining this application.

13. In *Sevele-'O-Vailahi v Kingdom of Tonga* [2019] TOSC 18 at [18] ff,[1] Paulsen LCJ recited the following well-established principles on strike out applications from his earlier decisions in *Friendly Islands Satellite Communications (Tongasat) Ltd and others v Pohiva and others* [2] and *Pacific Games Council v Kingdom of Tonga*[3], Paulsen LCJ):

    (a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. This is so even though they are not or may not be admitted. However, the assumption will not extend to pleaded allegations which

[1] CV 1 & 2 of 2018 (15 March 2019).
[2] [2015] Tonga LR 199, 209.
[3] Unreported, Supreme Court, 19 November 2018, CV 16 of 2018 at [8] and [9].

are entirely speculative and without foundation or contrary to otherwise uncontroversial facts which are already before the Court.

(b) Before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed even after amendment in a manner proposed by the plaintiff. The statement of claim must be beyond repair. It must be plain that even if it is reformulated the claim cannot succeed.

(c) The jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material to safely make a decision. The case should only be precluded from proceeding where it is so certainly or clearly bad and the court must be particularly careful in areas where the law is confused or developing.

(d) The fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude jurisdiction.

14. To those may be added the following:

(a) It is an important principle that every (person) is entitled to his or her day in court: *Kaufusi v Kingdom of Tonga* [1999] TOCA 8.

(b) No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed. ... If the (plaintiff) has a cause of action which may possibly succeed he is entitled to pursue it: *Jagroop v Soakai and the Kingdom of Tonga* [2001] Tonga LR 234 at 236. See also *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 at 631.

(c) The power to strike out a claim is one that should be used sparingly and only in the clearest case but, when such a case arises, the defendant is entitled to an order: *Fonua v Taufateau* [2003] TOCA 5 at [15].

(d) If the Court is left in doubt whether a claim might lie, or if disputed questions of fact arose, the case must go to trial. If the claim depends on a question of law

capable of decision on the material before the Court, the Court can determine the question even though extensive argument might be necessary to resolve it: *Cauchi v Air Fiji* [2005] Tonga LR 154.[4]

(e) The crucial decision a court must make is whether on the facts pleaded the plaintiff's alleged claim is sustainable in principle. That decision can be resolved only by close scrutiny of the pleadings: *Faingata'a v Westpac Bank of Tonga* [2010] Tonga LR 63.

(f) A 'reasonable cause of action' means one with some chance of success if regard is had only to the allegations in the pleadings relied upon by the claimant: *Stafford v Automotive Distributors Ltd* [2018] FCCA 2768.

15. A further consideration arises where the subject pleading has been prepared by a litigant in person without the benefit of legal assistance (or apparently without that benefit). In *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 , Kirby P cautioned:

> *"[C]are must be taken to ensure that this significant disadvantage does not deprive her of the opportunity to have her claim, if any, determined according to law. Persons unfamiliar with the rules of pleading and the technicalities which surround the drafting of a statement of claim in adequate and permissible legal form are inevitably, if unrepresented, at a disadvantage. Courts should approach the peremptory termination of the litigation with special care to ensure that, within the possibly ill expressed and unstructured statement of the legal claim sought to be ventilated, there is no viable cause of action which, with appropriate amendment of the pleading and a little assistance from the court, could be put into proper form."*

16. Accordingly, 'although an unrepresented party is not thereby entitled to advantages, which, if represented, that party would not have, the court is, nevertheless, required to examine carefully what that party has put, to ascertain the substance of alleged grievances, and ensure that a right which that party is entitled to, has not been lost, because of lack of legal knowledge': *Batterham v Nauer* [2019] FCA 485 at [70].

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[4] Referring to *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

Government's primary submissions

17. The first submissions filed on behalf the government may be summarised as follows:

(a) Paragraph 15 of the statement of claim fails to specify the facts upon which the actions taken by the Prime Minister at the time were "unjust and unfair".

(b) The allegations in paragraph 18 are 'unclear as to the cause of action under the law relied upon by the plaintiff'.

(c) The plaintiff has failed to specify what actions of the government caused the publication of the allegedly defamatory material.

(d) The particulars to paragraph 18, referred to above, are again 'unclear as the cause of action under the law relied upon'.

(e) The allegation that the government failed in its duty as the owner and main shareholder of the company newspaper to consider and address the plaintiff's concerns fails to disclose any wrongful action by the government which caused the actual publications by the second and third defendants.

(f) To the plaintiff's complaint that the government failed to address her concerns when received, the government says it could not interfere with the affairs and operations of the company's newspaper because pursuant to s.19 of the *Companies Act*, it was a legal entity in its own right separate from its shareholders.

(g) Further, as to any liability of the government as a shareholder, s.97 of the Act provides:

> *"(1) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, a shareholder is not liable for an obligation of the company by reason only of being a shareholder.*
>
> *(2) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, the liability of a shareholder to the company is limited to* — [relevantly]
>
> ...

(c) any liability under sections 130 to 136 that arises by reason of section 125(2);... "

18. On the basis of those provisions, the government says that the court would need to be satisfied that the newspaper company was an unlimited liability company or that the company's constitution provided that the shareholder's liability was unlimited. Neither of those matters are pleaded nor are they borne out in the company's Constitution (referred to further below).

19. Further to that unremarkable and widely accepted principle, the government referred to the decisions in:

(a) *Fifita v Jenkin & ors* [2013] TOSC 23, where Chief Justice Scott observed:

> *"[13] Ever since Salamon v Salamon [1897] AC 22 it has been settled law that a properly incorporated company, ... is a different legal personality altogether from its members. As a general rule, it is only where the incorporation of the company is a mere sham that the veil of incorporation will be lifted (see e.g. Gilford Motor Co. Ltd v Horne [1933] Ch 935). No evidence at all was led to suggest that the Third [Defendant was formed or used for any illegitimate purpose."*

(b) *Faingata'a v Westpac bank of Tonga* [2010] TLR 63 at 21, where Ford CJ adopted Lord Millet's statement in *Johnson Gore Wood & Co* [2001] 1 All ER 481 at 528:

> *" A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue."*

20. As such, the government submits, that as a shareholder, it cannot be sued for the actions of the second defendant company as it is a separate legal entity which was responsible for its own publications.

21. Further, the government submits it was under no legal duty to interfere with the editorial, publication or operations of the newspaper company.

22. If concludes that the plaintiff's claim is so clearly untenable that it cannot possibly succeed, even after amendment, and that even on the assumption that all the facts alleged can be proved, the statement of claim is beyond repair.

Plaintiff's submissions in opposition

23. The plaintiff opposed the application on the following grounds, in summary:

    (a) As the sole shareholder and owner, the government, together with the second defendant company, published, republished, distributed and republished the alleged defamatory material.

    (b) According to the plaintiff, the effect of s.97(2)(c) of the Act is that s.125(2) can give rise to liability on the part of the government shareholder in respect of breaches of ss.130 to 136.

24. Section 125(2) provides:

> *"If the constitution of a company confers a power on shareholders which would otherwise fall to be exercised by the board, any shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed, in relation to the exercise of the power or any consideration concerning its exercise, to be a director for the purposes of sections 130 to 137."*

25. Those director's duties pertain to:

    (a) acting in good faith and in best interests of company;

    (b) exercise of powers in relation to employees;

    (c) powers to be exercised for proper purpose;

    (d) directors to comply with the Act and constitution;

    (e) reckless trading;

    (f) duty in relation to obligations;

    (g) director's duty of care; and

    (h) use of information and advice.

26. In developing this part of her submissions, quite beyond her pleaded case, the plaintiff contended that:

    (a) the government, as sole shareholder, is a 'deemed director' pursuant to s.125(2) because it 'directed' the second, third and fourth defendants to publish the former Prime Minister's letters dated 10 March 2014;

    (b) on 20 March 2014, the defendants (collectively) published an article criticising the PSA and a photo of the plaintiff that was "not decent to defame and discredit her";

    (c) the government as sole shareholder of the newspaper company and employer of the third and fourth defendants is responsible and had a legal duty in relation to the management and operation of the newspaper company including editorial and publications.

27. Together with other ancillary submissions, the plaintiff submitted that "there is a clear cause of action against the first defendant in her statement of claim."

Government's supplementary submissions

28. On 13 November 2019, the government filed supplementary submissions addressing the plaintiff's submissions in relation to the various provisions of the Companies Act referred to above.

29. The government referred to s.33(a) of the Act to identify, in conjunction with the relevant provision of the certificate of registration of the second defendant company, that the Standard Constitution provided for by the Act applied to the operations of the company (a copy of which was attached to the government's supplementary submissions). Clause 37 of the Standard Constitution is in similar terms to s.97 of the Act, namely, that a shareholder is not liable for an obligation of the company by reason only of being a shareholder. Further, pursuant to sub clause (2), the liability of a shareholder *to the company* is limited to, relevantly, any liability under ss 130 to 136 that arises by reason of s.125(2).

30. The government submits that the Standard Constitution did not confer on it any power of the board which could have been exercised by the government thereby deeming it a "director" by operation of s.125(2). Without first being able to identify whether the government here is a director within the extended definition of that term in the Act, it is not possible to go to the next step of determining whether the government could be said to have breached any assumed director's duty in respect of the plaintiff's complaints herein.

31. The government also relied upon the following statement by O'Regan J in *Baker v Hodder* [2018] NZSC 78 in relation to a corresponding provision of the New Zealand *Companies Act*:

> *"[62] The Companies Act maintains the distinction drawn... between the powers of management exercised by the directors and the rights of shareholders (with the exception of the situation where shareholders are exercising the responsibilities and duties of directors under the Companies Act...".*

Plaintiff's reply submissions

32. On 4 December 2019 (the day before the last hearing of this matter), the plaintiff managed to file yet a further memorandum in reply to the government's supplementary submissions. In it, the plaintiff repeated her earlier submissions about s.125(2) and ss 130 to 137 of the Act.

33. In relation to clause 37(2)(c) of the company's Constitution, the plaintiff advanced a selective interpretation to the effect that by virtue of s.125(2), the liability of shareholders included liability for breaches of ss 130 to 136. In doing so, the plaintiff omitted the words in clause 37(2) that the liability of a shareholder ***to the company*** is limited to liabilities set out thereunder including for breaches of ss 130 to 136. By that reading of the clause and the said provisions of the Act, the plaintiff sought to argue that the government, as a shareholder, was liable to her for any breach of ss 130 to 136.

34. The plaintiff also referred to clause 63 of the company's constitution in support of a submission that "the management of the Tonga weekly (Newspaper) Ltd including its business and affairs was managed by, or under the direction or supervision, of the

board of the company who has all the powers necessary for managing, and for directing and supervising the management of, business and affairs of the company."

35. She then set out the text of each of sections 130 through to 137 of the Act. Her written submissions did not seek to identify any alleged breaches by the government of any of the directors' duties therein. During oral submissions, she did. However, the premise for that excursion was that the government, as shareholder, is to be deemed to have assumed the role and exercised the powers of the board of the company in the decision to publish the allegedly defamatory articles.

36. No doubt conscious of the difficulties facing the claim, that apparent premise became the platform on which the plaintiff then sought to advance her claim by the following reformulation:

    (a) on 13 March 2014 the former Prime Minister published his first letter in the newspaper;

    (b) instead of publishing her email of 4 April 2014 to the editor of the paper as the PSA's reply to the statement of the former Prime Minister, the newspaper published the first defamatory article against the plaintiff on 20 March 2014;

    (c) that, the plaintiff asserts, confirmed that the former Prime Minister had "**directed** the second, third and fourth defendants to publish his reply to the PSA"; and

    (d) therefore, pursuant to s.125(2) of the Act and clause 37(2)(c) of the company's constitution, the government assumed the role of director and thereby directed the second, third and fourth defendants to publish the former Prime Minister's letters.

37. In reply to the government's submission that the deregistered second defendant cannot be restored upon application in respect of the plaintiff's claims, the plaintiff submitted that the actual chronology of events demonstrated that in 2014 she had made her intentions clear that she was going to sue the defendants for defamation.

38. The plaintiff concluded, relevantly, that:

(a) the government assumed the role of a director and directed the publication of the letters of the former Prime Minister; and

(b) the defendants jointly published the defamatory articles.

Discussion

39. In approaching this application, I have been particularly conscious of the fact that the statement of claim has been prepared by a litigant in person without the benefit of legal assistance (or apparently without that benefit). Therefore, I am mindful to take special care to identify whether, 'within the possibly ill expressed and unstructured statement of the legal claim sought to be ventilated; there is no viable cause of action which, with appropriate amendment of the pleading and a little assistance from the court, could be put into proper form'.

40. I therefore propose to consider the application in two parts: firstly, the current allegations in the statement of claim as it stands; and secondly, the reformulated claim sought to be ventilated by the plaintiff during the course of submissions.

Paragraph 18

41. Starting then with paragraph 18 of the statement of claim, which, as observed above, is the sole repository of any form of alleged wrongdoing by the government. For the reasons which follow, the allegations in paragraph 18 of the statement of claim, on their face, are defective to a sufficient extent to warrant that part of the claim, as against the government, to be struck out.

42. First, the allegation in the body of the paragraph that the Defendants collectively published the articles is unclear, unparticularised and unsustainable. There are no other facts alleged to support it. The more likely proposition, as pleaded in paragraph 6, is that the second and third defendants – the company and the editor – were responsible for the publications.

43. Second, the specific allegation against the government is in fact contained in what are described as "Particulars". That is not the place in any pleading for a material fact. Opposite parties are not required to plead to particulars.

44. Third, and putting aside any issue as to form, and reading it as beneficially as one can, the plaintiff alleges that the government owed a duty to the plaintiff (and the people of Tonga) to 'consider and address' the plaintiff's concerns after the allegedly defamatory material was published in the newspaper. The duty appears to be said to arise solely by reason of the government being the 'owner and main shareholder' of the newspaper. No other fact or legal proposition has been pleaded to inform or in fact demonstrate the existence of any such duty. There is no allegation as to the content or scope of the asserted duty or what the words "consider and address" are intended to convey or require for the purpose of being able to assess whether, if it exists, the government breached that duty.

45. I am not aware of any legal principle, statutory or at common law, that has the effect of imposing on a shareholder of a limited liability company a duty of care to prevent the company from causing economic loss or other harm to a person in the position of the plaintiff here. The plaintiff did not make any submission or provide any authority to that effect.

46. During oral submissions, Mr 'Aho relied upon a of the House of Lords in *Williams & Anor v Natural Life Health Foods Ltd & Anor* [1998] 2 All ER 577. There, the principal question on appeal was whether a director of a franchisor company was personally liable to franchisees for loss which they suffered as a result of negligent advice given to them by the franchisor company. Part of the analysis undertaken by the House was whether the principle in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465, was not confined to statements but could apply to any assumption of responsibility for the provision of services. Lord Steyn said:

> *"The extended Hedley Byrne principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the*

> *extended Hadley Byrne principle, there is no need to embark on any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss. Thirdly, and applying Hedley Byrne, it was made clear that "reliance upon [the assumption of responsibility] on the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect). Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect."*

47. Other parts of that decision relied upon by the government were concerned with the assumption of responsibility in determining the existence of a duty of care to avoid economic loss. There it was said that the test is not simply reliance in fact, but whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual to perform the services on behalf of the company.

48. It is, with respect, not necessary to consider in any greater detail, the application or otherwise of the decision in *Williams* to the instant application, for in my view, it falls to be determined on more fundamental considerations.

49. Fourth, insofar as the pleading seeks to impose liability on the government by way of the posited duty referred to above, in my view, it fails to disclose any reasonable cause of action. In other than those relationships where the law readily recognizes the existence of a duty of care to avoid economic harm, it is incumbent on a plaintiff to plead by way of material facts the salient features of the posited duty, in terms of proximity, foreseeability of harm, assumption of responsibility, reliance and others,[5] which, as a matter of law, could give rise to the alleged duty. Here, that has not been attempted. In that regard, the pleading is also unclear. The government is entitled to have it presented in an intelligible form, so that it may not be embarrassed in meeting it: *Pacific Games Council v Kingdom of Tonga*, ibid, at [7].

50. Fifth, the alleged failure (that is, breach of the alleged duty) by the government to consider and address the plaintiff's complaints about the publications by the company, of which the government was the shareholder, runs contrary to the statutorily enshrined distinction between the liability of shareholders of a limited liability company and the

[5] *Greenway & Ors v Johnson Matthey Plc* [2016] EWCA Civ 408; *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258; *Carter Holt Harvey Limited v Secretary for Education* [2015] NZCA 321.

company itself as a separate legal entity. As a general proposition, and subject to the provisions by which a shareholder can be liable (to the company) as a deemed director, a shareholder cannot be held legally liable for the tortious acts of the company. In that context, the plea is bad at law and cannot provide the basis for a viable or arguable cause of action.

51. Sixth, there is no clear allegation pleaded or particulars provided of any breach of any alleged duty to 'consider and address' the plaintiff's complaints, what that required, or (the counterfactual) what should have been done. Nor is there any attempt to plead causation, that is, how any such alleged breach might be said to have caused any of the plaintiff's claimed loss or damage. It is to be recalled that her complaints were made *after* all or some of the impugned publications.

52. Seventh, insofar as the pleading seeks to allege that the government is responsible for the publications, it does not contain, nor was there any suggestion raised during submissions of, any allegation which could attract the court's power to 'pierce' or 'lift' the corporate veil, or that the incorporation of the newspaper was somehow a 'sham'.

Reformulated claim: deemed director

53. That then brings me to the plaintiff's reformulated claim. Plainly it has not been pleaded. However, for the purposes of determining whether there is any viable cause of action sought to be ventilated, which, with appropriate amendment of the pleading, could be put into proper form, it is necessary to examine this part of the plaintiff's submissions.

54. In this case, in order to *possibly* advance a viable claim of 'deemed directorship', thereby seeking to hold the government shareholder liable (to whom is another matter discussed below) pursuant to s.97(2) of the Act for the impugned publications by the company, it is necessary to be able to identify and plead:

    (a) pursuant to subsection 125(2) of the Act, provision/s of the company constitution that conferred a power on the government which would otherwise fall to be exercised by the board;

(b) that that power was relevant to the decision to publish the impugned articles;

(c) that the government exercised that power or took part in deciding whether to exercise that power;

(d) that it is thereby deemed to be a director for the purposes of ss 130 to 137; and

(e) breach/es of any one or more of the directors' duties in sections 130 to 137 relevant to the decision to publish the impugned articles.

55. Here, as demonstrated during argument, the seemingly insurmountable obstacle is that the Standard Constitution does not contain any provision which empowered the government to effectively weigh in on any decision by company (whether by its actual board, the editor, or both) to publish.

56. Therefore, even if it were pleaded, as a material fact, and proved at trial, that the former Prime Minister *directed* the board to publish his letters, in the absence of any provision of the company constitution conferring power on the government to make such directions, the ultimate decision whether to abide by any such direction was still entirely a matter for the board. As such, it can only be the board which could be responsible (in the relevant sense provided by sections 130 to 137 of the Act) for the decision to publish.

57. However, there is yet another problem. Even if the above could be properly pleaded and proved, s.97(2)(c) of the Act is to the effect that any breaches by the government, as a deemed director, of ss 130 to 137 of the Act could only render it liable *to the company*.

58. That means that if, in the ordinary course, a plaintiff was successful in suing a newspaper company for defamation, and the wrong was caused by a shareholder of the company exercising a power of the board as conferred by the company's constitution, the company may have a right of action, whether by third party proceedings or otherwise, against that shareholder.

59. The relevant provisions do not automatically confer a separate right of action on the plaintiff against a director (or deemed director) for a tort by the company. In every

such case, it is necessary to examine with care the part the director played personally in regard to the act or acts complained of: *C. Evans & Sons Ltd v Spitebrand* [1985] WLR 317 at 329. Further, in order to fix a director with personal liability, it must be shown that he assumed personal responsibility for the act, and that there are special circumstances which set the case apart from the ordinary. In each case, the decision is one of fact and degree: *Williams v Natural Life Health Foods Ltd*, ibid, at 152 per Hirst LJ.

Result

60. For those reasons, there is, in my view, nothing in the statement of claim, as presently pleaded, which gives rise to an arguable cause of action against the government. The pleaded claims against the government are struck out.

61. In determining whether to grant leave to the plaintiff to re-plead or dismiss the claim against the government, I am mindful of a number of matters.

62. Firstly, the above analysis of the plaintiff's reformulated claim may be subject to further consideration. I gained the distinct impression that the full ramifications of the interplay between the various provisions of the Act and the company's constitution were only being appreciated by the plaintiff during argument.

63. Secondly, the plaintiff's memoranda in recent times have included complaints about inadequate discovery in relation to minutes of board meetings which she says might illuminate the decision to publish and the government's possible involvement in that. That raises a concern about the plaintiff's assertion, to date, that the former Prime Minister *directed* the company to publish the articles. That enquiry may be the subject of an application for non-party discovery, including one or both of the other directors of the company at the time.

64. Thirdly, for the reasons set out in the minute of mention issued in respect of the appearance on 5 December 2019, I have ordered a stay of this proceeding pending the filing, hearing and determination of any application by the plaintiff to have the second

defendant restored to the Tongan register. Any such proceedings are to be filed by 10 January 2020.

65. In those circumstances, I consider it appropriate to grant leave to the plaintiff to replead any claim against the government, if she wishes to do so.

66. Formal dispositive orders will be issued separately with these reasons.

NUKU'ALOFA
10 December 2019

M.H. Whitten QC
LORD CHIEF JUSTICE