

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

CV 57 of 2018

BETWEEN:

WILLIAM CLIVE EDWARDS

Plaintiff

-and-

[1] PUBLIC SERVICE ASSOCIATION

[2] MELE TEUSIVI 'AMANAKI

Defendants

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Plaintiff's applications to strike out Defences and Second Defendant's Counterclaim

## RULING

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BEFORE: LORD CHIEF JUSTICE WHITTEN  
Counsel: Mr W.C. Edwards SC, the Plaintiff, in person  
Mrs M. Amanaki for the Defendants  
Date of hearing: 15 June 2020  
Date of ruling: 30 June 2020

### The applications

1. This proceeding concerns claims and counterclaims for defamation arising out of an exchange of emails on 16 and 19 May 2014 between the Plaintiff, Mr Edwards, and the Second Defendant, Mrs Amanaki, who at all material times, was and is the Secretary General of the First Defendant, the PSA.
2. On 27 April 2020, Mr Edwards, filed an application to strike out the PSA's Second Amended Statement of Defence and Mrs Amanaki's Fourth Amended Statement of Defence. On 28 April 2020, he filed an application to strike out Mrs Amanaki's Counterclaim.
3. After the filing of various submissions and other material on the applications, I heard from the parties on 22 June 2020. During the course of submissions, Mr Edwards indicated that his application to strike out the defences was based on an apprehension borne of a statement by the former Lord Chief Justice to the effect that at any trial of the proceeding the jury would be provided with copies of the pleadings.

4. The court file reveals that, from at least 28 February 2019, Paulsen LCJ made observations about the unsatisfactory state of Mrs Amanaki's defence and counterclaim principally by reason of the voluminous documents attached to it which included matters of evidence. On 17 April 2019, his Honour recorded in a minute of mention, among other things, that:

"[2] Mr Edwards raised concerns about the second defendant's statement of defence and counterclaim on two grounds. First, he said that because of its content and annexures it is very difficult to prepare a reply. Secondly, he complained that the document contains much irrelevant material which should never be put before a jury. Mrs Amanaki advises that the defendants will not request a jury trial. On the basis of this assurance Mr Edwards said he will prepare a reply which is to be filed by 6 May 2019."

5. More recently, Mrs Amanaki (on behalf of both defendants) has elected trial by jury.
6. However Mr Edwards may have gained a belief that the pleadings in this proceeding will be placed before the jury, it was incorrect. Pleadings are not given to juries. They are to inform each party and the court as to the material elements of the relevant causes of action, the alleged material facts founding such cause or causes of action, any applicable statutory or other legal basis for the claim or defence, and otherwise to identify and elucidate the issues for hearing determination at trial and the relief sought. Ordinarily, the only matters a jury is to consider are admissible evidence, submissions from counsel and directions from the judge. Also, in a defamation case such as this, questions may be formulated and provided to the jury for its answer.
7. With that clarification, Mr Edwards withdrew his application to strike out both defences. He maintained his request filed 24 April 2020 for further and better particulars of the defences in relation to the allegations that Mr Edwards advised the then Prime Minister to make a payment to 'Tongasat' (explained further below). Mrs Amanaki stated that she had not received any such request.
8. That left Mr Edwards' application to strike out Mrs Amanaki's counterclaim. This is my ruling on that application.

### **Background**

9. On about 31 January 2014, the PSA publicly called for the then Prime Minister, Lord Tu'ivakano, to resign for what was then alleged to have been an unlawful payment in 2011 of around \$32 million to a satellite company owned by HRH Princess Pilolevu Tuita known as 'Tongasat'.

10. On or about 13 March 2014, the PSA's press release calling for his resignation and the then Prime Minister's letter in reply were published by the Government owned, Tonga Weekly (Newspaper) Ltd ("*the newspaper*").
11. On or about 20 March 2014, the newspaper published an article by Dr Fotu Fisi'iahi, a former vice president of the PSA, who then resided in New Zealand. The article was entitled "The PSA's boat has lost course". In it, the author criticised the PSA's call for the Prime Minister's resignation. The paper also published a black-and-white photo of Mrs Amanaki which depicted her sitting on the lap of a man who appeared to be asleep.
12. In 2014, Mr Edwards held a number of government positions, including Minister of Justice and Public Enterprises. He was also one of the newspaper's three directors.
13. On 24 March 2014, Mrs Amanaki replied to the then Prime Minister's letters on the issue.
14. On or about 4 April 2014, Mrs Amanaki emailed the newspaper's editor and asked him to publish the PSA's reply to the then Prime Minister's letters which had been published on 13 March 2014.
15. On or about 11 April 2014, the newspaper instead published an article about Mrs Amanaki together with the same photo, although this time it was increased to about half a page in size.
16. Between 2 and 5 May 2014, Mrs Amanaki emailed her letter to the editor and another letter to the then Prime Minister to various members of Government including Cabinet Ministers, Members of Parliament, the directors of the newspaper, Government CEOs, the PSA Board and National Committee members and other media.
17. On 9 May 2014, the newspaper again published the photo, this time on the whole front page in full colour.
18. In proceedings CV 9 of 2019, Mrs Amanaki claims that the newspaper's publications were defamatory.
19. On 14 May 2014, Mrs Amanaki again emailed the editor expressing her concerns about the allegedly defamatory publications and, among other things, requested the newspaper to refrain from "provoking animosity in our small nation". She copied her email to approximately 37 addressees who included the government officials, CEOs and media outlets as described above.
20. On 16 May 2014, Mr Edwards 'replied all' to Mrs Amanaki's email, as follows [for ease of reference, each paragraph is numbered]:

"Mele,

[1] I have received your letter to the editor of the Tonga Weekly, and you had copied it to those whose names appear on your email.

[2] It is indeed unfortunate that you inserted my name in your letter, and you inferred that we had any involvement in the printing of your photo and the information shown in the Tonga Weekly. It is obligatory that it is clear to you, the difference between the responsibility of the director, and the role of the management, and the printing of the news on the newspaper. **If that matter is not clear to you, then please stop acting ineffectually.**

[3] **This is the last time that you will ever write to me intimidatingly. you have also mentioned how your brothers are very angry with the Tonga Weekly newspaper. You have indicated in your letter that you had pleaded with your brothers, not to do anything to us, because of the criminality of the offences, if committed thereby.**

[4] **The things you do, are indeed beyond your understanding, and I am recommending this to you. But you plead with your brothers and male relatives, with whom you have conversed, to consider well and look properly at what you have done, in order to stop futile anger. I am not involved in anything improper or have any knowledge about printing this matter in the newspaper. But what is clear to me at this time, is that the newspaper had duly performed its correct and true responsibilities.**

[5] **I was only aware of these things after I received your letter of complaint, and I directed the newspaper to bring up information to give the Prime Minister's Office, as the grounds of your complaint, that you had mentioned in your letter, as well as what you had done, are incorrect.**

[6] **Mele, do not be too angry, for it is your own fault that you sat on the lap of Daniel Urai and you had touched his face and stomach. I am surprised because you were duly aware that it was improper, yet you went and sat on Daniel Urai, and had your photo taken at your bedside which appeared crumpled.**

[7] **Far be it from me to be involved in anything that was printed, and far from it, but there is any jealousy of you. There is actually no attempt to make you look bad as the photo of you and Daniel Urai is a beautiful one, but it only seemed strange was the visibility of your thigh.**

[8] **My question to you is, did you ask the person who took the picture, to photograph you, or were you unaware of it? Having seen the picture of you too, your attempt to look proper and calm in the photo, was apparent. I am surprised that your letter of complaint of this time, about the anger of your brothers and male relatives, and you're inferring that there is jealousy of you. Mele, upon what premise will either be made jealous of you?**

[9] **Have you forgotten your request for government to assist your export of sweet yams to New Zealand. The government had granted you financial assistance to develop and inspire the export of sweet yams overseas, and that was it. We have hitherto neither received any information nor any appreciation of the government assistance accorded to you.**

[10] **We are not aware of what stories the schoolchildren are talking about, but I think that they are good stories about the good relations between the leader of the Trade Union of Fiji, and the leader of the PSA of Tonga. Just look at it positively as it may be good conversation about how you to look beautiful. For there were some in Fiji who, upon seeing the photo, intimated in the Fijian language - the lady is strong thank you from Tonga - . The only thing that seems strange that you went to Fiji to represent Tonga on Trade Union matters but we have no Trade Union here in Tonga.**

[11] **It is clear at this time, that you are sad, as the people learned that you left the trade union work, and also the meeting, and you went out to party, and have your photo taken with Daniel.**

[12] **Do not harbour any ill feeling, as you were well aware of what you did. It is indeed clear that there is a need for you to apologise to the members of the PSA, as well as to the people.**

[13] **You are a woman who was, from time to time, the top student in your class, like you explained in your letter to Fotu Fisi'iahi, and it is only proper for your conduct to be proper as well. You are too arrogant, and making futile threats, and disrespect the people, even the Royal Family. You ought to behave befitting of a frequent top student in the classroom.**

[14] **I beg your pardon if there are any inappropriate words in this letter, but it is a combination of anger, as referred to in your letters, but you are wrongly accusing me and the board.**

Respectfully,

Clive Edwards"

21. That email is the subject of Mrs Amanaki's counterclaim herein in which she alleges that the emboldened passages contain defamatory statements against her.
22. On 19 May 2014, Mrs Amanaki replied all to Mr Edwards' email by inserting comments between various paragraphs within Mr Edwards' email. In this proceeding, Mr Edwards' claim for defamation against both defendants is based on certain statements in Mrs Amanaki's reply email.
23. In May/June 2014, Lord Tu'ivakano and Mr Edwards commenced proceedings in the Magistrates Court (CB 87 and 95 of 2014) against the PSA and Mrs

Amanaki for defamation claiming damages of \$10,000. Their claim related to the allegations by the PSA and Mrs Amanaki that Mr Edwards had advised the then Prime Minister to make the Tongasat payments and that those payments were unlawful.

24. Because of the public importance of any ruling in relation to the Tongasat payments, an application was made to transfer those proceedings from the Magistrates Court to the Supreme Court, or to stay them. Scott J dismissed the application. Mrs Amanaki and the PSA appealed. On 16 September 2015, the Court of Appeal upheld the appeal and ordered that the Magistrates Court proceedings be removed to the Supreme Court.<sup>1</sup> Those actions proceeded as CV 49 of 2014 in the Supreme Court and were effectively stayed pending the determination of the claim in CV 48 of 2014 as to whether the payments to Tongasat were unlawful.
25. On 17 August 2018, Paulsen LCJ ruled that the government payments to Tongasat were unlawful. Tongasat appealed.<sup>2</sup>
26. Lord Tu'ivakano then withdrew his claim against the PSA and Mrs Amanaki. Mr Edwards continued his claims in this proceeding and increased the quantum of damages sought from \$10,000 to \$60,000.<sup>3</sup>
27. On 3 February 2020, after having failed to lodge security for costs ordered on the appeal, or take any further step in it, the Tongasat appeal was taken to have been abandoned and dismissed.

### **The counterclaim**

28. Mrs Amanaki's counterclaim commences at paragraph 13 of her Fourth Amended Defence and Counterclaim filed on 3 February 2020 where she pleads that Mr Edwards was at all material times the Minister of Revenue & Customs in 2011, Minister of Justice and Minister of Public Enterprises in 2012 to 2014, a member of Cabinet from 2011 to 2014 and a Director of the newspaper from June 2012 to May 2017.
29. At paragraph 14, she refers to the newspaper having been registered on 1 June 2012 and 100% owned by the Government of Tonga.
30. At paragraph 15, she alleges that the plaintiff caused, published and distributed false and malicious statements in his email dated 16 May 2014 that she "is a prostitute, a party girl, an irresponsible mother and leader, arrogant and a liar, and an ungrateful thief".

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<sup>1</sup> AC 5 of 2015

<sup>2</sup> AC 15 of 2018

<sup>3</sup> \$40,000 for general damages and \$20,000 for exemplary damages.

31. At paragraph 16, she alleges that the plaintiff was actuated by anger and ill will to discredit her character because the PSA had called on the then Prime Minister to resign over the Tongasat payments "which the plaintiff was involved in by including \$4.1 million of Tongasat's tax arrears penalty fees that he had waived in his capacity as Minister of Revenue".
32. At paragraph 17, Mrs Amanaki sets out the text of Mr Edwards' email which she describes as containing "threats, false, malicious, derogatory and defamatory statements concerning her" which further injured her character after the repeated defamatory publications by the newspaper of which "the plaintiff was a director overseeing its operation".
33. At paragraph 18, she alleges that the plaintiff "wrote, published, distributed and orchestrated his own false, malicious opinions concerning the 'indecent photo' published by" the newspaper.
34. At paragraph 19, Mrs Amanaki alleges that the natural and ordinary meaning of the emboldened passages of Mr Edwards' email, meant and were understood to mean, that:
  - (a) "she is a stupid and reckless person;
  - (b) she is a prostitute;
  - (c) it was wrong for her to ask the editor and the directors of the newspaper to stop the ongoing publications of her "indecent photo";
  - (d) it was wrong for her brothers and relatives to be angry and concerned when they saw the 'indecent photo' in the newspaper;
  - (e) it was her fault that her brothers and relatives were angry as it was her who made the 'indecent photo';
  - (f) she is an ungrateful thief who has taken money from Government without reporting to or thanking them;
  - (g) she is an irresponsible mother;
  - (h) her daughters are liars bringing home false stories from school;
  - (i) she is a liar who has misled the PSA, its members and the public that she was going overseas on trade union meetings;
  - (j) she is a party girl;
  - (k) she is arrogant and disrespectful;
  - (l) she is a bad woman; and

(m) she acted wrongly.”

35. At paragraph 20, Mrs Amanaki pleads that, by reason of those matters, she has suffered injury to her credit, character, reputation and her professional calling and that Mr Edwards’ email has *"imputed unchastity on her as a woman and a mother whereby she was held up to shun, hatred, ridicule and contempt and have suffered damage"*.
36. At paragraph 21, she refers to the Tongasat payment having been determined unlawful and that it included \$4.1 million of tax arrears penalty fees that the plaintiff is alleged to have waived in his capacity as the Minister of Revenue.
37. At paragraph 22, she alleges that the plaintiff and/or the newspaper never asked her about the defamatory articles and photograph which they repeatedly published between 20 March and 9 May 2014 and in respect of which the plaintiff ‘orchestrated’ and wrote his own defamatory statements in his email of 16 May 2014.
38. At paragraph 23, it is alleged that Mr Edwards’ email was actuated "by malice, anger and ill will" and, as a result, Mrs Amanaki claims general damages of \$100,000 and exemplary or aggravated damages of \$50,000. In the particulars thereto, Mrs Amanaki alleges that the plaintiff failed in his duty as a government minister and director of the newspaper when he endorsed the defamatory publications by the newspaper in 2014. She also alleges that the plaintiff distributed his email on 16 May 2014 with his own defamatory and malicious views on the newspaper publications because he was "fuelled and actuated by anger and ill will" because of the PSA’s call for the then Prime Minister to resign over the Tongasat payments.

#### **Plaintiff’s Defence to Counterclaim**

39. In his defence to counterclaim filed on 27 April 2020, Mr Edwards denies that his email either expressly or impliedly contained any derogatory imputations or allegations that Mrs Amanaki is a prostitute, a party girl, an irresponsible mother and leader, arrogant and a liar or an ungrateful thief.
40. At paragraph 17, under the guise of particulars to a bare denial, Mr Edwards pleads that:
  - (a) the allegations that his email contained threats, false, malicious derogatory and defamatory statements are without factual basis and require particulars;
  - (b) the alleged defamatory publications by the newspaper are irrelevant;
  - (c) he is not liable at law for the alleged defamation by the newspaper; and

- (d) the English translation of paragraphs 2 to 14 of his email is inaccurate.
41. At paragraph 18, again as particulars to a denial, Mr Edwards pleads, relevantly, that:
- (a) the alleged indecent photograph was taken with Mrs Amanaki's permission;
  - (b) she had admitted that the photo was taken as a prank or to tease the Fiji Trade Union Congress President, Daniel Urai;
  - (c) the photo was from an article headed "Fiji's sleeping bandas and rugby goons" dated 6 November 2012 published on the Fiji website "Fiji Coupfourpointfive";
  - (d) he did not publish the photograph in the newspaper;
  - (e) he became aware of the publication of the photograph when he wrote his email dated 16 May 2014; and
  - (f) when he directed the management of the newspaper to submit an explanation to the Prime Minister in connection with Mrs Amanaki's complaint, he was then referred by the manager to the article on the Fijian website showing the photograph.<sup>4</sup>
42. At paragraph 19, Mr Edwards denies that his email contained or imputed the meanings ascribed by Mrs Amanaki and that they are 'not connected or related to the contents of his email. He further pleads that:
- (a) in relation to the alleged imputation that Mrs Amanaki "was a party girl", even if she was, that term is not defamatory;
  - (b) in relation to the allegation that his email imputes that Mrs Amanaki is "arrogant", the correct translation of the Tongan word used – 'afungi' - means self-important, boastful or bragging;
  - (c) his email was to 'correct the false and wrong accusations and threats made and published' by Mrs Amanaki against him in her email;
  - (d) his email 'is a privilege[d] document because the public had an interest to know whether the accusations made against the plaintiff as Minister of Justice were true and there was a duty on the plaintiff to answer those accusations and the matters contained in the email are matters of general public interest'.

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<sup>4</sup> Why the manager of the newspaper had occasion to search for and/or find the article and photograph is not explained.

43. At paragraph 20, Mr Edwards denies that anything in his email has injured Mrs Amanaki's credit, character or reputation and that her allegations are 'false, unrelated to the email and self-created'.
44. In relation to paragraph 21, Mr Edwards alleges that the \$4.1 million of tax penalties was not included in the payment of \$32 million to Tongasat, that the tax arrears was not the subject of the court's decision in CV 48 of 2018 and it is therefore irrelevant and prejudicial to him.
45. Mr Edwards pleads that paragraph 22 of the counterclaim:
- (a) raises matters which are unrelated to his email and therefore irrelevant;
  - (b) introduces a 'new unparticularised obligation concerning his duties' as a director of the newspaper concerning publication of articles by the newspaper for which he is not liable; and
  - (c) alleging that he orchestrated and wrote his own defamatory statements in his email 'makes no sense and is vague and irrelevant'.
46. He denies the allegations in paragraph 23 of the counterclaim including the allegations in the particulars thereto.
47. At paragraphs 24 to 27, Mr Edwards asserts, relevantly and in the alternative, that the counterclaim has no merit, is an abuse of process and is frivolous, scandalous and vexatious.

#### **Plaintiff's submissions**

48. Mr Edwards' relies on O.8 r.8(1)(b) and (c) of the Supreme Court Rules which provide:

(1)The Court may at any time order that any pleading or part thereof be struck out if:

...

b) it is scandalous, frivolous or vexatious; or

c) it is unclear or may otherwise prejudice or delay the fair trial of the action; ...

49. He submits that:
- (a) generally, the counterclaim is unclear and the allegations lack any factual foundation;
  - (b) there is no factual foundation or any reference in his email to the allegations in paragraph 15;

- (c) the allegations in paragraph 16 are vague, confusing, speculative and unclear;
- (d) the allegations in paragraph 17 are unrelated to the contents of his email;
- (e) the natural and ordinary meaning of the words in his email do not correspond with or give the meaning ascribed by Mrs Amanaki in paragraph 19; and
- (f) the counterclaim is scandalous, frivolous and vexatious.

### **Second Defendant's submissions**

50. By her notice of opposition, memorandum and affidavit all filed on 29 May 2020, Mrs Amanaki opposes the application and refutes the grounds and complaints by Mr Edwards for the following reasons:

- (a) the allegations in her counterclaim are clear;
- (b) the factual foundations are set out;
- (c) her claims are not scandalous, frivolous or vexatious;
- (d) the words "... *If that matter is not clear to you, then please stop acting ineffectually...*" and "... *This is the last time that you will ever write to me intimidatingly...*" are very serious threats when a Minister of Justice writes to anyone in public especially in the Tongan language and culture;
- (e) Mr Edwards had set the tone to capture the interest of the readers to continue reading his email and his intention to publish defamatory and malicious statements against her without considering her requests and concerns in her email of 14 May 2014 to the editor of the newspaper to which Mr Edwards was replying on behalf of the newspaper as one of its directors;
- (f) by the words "... *The newspaper had duly performed its correct and true responsibilities...*", Mr Edwards endorsed the defamatory and malicious publications made by the newspaper;
- (g) as the photo was not published or attached to Mr Edwards' email, and therefore the readers did not sight it, their imaginations were solely dependent on the statements in Mr Edwards' email;
- (h) Mr Edwards orchestrated his own opinion about the photo and described it in defamatory and malicious statements to the readers to ensure maximum damage was done to her;

- (i) in relation to the words "... *I was only aware of these things after I received your letter of complaint, and I directed the newspaper to bring up information to give the Prime Minister's office, as the grounds of your complaint, that you had mentioned in your letter, as well as what you had done, are incorrect ...*" Mr Edwards, as one of the directors of the newspaper, failed in his responsibility imposed by s.127(1) of the *Companies Act* to manage, direct or supervise the operation of the newspaper by being fully aware of the defamatory and malicious publications the newspaper published and distributed against her;<sup>5</sup>
- (j) in relation to the words "... *Mele, do not be too angry, for it is your own fault and you sat on the lap of Daniel Urai and you had touched his face and stomach. I am surprised because you were duly aware that it was improper, yet you went and sat on Daniel Urai, and have your photo taken at your bedside which appeared crumpled ...*" Mr Edwards described the photo to the readers of his email in defamatory terms including the reference to the crumpled bed which she says could not be seen without telescopic vision, and by which, Mr Edwards sought to imply that Mrs Amanaki and Mr Urai had used or slept on the bed. She submits that those statements imply that she was a reckless person, a prostitute, an irresponsible mother and leader and imputed unchastity upon her as a woman;
- (k) if her claims in proceeding CV 9 of 2019 against the newspaper are successful, then Mr Edwards will have breached his obligations as a director of the newspaper under s.134 of the *Companies Act* (reckless trading) and s.136 (director's duty of care) by agreeing to reckless trading thereby contributing to a substantial risk of serious loss to the company's creditors;
- (l) further, as a Minister of Justice and experienced law practitioner, Mr Edwards failed to act responsibly but rather ensured further damage and injury to her by the repeated defamatory and malicious publications by the paper;
- (m) the words "... *There is actually no attempt to make you look bad as the photo of you and Daniel Urai is a beautiful one, but it only seems strange the visibility of your thigh ...*" in Tongan culture were derogatory and sexually defamatory, especially when made by a Minister of Justice and

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<sup>5</sup> As per Mrs Amanaki's allegations in proceeding CV 9 of 2019 which includes Mr Edwards as one of the defendants.

'the readers of his email not knowing what he was talking about' and implied that she was a prostitute;

- (n) by the words "... *Did you ask the person who took the picture to photograph you all were you unaware of it? Having seen the picture of you too, your attempt to look proper and time in the photo was apparent...*" and "... *you're inferring that there is jealousy of you. Mele, upon what premise will either be made jealous of you? I am surprised that your letter of complaint this time, about the anger of your brothers and male relatives, and you're inferring that there is jealousy of you...*" Mr Edwards continued to endorse the defamatory publications by the newspaper and continued 'to orchestrate his own views about the photo adding further injury and damage' to her;
- (o) the references to jealousy of her implied that Mr Edwards was having a relationship with her and that he was therefore jealous of her presumably because the photo depicted her sitting on the lap of another man, all of which again implied that she is a prostitute;
- (p) the words "... *Have you forgotten your request for government to assist your export sweet yams to New Zealand. The government had granted you financial assistance to develop and inspire the export of sweet yams overseas, and that was it. We have hitherto neither received any information nor any appreciation of the government assistance according to you...*" imputed that she was a thief who had misused public funds from government. The Agricultural Marketing Fund offered low interest loans with no security to agricultural exporters. Mr Edwards was a member of the Development Committee in the Ministry of Finance that administered the fund between 2011 and 2013. She had paid her AMF loan of \$20,000 +1% interest in one payment after her exported containers of sweet yams were sold around September 2014. The recipients of Mr Edwards' email were all aware of the AMF program and how it operated, and would therefore have immediately understood that Mr Edwards was implying that she had not paid her loan and was therefore a thief;
- (q) the words "... *We are not aware of what stories the schoolchildren are talking about, but I think that they are good stories about the good relations between the leader of the Trade Union of Fiji and the leader of the PSA of Tonga...*" were further examples of Mr Edwards' 'sexual narration' of the photo and by which he accused her of being an irresponsible mother and a liar in that she went to Fiji to represent Tonga on trade union matters when there is no trade union here in Tonga;

- (r) by the words "... *It is clear at this time that you are sad as the people learn that you left the trade union work and also the meeting and you went out to party and have your photo taken with Daniel...*" Mr Edwards accused her of neglecting her duties as a trade union leader, and of being a party person and a liar;
- (s) by the words "... *You are too arrogant, and making futile threats, and disrespect the people, even the Royal Family...*" Mr Edwards accused her of arrogance, making pointless threats and disrespecting the people, even the Royal family to ensure maximum damage to her character. The Tongan word 'afungi' means a person who is not good, is conceited, overconfident, supercilious, self-important, big headed, etc. Calling someone "too arrogant" makes that person 'a really bad person', especially when written by the Minister of Justice;
- (t) Mr Edwards' reference to the Royal family was out of context with her concerns over the defamatory publications by the newspaper in her email of 14 May 2014 and was a reference to the PSA's proceedings against Tongasat in CV 48 of 2014 in which Her Royal Highness, Princess Pilolevu Tuita, was Tongasat's main shareholder. Further, in the context in which he used the term 'Royal family', Mr Edwards' indicated that any commoner and/or organisations such as the PSA were not good enough, were unworthy or had no right to speak out about the corruptions of leaders in government and/or a member of the Royal family; and
- (u) by the words "... *but it is a culmination of anger, as referred to in your letters, that you are wrongly accusing me and the board...*", Mr Edwards admitted that his email was actuated by anger and hatred.

## Consideration

### *Strike out principles*

51. In a recent decision in an allied proceeding - *'Amanaki v Government of Tonga - Ruling* [2019] TOSC 47 - the guiding principles for strike out applications were surveyed from a number of previous decisions in the Kingdom and other common law authorities.<sup>6</sup> They may be summarized as follows:

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<sup>6</sup> *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 at 631; *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534; *Kaufusi v Kingdom of Tonga* [1999] TOCA 8; *Jagroop v Soakai and the Kingdom of Tonga* [2001] Tonga LR 234 at 236; *Fonua v Taufateau* [2003] TOCA 5 at [15]; *Cauchi v Air Fiji* [2005] Tonga LR 154; *Faingata'a v Westpac Bank of Tonga* [2010] Tonga LR 63; *Friendly Islands Satellite Communications (Tongasat) Ltd and others v Pohiva and others* [2015] Tonga LR 199, 209; *Stafford v Automotive Distributors Ltd* [2018] FCCA 2768; *Pacific Games Council v Kingdom of Tonga* (unreported, Supreme Court, 19 November 2018, CV 16 of 2018 at [8] and [9]); *Sevele-'O-Vailahi v Kingdom of Tonga* [2019] TOSC 18 at [18] ff; *Batterham v Nauer* [2019] FCA 485 at [70].

- (a) it is an important principle that every person is entitled to his or her day in court;
- (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 or is "doomed to fail" or has "no real prospect of success";<sup>7</sup>
- (c) the jurisdiction is one to be exercised sparingly and only in a clear case where the court is satisfied it has the requisite material to safely make a decision;
- (d) before the court may strike out proceedings, the causes of action must be so clearly untenable or beyond repair that they cannot possibly succeed even after amendment;
- (e) a strike-out application proceeds by close scrutiny of the pleadings and on the assumption that the facts pleaded in the relevant pleading are true, even though they are not or may not be admitted;
- (f) however, that assumption will not extend to pleaded allegations which are entirely speculative and without foundation or contrary to otherwise uncontroversial facts which are already before the Court;
- (g) the court must be particularly careful in areas where the law is confused or developing;
- (h) that applications raise difficult questions of law or require extensive argument does not exclude jurisdiction;
- (i) if the Court is left in doubt whether a claim might lie, or if disputed questions of fact arise, the case must go to trial;
- (j) special care must be taken where the subject pleading has been prepared by a litigant in person without (or apparently without) the benefit of legal assistance to ensure that a right to which that party is entitled is not lost because of lack of legal knowledge and that the litigant is not deprived of the opportunity to have his/her claim, if any, determined according to law. That includes ascertaining the substance of alleged grievances and determining whether, within the possibly ill-expressed and unstructured statement of the legal claim sought to be ventilated, there is any viable

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<sup>7</sup> As referred to by Ward J in *Cauchi v Air Fiji & Air Pacific Ltd* [2005] TOSC 7 citing *Nugent v Goss Aviation* [2000] 2 WLR 222.

cause of action which, with appropriate amendment of the pleading and a little assistance from the court, could be put into proper form.

*Scandalous, frivolous or vexatious*

52. As noted above, Mr Edwards application is based on Order 8 rule 8(1)(b) and (c) which permits the Court to strike out a pleading or any part thereof, if it is:

- (a) scandalous, frivolous or vexatious; or
- (b) unclear or may otherwise prejudice or delay the fair trial of the action.

53. Neither party made any submissions on what is meant by, or any test for determining whether a pleading may be, scandalous, frivolous or vexatious.

54. The object of the rule is to empower the Court to stop an action which ought not to be launched if:

“... it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless ...”<sup>8</sup>

55. The rule (in almost identical terms) has been held in the United Kingdom to be directed to the conduct of proceedings in a way which amounts to an abuse of the Court’s process. ‘Abuse is the genus of which the three epithets scandalous, frivolous and vexatious are species’: *Bennett v Southwark London Borough Council* [2002] EWCA Civ 223 at [26].

56. The word ‘scandalous’ has been held to mean, or at least include, behaviour which is outrageous: *Sivanandan v London Borough* [2002] All ER (D) 44 at [84]. In *Bennett*, the Court of Appeal identified two narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process.

57. The word ‘frivolous’ has been held to include conduct which is foolish or disrespectful; and ‘vexatious’ to mean deliberate or calculated to cause annoyance/obstruction of the proper conduct of proceedings.<sup>9</sup> In *Masila v Helu* [1999] TOSC 70, the words ‘frivolous and vexatious’ were considered to be the contrary of ‘a serious question to be tried’.<sup>10</sup>

58. Apart from the bald allegation in paragraph 26 of his defence to counterclaim, his application and paragraph 18 of his affidavit/submissions in support, Mr

<sup>8</sup> *Balamoody v UKCC for Nursing Midwifery and Health Visiting* [2001] All ER (D) 80.

<sup>9</sup> *Sivanandan v London Borough*, supra.

<sup>10</sup> Citing *American Cyanamid* [1975] AC 396 at 408, per Lord Diplock.

Edwards did not elucidate any bases for the assertion that the counterclaim, in its entirety, is scandalous, frivolous or vexatious, whether in terms of the authoritative meanings discussed above, or otherwise.

59. Applying those meanings to the counterclaim as a whole, I am not satisfied that any of the allegations are scandalous, frivolous or vexatious. Accordingly, the application, on that basis, fails.

*Unclear*

60. However, Mr Edwards is on firmer ground in relation to his complaints that certain allegations in the counterclaim are unclear.
61. A defendant is entitled to have the case against him presented in an intelligible manner. A pleading is 'unclear', in the relevant sense, if it does permit the other party to know with any certainty the case which he/she has to answer. Severing the objectionable parts is an alternative to striking out if the remaining pleading clearly discloses a cause for trial: *Masila v Helu*, *ibid.*<sup>11</sup>
62. However, as Paulsen LCJ observed in *Friendly Islands Satellite Communications (Tongasat) Ltd v Pohiva*,<sup>12</sup> only in an exceptional case will a court strike out a claim on this ground without giving a claimant the opportunity to amend his/her pleading.
63. In his substantive defence to Mrs Amanaki's counterclaim (paragraphs 13 to 23), at a high level, Mr Edwards denies the vast majority of the allegations and has added detailed bases (in the form of Particulars) as to why each of those allegations should be rejected. That is consistent with a party understanding the case he has to meet. In fact, there is no reference anywhere in the substantive defence to any of the allegations being unclear, or, for that reason, that they should be struck out. The factual and contextual issues arising from those allegations and Mr Edwards' denials of them will be matters for a jury.
64. However, in my view, Mr Edwards' complaints (in his defence and material on this application) about the lack of clarity, relationship or connection between the impugned statements in his email set out in bold at paragraph 17 of the counterclaim and a number of the imputations in paragraphs 15 and (expanded upon in) 19 are well-founded. Apart from his secondary defence of qualified privilege, Mr Edwards' primary defence is, in fact, that the alleged defamatory imputations do not arise from his email.

<sup>11</sup> Citing *Kaufusi v Kingdom of Tonga*, C1310/98, unreported, 1 March 1999, upheld on appeal, CA10/99, 23 July 1999.

<sup>12</sup> [2015] TOSC 16 at [47]

*The alleged imputations*

65. As discussed during the hearing, it is not immediately apparent how a number of imputations alleged in paragraph 19 of the counterclaim:
- (a) arise from or may be understood from the natural and ordinary meaning of the impugned statements in Mr Edwards' email; and
  - (b) if they do, whether they could be regarded as defamatory.
66. Section 2 of the *Defamation Act* defines 'defamation of character' as any matter, spoken or written, damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned. In this case, publication is not in issue.
67. Section 17 of the Act provides:
- If at the trial of any civil action for defamation of character it appears to the judge or magistrate that the words complained of are not reasonably capable of a defamatory meaning he shall enter judgment for the defendant. But if the judge is satisfied that the words are reasonably capable of a defamatory meaning he shall leave it to the jury to decide whether the words have in fact a defamatory meaning.
68. This application is not the trial of the action. Clearly, section 17 contemplates that after all the evidence is adduced at trial, it is then for the Court to determine whether the words complained of are not reasonably capable of a defamatory meaning. That accords with the approach taken in *Edwards v Senituli* [2009] Tonga LR 386.<sup>13</sup> It is akin to a 'no case' procedure. It requires a two-step process: firstly, to decide what the words mean; and then secondly, to decide whether the meaning is capable of being defamatory.<sup>14</sup> That calls for an examination of the evidence called at trial.
69. Here, however, I am concerned with the state of the counterclaim as a pleading, and whether the alleged imputations are so unclear or may otherwise prejudice or delay the fair trial of the action, that they should not be allowed to proceed to trial in their current form.
70. At common law, the natural and ordinary meaning of published material is the meaning which an ordinary person would attribute to the material, based solely on the words used and generally known facts. In determining the natural and ordinary meaning of published material, the ordinary person is assumed to

<sup>13</sup> Compare *Pohiva v Kingdom of Tonga* [1994] Tonga LR 115 where the Court considered that at the interlocutory stage of the proceedings, it was required to answer whether, in the context of the article the subject of the action, the words were capable of referring to the plaintiff and of a defamatory meaning.

<sup>14</sup> *Gatley on Libel and Slander*, Sweet and Maxwell, 12th edition, [2.1].

have a greater capacity for implication than the lawyer,<sup>15</sup> including the ability to read between the lines, and to indulge in 'loose thinking'.<sup>16</sup> Inferences which the ordinary person would draw from the published material based on generally known facts are relevant to a determination of the natural and ordinary meaning of the material. Such inferences are known as 'false' or 'popular' innuendo meanings. As the test is an objective one, evidence as to how the words used were actually understood by the recipient of a publication is irrelevant in determining the natural and ordinary meaning conveyed.<sup>17</sup>

71. Except in cases where the publication bears only a direct and literal meaning, the plaintiff in a defamation action pleads of the 'imputation' borne by, or the gist of, the published words. Where a publication conveys a defamatory meaning only to persons with knowledge of extrinsic facts, it is said to be a 'true' or 'legal' innuendo meaning. Where in a defamation action, the imputation borne by a publication is a true or legal innuendo, the extrinsic factors as to cause the actual words to convey a defamatory meaning must be pleaded, and evidence of them led, if the action is to succeed.<sup>18</sup> It is no defence that the publisher did not know of the extrinsic facts.<sup>19</sup>
72. Imputations can also depend on the tone used by the publisher, including sarcasm.<sup>20</sup>
73. In cases of alleged imputations of unchastity, it is not essential that the imputation should be made in direct or positive terms; it is sufficient if the expressions used would be understood by persons of ordinary intelligence to convey a specific imputation of unchastity.<sup>21</sup> If the words used are susceptible of two meanings, one being want of chastity, it will be for the jury to say in which sense they were understood by those who heard them.
74. In my view, in the present case, and having regard to the above principles, it is sufficiently clear that a jury could (not will) find that the natural and ordinary meaning of the statements made in paragraphs 4, 6, 7, 8, 10 and 11 of the email imputed unchastity or improper relationship. That particular imputation is pleaded in paragraph 20 of the counterclaim. Section 16(1)(d) of the Act provides that if the defamatory matter complained of imputes unchastity to a woman or girl, it shall not be necessary for the plaintiff to prove she has

<sup>15</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 277; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 165.

<sup>16</sup> *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1245, 1254.

<sup>17</sup> *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, 515; *Toomey v Fairfax* (1985) 1 NSWLR 291, 301-2.

<sup>18</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, 281.

<sup>19</sup> *Berkoff v Burchill* [1996] 4 All ER 1008, 1018.

<sup>20</sup> *Lewis v Daily Telegraph Ltd*, *ibid* at 271.

<sup>21</sup> *Saunders v Randolph Hotel* [1945] 4 D.L.R. 420 Ont. CA.

sustained any monetary or other actual loss by reason of the publication of any such defamatory matter.

75. I am satisfied that the following alleged imputations in paragraph 19 of the counterclaim are sufficiently clear from the relevant passages in Mr Edwards' email, namely, that:

- (e) it was her (Mrs Amanaki's) fault that her brothers and relatives were angry as it was her who made the 'indecent photo';
- (g) she is an irresponsible mother;
- (i) she is a liar who has misled the PSA, its members and the public that she was going overseas on trade union meetings;
- (j) she is a party girl;
- (k) she is arrogant and disrespectful;
- (l) she is a bad woman; and
- (m) she acted wrongly.

76. I am also satisfied that when considered in their context, it is arguable that a jury *could* find those imputations to be defamatory. That finding is based solely on the pleading. In accordance with section 17 of the Act, the issue may be revisited during any trial.

77. However, it is not clear from the pleading itself how the following allegations in paragraph 19 arise from Mr Edwards' email or are to be imputed from the natural and ordinary meaning of the words used, namely, that:

- (a) Mrs Amanaki is a stupid and reckless person;
- (b) she is a prostitute;
- (c) it was wrong for her to ask the editor and the directors of the newspaper to stop the ongoing publications of her "indecent photo";
- (d) it was wrong for her brothers and relatives to be angry and concerned when they saw the 'indecent photo' in the newspaper;
- (f) she is an ungrateful thief who has taken money from Government without reporting to or thanking them; or
- (h) her daughters are liars bringing home false stories from school.

78. Further, of those, it is not clear how (c), (d), or (h) could be said to be defamatory.

79. On strike out applications based on grounds other than that the impugned pleading does not disclose a reasonable cause of action, the Court is able to consider any affidavit evidence either in support of or against the pleading. Of all the material Mrs Amanaki filed in opposition to the overall application to strike out the defences and her counterclaim, her affidavits have been of little

assistance. As they have on numerous occasions throughout this proceeding to date, Mrs Amanaki's affidavits traversed the history of her dispute with the newspaper, Mr Edwards and others since 2014 and the procedural history of this and the related actions. However, paragraph 15 of her affidavit sworn 18 May 2020 was of some assistance where Mrs Amanaki deposed to her daughters coming home from school around 23 April 2014 upset because some of the students, after seeing the photo in the newspaper, had teased them that their mother was a prostitute. That appears to be the only reference in the material that some (unidentified) persons interpreted the photograph in that way. That is to be compared to the words used by Mr Edwards in his email when referring to the photograph. As I have indicated above, in my view, it is presently unclear how any of those words could impute that Mrs Amanaki was a prostitute, meaning someone who engages in sexual intercourse for money.

80. However, Part II of Mrs Amanaki's memorandum dated 28 May 2020 in fact goes a fair way to explaining as to how, from her perspective at least, the alleged imputations arise from Mr Edwards's email and how they would be understood. Her submissions in the memorandum even present more as the pleading her counterclaim should have been in the first place.
81. While one can see certain advantages in requiring Mrs Amanaki to amend her counterclaim, it seems to me that the real vice in her pleading can be efficiently and fairly remedied by the provision of particulars or further and better particulars as the case may be. That also coincides with Mr Edwards' request for particulars of paragraph 9 of the defences.
82. I am not satisfied it is necessary or reasonable to strike out paragraphs 21 or 22 of the counterclaim.
83. Whilst the allegations contained therein are not directly relevant to the specific issues raised by the counterclaim, that is, whether Mr Edwards' email on 16 May 2014 in reply to Mrs Amanaki's email of 14 May 2014 is defamatory of her, they do relate to the background or context for Mrs Amanaki's email to the editor of the newspaper (copied to others) which elicited Mr Edwards' reply. Further, the allegations in paragraph 21 amount to no more than that the Tongasat payments were declared unlawful by the court on 17 August 2018. That is a matter of record. The historical connections between those payments, the PSA's call for the then Prime Minister to resign over them, and the ensuing publications by the newspaper of articles and photographs of Mrs Amanaki arising from the PSA's press release have been canvassed above in the Background section.

84. The allegations in paragraph 22 that neither Mr Edwards nor the newspaper ever asked Mrs Amanaki about the allegedly defamatory publications appear to be uncontentious, and again, are contextual only. Beyond that, she alleges that Mr Edwards' email contained defamatory statements about those publications. That is relevant to the primary issues raised by the counterclaim.
85. It should be emphasised that declining to strike out those paragraphs or any other allegations by the Defendants concerning the publications by the newspaper complained of by Mrs Amanaki in CV 9 of 2019 (which is presently stayed), does not mean that those issues are for determination by a jury in any trial of this proceeding. They are relevant only as to background and context. The demarcation between the allegations of defamation arising from the newspaper publications on the one hand and the two emails the subject of this proceeding on the other will be strictly maintained during any trial of the two proceedings.

### **Result**

86. By 14 July 2020, the First and Second Defendants are to file particulars of paragraph 9 of their respective current Statements of Defences concerning the alleged truth of the publication that the Plaintiff unlawfully advised the Prime Minister to authorise the payment of \$32 million to Tongasat, including:
- (a) the date of the advice;
  - (b) where the advice was given;
  - (c) whether the advice was in writing and/or oral, identifying any such document/s and/or details of any such conversation/s;
  - (d) who the Prime Minister authorised to make the payment;
  - (e) the date of the Prime Minister's authorisation; and
  - (f) whether the Prime Minister's authorisation was in writing or oral, identifying any such document/s and/or details of any such conversation/s.
87. By 14 July 2020, the Second Defendant is to file particulars of the allegations in subparagraphs 19(a), (b), (c), (d), (f) and (h) of her current Counterclaim, including, in respect of each alleged imputation, details of:
- (a) the specific words in the Plaintiff's email dated 16 May 2014 which are alleged to give rise to the imputation;
  - (b) how the natural and ordinary meaning of those words could be understood to convey the imputation;

- (c) any extrinsic factors said to cause the words to convey a defamatory meaning; and
  - (d) the defamatory meaning conveyed by the imputation.
88. The Plaintiff's application to strike out the defences and the second defendant's counterclaim is otherwise dismissed.
89. In light of the application to strike out being refused but orders made for further particulars being granted, there will be no order as to costs.
90. The matter will be mentioned again on 17 July 2020 at 9 AM.

A handwritten signature in blue ink, appearing to read 'M.H. Whitten', with a long, sweeping flourish extending to the right.

NUKU'ALOFA  
30 June 2020

M.H. Whitten QC  
LORD CHIEF JUSTICE