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

CV 21 of 2021

BETWEEN:

EZINET LIMITED ("*Ezinet*") Claimant

-and-

DS VENTURE LIMITED ("*DSV*") Respondent

Whether Ezinet's claim on the limitation fund is admissible as a matter of law

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Messrs P. David QC, M. McCarthy and W. Edwards for DSV
Mr J. Tapueluelu for Ezinet
Hearing: 2 and 18 August 2021, 10 September 2021
Ruling: 29 September 2021

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Introduction

1 DSV is the owner of the 'Duzgit Venture' tanker vessel. On 20 January 2019, as the vessel approached the Port of Nuku'alofa, the starboard anchor and chain were prematurely released from their housing. As the anchor and chain were being winched back in, a cable was observed caught in the anchor ("**incident**"). The cable was one of two undersea communications cables owned by Tonga Cable Limited ("**TCL**") connecting Nuku'alofa, Ha'apai and Vava'u with Fiji. As a result of damage to the cable, Tonga was without cable telecommunications for almost three weeks. TCL initially claimed damages from DSV in the sum of US$1,237,890.06.

2 On 20 December 2019, DSV commenced proceedings for a decree of limitation of its liability for the incident pursuant to s.2 of the *Shipping (Limitation of Liability) Act* 1980.

3 On 22 December 2020, the Court granted DSV's application. A limitation fund was established by Letter of Undertaking from DSV's insurers in the sum of TOP$952,407.70, inclusive of interest, as calculated in accordance with the relevant international convention.[1]

4 Directions were then made for publication of notices calling for claims on the fund.

5 TCL's original (counter)claim, which had been stayed pending the outcome of the limitation proceedings, was reactivated and treated as its claim in this, the 'claims phase'. On 12 July 2021, DSV admitted TCL's amended claim totalling US$238,721.64 (approximately TOP$538,757.35) as admissible against the limitation fund.

6 This ruling concerns a challenge by DSV against the only other claim on the fund.

Ezinet's claim

7 At all material times, Ezinet was and is a licensed internet service provider in Tonga pursuant to the *Communications Act* 2015. It provided services through the TCL cable referred to above and by satellite connection owned by Kacific Broadband Satellite Limited ("**Kacific**").

8 On 25 March 2021, in this proceeding, Ezinet filed a claim on the fund for costs incurred in providing TCL as well as Tonga Telecommunications Corporation ("**TCC**") and Digicel (Tonga) Ltd ("**Digicel**") (Tonga's other internet service providers) with satellite connectivity until the cable was repaired, totalling TOP$302,391.50.

9 On 8 April 2021, counsel for DSV filed a memorandum in which, among other

[1] 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature.

things, DSV complained that:[2]

> *"... The Statement of Claim by Ezinet Limited does not set out any cause of action in law on which the claim is based. On the assumption that the claim which is put forward would be in negligence, the claim would appear to face the difficult [sic] as regards its admissibility that it is for economic loss sustained as a result of damage to another's property."*

10 On 23 April 2021, Ezinet was directed to file an amended claim identifying the cause/s of action upon which it claims, setting out the legal and factual bases for the said cause/s of action and full particulars of its claimed loss and damage.

11 On 17 May 2021, Ezinet filed an amended claim, in which it pleaded, in summary, that:

11.1 its cause of action against DSV was in negligence;

11.2 the bases for the existence of a posited duty of care were, principally, reasonable foreseeability and vulnerability;

11.3 the duty was owed by DSV to all end users of the internet services being transmitted through the TCL cable and to all licensed communications providers in Tonga;

11.4 DSV's negligence caused a 'national crisis' which required Ezinet, as a licensed communication service provider, and 'good corporate citizen' and 'key stakeholder' in the internet service provider market, to assist the Tongan Government and TCL to restore internet services in the interests of the Government and the people of Tonga;

11.5 Ezinet was the only provider with operational satellite capabilities;

11.6 Ezinet owed a duty to all end users and the country, as a whole, to assist in restoring communications to Tonga in a time of national crisis;

11.7 DSV's negligence caused Ezinet to suffer financial loss in restoring telecommunications services;

11.8 as an end user, Ezinet had to make adjustments to its internal operations to ensure that it and its parent company, Pacific Finance Group, had the use of the satellite connection, for which it claimed TOP$10,000;

11.9 as a communication service provider, Ezinet incurred losses in 'having to assist TCL, the Government of Tonga, TCC and Digicel' to provide backup connectivity, in the original sum of TOP$302,391.50.[3]

12 On 31 May 2021, counsel for DSV filed a further memorandum in which they

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[2] [6]
[3] With the earlier reference to having recovered costs from TCC and Digicel deleted.

submitted, relevantly, that:

> *"5. Both claims lodged are in negligence for loss and damage by way of financial expense. As counsel understand the position, Tonga applies English common law in tort. In order to bring a claim for financial loss and damage arising from damage to property in negligence, a claimant must be the owner of the property damaged or have an immediate legal right to possess the property. A party which does not have such rights can have no claim in negligence as a matter of law. A party which is the owner of the property damaged by another's negligence can claim for the property damage and loss which is proven to be consequential upon the property damage.*
>
> *6. Ezinet has filed an amended pleading claiming for various costs and expenses incurred in providing backup satellite internet capacity to Tonga Cable. No supporting documents for the various costs and expenses have been provided and in order to prove any alleged loss and damage would have to substantiate this by relevant accounting evidence. However, more fundamentally, Ezinet claims as a party using the damaged cable presumably in contract. As a matter of law, Ezinet could have no claim in negligence."*

13 DSV then proposed that the issue of whether Ezinet's claims, as pleaded, are admissible as a matter of law, should be determined as a preliminary question.

14 On 11 June 2021, directions were made which included requiring Ezinet to file a further amended claim explaining, among other things, the legal and factual basis for the duty of care it allegedly owed to assist the Tongan Government, TCL and Digicel by the provision of satellite services during the period that TCL's cable was out of commission, and to file affidavit/s averring to the allegations in its further amended claim and exhibiting all documents evidencing its claim.

15 On 25 June 2021, Ezinet filed a further amended claim, in which it pleaded, either in substitution or addition to its amended claim, that:

15.1 Ezinet's duty of care to do all it reasonably could to help solve the 'national crisis' that had occurred as a result of DSV's negligence arose by virtue of:[4]

15.1.1 section 103 of the *Communications Act* and the conditions of its licence as set out in the Second Schedule to the Act; and

15.1.2 "Tongan cultural norms of co-operation and Christian values that obligate Tongan people and businesses to provide assistance when there is a national crisis or emergency";

15.2 on 21 January 2019, the CEO of TCL asked Mr John Paul Chapman, Ezinet's 'proprietor', if Ezinet could make available some of Ezinet's satellite internet capacity to TCL. Ezinet agreed to TCL's request as Mr Chapman, 'believed that the cable breach had caused a national crisis'.

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[4] [31]

TCC and Digicel also made similar requests of Ezinet, to which Mr Chapman agreed;[5]

15.3 Mr Paula Piveni Piukala, a member of TCL's board of directors and special advisor to the late Prime Minister, the Hon. 'Akilisi Pohiva, gave the 'go ahead' for TCL to request Ezinet's assistance. Mr Piukala also sought assistance from Kacific which was Ezinet's satellite internet provider;[6]

15.4 Mr Piukala advised Mr Chapman that the then Prime Minister was 'supportive' of Ezinet's involvement in assisting TCL and the Government and 'it was always clear that the costs of Ezinet's involvement would be reimbursed at some point after the crisis, by the Government or TCL...";[7]

15.5 the costs claimed of $302,391.50 included sourcing a satellite connection between 20 January 2019 and 19 September 2019 which cost US$252,000, of which, Ezinet recovered US$185,000 from TCC and Digicel, leaving a balance with respect to the request by Government and TCL of TOP$148,391.50.

Ezinet's evidence

16 Ezinet relied on affidavits from Messrs Chapman and Piukala, referred to above, as well as Mr Paula Ma'u, the Chief Executive Officer of MEIDECC,[8] and Ms 'Unaloto Mafi.

17 Mr Chapman verified much of Ezinet's pleaded narrative, and elaborated on the following:

17.1 Ezinet is a customer of, and obtains an internet connection from, TCC;

17.2 Ezinet also has a separate satellite connection as a backup, through its relationship with Kacific;

17.3 the morning after the cable breach, he received requests from representatives of TCL for TCL to link to Ezinet's satellite connection;

17.4 he agreed to TCL's requests;

17.5 he understood from Piveni Piukala that the late Prime Minister supported Ezinet becoming involved;

17.6 TCC and Digicel also requested use of Ezinet's satellite connection;

17.7 he agreed to their requests too as the nation was in a 'virtual cyber blackout';

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[5] [33]
[6] [34]
[7] [35]
[8] Ministry of Meteorology, Energy, information, Disaster Management, Climate Change and Communications.

17.8 the priority was to enable TCL to connect with the French company responsible for servicing and maintaining the cable;

17.9 at the same time, TCC and Digicel were pressuring for more bandwidth;

17.10 after a satellite dish was set up, they realised there was not enough bandwidth to satisfy the emergency demands;

17.11 as a result, Ezinet had to free up demand from its Vanuatu operations for use in Tonga;

17.12 he liaised with Kacific and TCL and the other providers about sharing the costs of engaging the engineer required for setting up the dish;

17.13 he 'expected' that Ezinet would be reimbursed for any costs it incurred in providing the assistance, and 'did not see the issue of reimbursement as being as big an issue as opposed to doing the right thing and assisting in the way that' Ezinet did;

17.14 he certainly expected that Ezinet would be reimbursed through the Government or TCL as he had formed the view that TCL could not meet its obligations to its customers due to the cable break, that it would have to pay for getting it repaired and that TCL would claim those costs and other losses from its insurers or from whomever caused the breach;

17.15 later in 2019, after the 'crisis had passed', Ezinet invoiced TCC and Digicel and recovered part of its costs of assisting them with a satellite connection through Kacific;

17.16 those costs were 'greatly reduced' by Ezinet because 'it expected that Government/TCL would be reimbursed in due course by the shipping company that had damaged the cable and Ezinet would be further reimbursed in due course or be bought by TCL or the Government';

17.17 'there had been a proposal at one point by the Tongan Government to buy Ezinet as the redundancy for TCL', but ultimately, nothing happened; and

17.18 around 6 March 2019, after finding out that the cable break had been caused by the Duzgit, the conversation turned to TCL suing for damages and seeking compensation. Mr Chapman and the CEO for TCL agreed that 'TCL should claim all the losses and costs' from the shipowner and insurers.

18 Mr Piukala deposed, in summary, that:

18.1 he was a TCL board member from 2017 to 2019;

18.2 he was also a special advisor to the late former Prime Minister Pohiva, whom he kept informed during the 'crisis';

18.3 he gave the go-ahead for the CEO of TCL to request the use of Ezinet's satellite connection;

18.4 throughout his dealings with Ezinet and Mr Chapman, as well as TCC and Digicel, it was his 'understanding that all parties were aware that there would be costs involved' in finding out and fixing the problem and to get the internet back up and running. There was no mention of any assistance being provided free of charge;

18.5 at the time, TCL, as a service provider, was obliged under the rules of the International Telecommunications Union to have a 'redundancy' in place, but its ability to meet that obligation was still 'under negotiation' with Kacific;

18.6 he requested assistance from Kacific, which they 'eventually provided through Ezinet';

18.7 from his perspective, TCL expected that everyone who could assist in Tonga 'would need to scramble and was what happened, especially with TCC and Digicel as they were part-owners of TCL together with the Government';

18.8 he told the media that the problem was a 'national crisis';

18.9 MEIDECC required Ezinet to provide reports and updates for the Minister and Cabinet, and MEIDECC also held meetings with all the service providers;

18.10 'there was no response from Government and so the rescue effort was left to the service providers';

18.11 there was never any official enquiry by the Government into the matter;

18.12 suing DSV was discussed with the other stakeholders in terms of recovering the costs of responding to the crisis; and

18.13 he was aware of meetings between the owners of TCL (TCC, Digicel and Government) and internal discussions within TCL that part of its role would be to inform other parties with a claim to come forward, including end-users.

19 Paul Ma'u, deposed, in summary, that:

19.1 MEIDECC is responsible for the national response to natural disasters and emergencies declared under the *Emergency Management Act*, and associated legislation, and is also the regulator for the Information Communications Technology market/industry in Tonga under the *Communications Act*;

19.2 TCL is a commercial company owned by Government (majority), TCC and Digicel;

19.3 TCL's request for assistance from Ezinet was endorsed by MEIDECC;

19.4 MEIDECC was 'comfortable with TCL requesting help from local providers to assist the rescue effort because "*in a small economy like Tonga where there are enormous government budgetary restrictions as well as restrictions on resources and technology, it is not unusual in our culture (and in fact necessary as was in this case) to work together with the private sector (in this case a licensed communication provider) and civil society and call upon them to help government with the rescue effort in a national emergency for the good of the whole country as it had occurred in this case*";

19.5 at the time of the outage, MEIDECC and Government had been working for several years to develop Tonga's satellite capability through the assistance of the International Telecommunications Union. Under the rules of the Union, TCL needed to have a 'redundancy'[9] or back-up system in place. MEIDECC possessed some satellite equipment and a technical expert, but the projects had not been fully implemented. Therefore, at the time of the outage, Tonga did not have any sufficient back-up system in place;

19.6 in his view, the internet outage was a 'national emergency' as defined in the *Emergency Management Act* because 'the characteristics of the incident and impact to the communication environment in Tonga, and also the potential threat to national security' required a significant co-ordinated rescue effort;

19.7 even though it was never a 'declared emergency' under the Act, '*Government had treated the incident for all intents and purposes as an emergency under the Act*';

19.8 Government did not declare a state of emergency because the outage was sudden and, thereafter, there was a lack of technology and equipment to investigate the cause and a lack of reliable information as to what had occurred;

19.9 further, the speed at which TCL and Ezinet (with Kacific behind them) acted '*inhibited any consideration by the Government of making a declaration of emergency under the*' Act; and

19.10 he attended a single meeting of a Parliamentary Committee tasked by the

[9] Which I take to mean 'contingency'.

Legislative Assembly to investigate the incident, but '*not much came out of that*'.

20 'Unaloto Mafi is the Chief Financial Officer of Pacific Finance & Investment Limited. She deposed to liaising with the Clerk of the Legislative Assembly to obtain a copy of the Parliamentary Minutes at the time of the outage on 19 January 2019 and 'the national crisis that ensued'. She was informed that the only Parliamentary session that took place in that period was a month later, on 19 February 2019. A copy of those minutes was exhibited to her affidavit.

DSV's submissions

21 Notwithstanding Ezinet's further pleading amendments, counsel for DSV filed further memoranda opposing the legal admissibility of Ezinet's claim.[10] In summary, DSV submitted that:

21.1 the claim by Ezinet that it owed a duty of care to provide the services which were requested by other parties has no proper foundation in fact or law;

21.2 the question for admissibility is whether DSV owes a duty of care to Ezinet in respect of the pleaded claims for financial loss being the cost of services provided to other parties;

21.3 both that claim for financial loss and the claim for financial loss as an end user cannot be sustained as a matter of law;

21.4 under the common law of England,[11] there is a well-established exclusionary rule in the tort of negligence, that no duty of care is owed by a defendant, who negligently damages property belonging to a third party, to a claimant who suffers loss because of a dependence upon that property or its owner;[12]

21.5 absent an interest in the property damaged (legal or beneficial ownership[13] or an immediate right to possession) no claim lies in negligence for financial losses;

21.6 the general exclusionary rule goes back to the 19th century case of *Cattle v Stockton Waterworks Co*,[14] has been applied in cable cutting cases[15] and has been affirmed by the Privy Council[16] and House of Lords;[17]

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[10] Filed 12 July 2021 and 16 August 2021.
[11] *Civil Law Act* 1966, s 3.
[12] *Clerk and Lindsell Law of Torts* 23rd Ed 7-152; Halsbury's Laws of England and Wales, Volume 78, Negligence 2018, para 12, Pure Economic Loss.
[13] Shell UK Ltd v Total UK Ltd [2010] 3 All ER 793.
[14] (1875) L R 10. QB 453.
[15] Spartan Steel Alloys Ltd v Martin(1973) QB 27; Electrochrome Ltd v Welsh Plastics Ltd(1968) 2 All ER 205; SCM (UK) Ltd v WJ Whittall Ltd [1977] 1 QB 337.
[16] Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter) [1986] AC 1.
[17] Leigh & Sullivan Ltd v Aliakmon Shipping Co [1986] AC 785.

21.7 the rule rests on policy factors in which the law leans against the broad indeterminate scope of potential liability which would arise if such a duty were to be imposed by law, arising from the wide range of contractual relationships with those whose property is used by third parties, and the ability of parties which have contractual relationships with the owner of the property damaged to protect themselves by contract and insurance;

21.8 Ezinet's pleaded claims are all for financial losses which are alleged to have been caused by the negligence of DSV causing damage to the cable which is the property of TCL and not Ezinet;

21.9 as Ezinet had no rights of ownership (whether legal or beneficial) nor any immediate right of possession in the cable (and pleaded no such interest), it cannot, as a matter of law, claim for financial loss caused by negligent damage to the cable;

21.10 the policy factors which underpin the exclusionary rule are equally applicable in the Kingdom of Tonga. The rule established in the common law of England is capable of application in the Kingdom of Tonga and its application promotes certainty in an important area of the common law. No general local circumstances or circumstances relevant to Ezinet's claim render it necessary to qualify the rule;[18] and

21.11 section 103 of the *Communications Act*, which provides for a licensee to place its facilities at the service of the Government free of charge in a national emergency, does not provide any statutory basis for the claimed duty because:

21.11.1 the statutory framework does not provide a basis for limiting the established exclusionary rule;

21.11.2 even if it did, Ezinet's claim does not fall within the scope of a claim made by reason of s 103;

21.11.3 Ezinet's claim is for services provided by agreement with other parties at their request;

21.11.4 s 103 should be interpreted as applying when a national emergency has been declared under the *Emergency Management Act*;

21.11.5 there was no direction pursuant to s 103 to Ezinet to provide its services;

21.11.6 s 103 only applies to licensees who broadcast content, not those who provide internet services or hosting to the public, such as

[18] s 4 Civil Law Act 1966

Ezinet; and

21.12 even if the claim in negligence against DSV can be sustained as a matter of law, it would clearly face significant causation and foreseeability issues.

Ezinet's submissions

22 In response, Ezinet submitted, in summary:

22.1 The traditional common law of England does not necessarily apply in Tonga because of the operation of the delimiting provisions of s 4 of the *Civil Law Act* 1966, which (according to Ezinet) provides:

> "The common Law and rules of equity referred to in section three of this Act shall be applied by the Court-
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom;
>
> (b) only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary."

22.2 The common law should be qualified in this case such that DSV owed a duty of care to Ezinet regardless of whether Ezinet owned the TCL Cable.

22.3 That is because Ezinet had a duty based on:

22.3.1 moral and cultural obligations arising from local circumstances; and/or

22.3.2 s 103 of the *Communications Act* and the *Emergency Management Act*,

to assist the Government in a time of crisis.

22.4 The relevant local circumstances also included that:

22.4.1 Tonga is a very small island state with an economy that primarily relies on foreign aid and remittances sent by family members of Tongans living overseas;

22.4.2 Tonga's government has 'enormous budgetary restraints' and is 'constantly lacking in resources';

22.4.3 further to above, there is a cultural norm in Tonga, rooted in traditional Tongan culture and Christianity, by which members of civil society and the private sector or the general public are expected to assist or work together with the Government to discharge its duties when Government lacks the resources or technology to do so, especially in times of crisis.

22.5 The incident was a "national crisis" in Tonga. Neither TCL nor the

Government had a contingency or back-up plan in the event of a cable cut.

22.6 The sudden occurrence of the outage, the lack of technology and equipment to investigate the cause, and a lack of available information about the circumstances surrounding how the outage occurred, and the 'mystery' surrounding it, may have contributed to the Government's failure to declare an emergency, or officially investigate and/or hold an inquiry into what occurred.

22.7 Further, the speed at which TCL, Ezinet and the other internet providers acted to provide a solution also 'inhibited' the Government from declaring an emergency.

22.8 Notwithstanding, the Government had treated the outage as a national emergency in its response.

22.9 In 2003, Parliament amended the *Civil Law Act* by deleting certain terms in s 4 and thereby broadened the application of the common law in Tongan courts to not just English common law but that of the 'common law world'.[19]

22.10 The common law of the common law world has developed and evolved over time.

22.11 *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd & anor,* ibid ("***Candlewood***") was an Australian decision which, at first instance, followed *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 ("***Caltex Oil***") which reversed the exclusionary rule. On appeal, the Privy Council rejected the Australian High Court approach and affirmed the traditional English common law rule.

22.12 The policy factors underlying the exclusionary rule, since the 19th century,[20] 'are now quite dated'. Those factors gave rise to the fear of innumerable circumstances where liability could arise if not excluded. Ultimately, such fears tended to reflect a conservative view of reality.

22.13 In contrast, a small island-state economy like Tonga, which is dependent on foreign aid and overseas remittances, can create and transact a multitude of financial and commercial transactions and a multiplicity of legal relationships of different types on a daily basis. The transmission of remittances is usually done through international money transfer agencies like Western Union, Moneygram and Digicel. Economies like Tonga, therefore, rely on having a working internet connection to enable its remittances and economy to operate. Any disruption to the internet

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[19] Citing *Leiola Group Ltd v Moengangongo* [2010] TOCA 10 and *R v Tu'ivakano* [2020] TOSC 5.
[20] Citing *Cattle v Stockton Waterworks Co*, ibid, and *Simpson v Thomson* (1877) 3 H.L. 279.

connection would result in economic and financial hardship.

22.14 In the later decision of *Perre v Apand Pty Ltd* [1999] HCA 36, the Australian High Court extended the *Caltex Oil* decision reversing the exclusionary rule and endorsed the 'incremental approach' earlier taken by that Court.

22.15 Both *Caltex Oil* and *Perre v Apand* are late 20th century decisions of the High Court of Australia which provide judicial authority for reversing the English common law position in *Candlewood* and support Ezinet's claim.

22.16 Section 4(b) of the *Civil Law Act* allows this Court to follow more recent decisions of the Australian High Court such as *Caltex Oil* and *Perre v Apand Pty* because '*application of those decisions are rendered necessary by Tonga's local circumstances' 'to protect the interests of the Kingdom and its people from the actions of wrongdoers, the consequences of which can be catastrophic on a national scale, as it was in this case*'.

Consideration

23 DSV's challenge to the legal admissibility of Ezinet's claim is akin to a strike out application pursuant to Order 8 rule 8 of the *Supreme Court Rules.* The considerations on such applications may be summarised, relevantly, as follows:[21]

23.1 it is an important principle that every person is entitled to his or her day in court;

23.2 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";[22]

23.3 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;

23.4 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;

23.5 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;

23.6 however, that assumption will not extend to pleaded allegations which are entirely speculative and without foundation or contrary to otherwise

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[21] *Edwards v Public Service Association* [2020] TOSC 45; *Amanaki v Government of Tonga - Ruling* [2019] TOSC 47; *Sevele-'O-Vailahi v Kingdom of Tonga* [2019] TOSC 18 at [18] ff.
[22] *Cauchi v Air Fiji & Air Pacific Ltd* [2005] TOSC 7 citing *Nugent v Goss Aviation* [2000] 2 WLR 222.

uncontroversial facts which are already before the Court;

23.7 the court must be particularly careful in areas where the law is confused or developing;

23.8 that applications raise difficult questions of law or require extensive argument does not exclude jurisdiction; and

23.9 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.

24 In this case, and at this stage, for Ezinet to plead (and, if permitted to proceed, later prove) a viable cause of action in negligence, it must be able to articulate the legal basis for a duty owed by DSV to exercise reasonable care to not cause Ezinet financial harm, breach of that duty, causation and loss and damage.

25 DSV's challenge is as to the first of those elements. A duty of care 'does not exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered.'[23] If Ezinet cannot demonstrate through its pleaded claim (and supporting evidence) the legal basis for the existence of such a duty of care, then its claim is 'doomed to fail'.

English exclusionary rule

26 DSV seeks to defeat Ezinet's claim by reliance upon the English common law rule that no duty is owed by a defendant, who negligently damages property belonging to a third party, to a claimant who suffers loss because of the dependence upon the property or its owner ("***exclusionary rule***").[24]

27 Where economic loss results from damage negligently caused to the claimant's own property, it is recoverable as a measure of that physical damage.[25] However, here, Ezinet's claim is for pure economic loss, meaning financial loss suffered by a claimant which does not flow from any damage to his own person or property.[26] Rather, the loss is usually caused through a web of economic relationships in which the claimant is involved. The preplanned nature of those relationships frequently provides the claimant with an opportunity to seek protection through such measures as contract and insurance. The interlocking nature of the relationships means that the consequences of a single act of negligence may cause financial loss to numerous individuals. For both those reasons, in England,

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[23] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 211.
[24] Clerk & Lindsell on Torts, 23rd ed., 7-152.
[25] *Harris v Hall* (1992) Independent, 18 August, CA; *Hill v Van Erp* (1997) 188 CLR 159.
[26] *Greenway v Johnson Matthey plc* [2016] All ER (D) 207.

recovery for economic loss has not generally been allowed, however foreseeable it may have been.[27]

28 Thus, where a defendant negligently damages property belonging to a third party, a claimant who suffers economic loss through dependence on that property,[28] or a relationship with its owner,[29] will not be able to recover unless he too has an interest in the property or, possibly, in the venture in which the third party is involved[30]. Generally, courts will only allow recovery for pure economic loss where it can be said that the defendant has assumed a responsibility to the claimant[31] (although this is not an invariable rule[32]) and that the imposition of a duty would be fair (that is it would provide the claimant with adequate protection without undermining other legal principles or remedies). The existence of a contractual relationship between the defendant and claimant will tend to support the imposition of a tortious duty unless the terms of the contract exclude or are inconsistent with such a duty.[33]

29 The learned authors of "Clerk & Lindsell on Torts" explain the origins, rationale and operation of the exclusionary rule as follows.[34]

30 As noted in the parties' submissions, the leading authority was the 1875 case of *Cattle v Stockton Waterworks Co*, ibid, where the claimant suffered economic loss in performing a contract with a third party as a result of damage to that party's property. The defendant's negligence led to the saturation of an embankment on the third party's land and made it more difficult for the claimant to complete his contract with the third party to tunnel through the embankment. As a result, the claimant failed to make as much profit as would otherwise have been the case and sued the defendant for that loss of profit. Blackburn J held that such loss was irrecoverable on the ground that no property of the claimant was damaged.

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[27] *Murphy v Brentwood District Council* [1990] 2 All ER 908 at 934, HL, per Lord Oliver of Aylmerton; *Reynolds v Katoomba RSL All Services Club Ltd* (2002) 189 ALR 510.

[28] *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557, CA; *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205; *SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd* [1971] 1 QB 337, [1970] 3 All ER 245, CA; *Londonwaste v Amec Civil Engineering* (1997) 83 BLR 136.

[29] *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Simpson & Co v Thompson* (1877) 3 App Cas 279, HL; *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243; *Weller & Co v Foot and Mouth Disease Research Institute* [1965] 3 All ER 560; *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 2 All ER 145, HL; *Shell UK Ltd v Total UK Ltd; Total UK Ltd v Chevron Ltd* [2010] 3 All ER 793.

[30] *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265, HL, distinguished and explained in *Londonwaste v Amec Civil Engineering* (1997) 83 BLR 136; cf *Canadian National Rly Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289, Can SC; *Network Rail Infrastructure Ltd v Conarken Group Ltd; Network Rail Infrastructure Ltd v Farrell Transport Ltd* [2012] 1 All ER (Comm) 692.

[31] *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 520–521, HL; *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] 2 All ER (Comm) 929.

[32] *Customs and Excise Comrs v Barclays Bank plc* [2006] 4 All ER 256 at [51]–[52].

[33] *Henderson v Merrett Syndicates Ltd*, ibid, at 532, 534; *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Ltd) (in administration) and others* [2021] EWHC 590 (TCC).

[34] 23rd ed., 7-152 to 155.

31 The rule was affirmed by the Privy Council and House of Lords respectively in *Candlewood*, ibid, and *Leigh & Sullivan Ltd v Aliakamon Shipping Co.* [1986] A.C. 785. In *Candlewood*, the Privy Council held that a time charterer of a vessel could not sue for the profit it would have made during the period the vessel was under repair following a collision caused by the defendant's negligence.

32 In the *Aliakamon* case, the claimant had agreed to buy cargo to be shipped on the defendant's vessel. Because of poor stowage, the cargo was damaged. At the time of the damage, the claimant was neither the owner nor possessor of the cargo but under the terms of the purchase contract, he had assumed the risk of damage to the cargo. The House of Lords held that as the property was owned by a third party at the time it was damaged, the claimant had no claim.

33 The problem in both cases was that the claimant had no proprietary interest in the damaged property but only a contractual interest which resulted in economic loss as a consequence of the damage. However, where the claimant has a beneficial interest in trust property damaged by the defendant's negligence, the exclusionary rule does not apply and, by joining the legal owner of the property to the proceedings, he can recover as foreseeable economic loss consequential on the physical damage to the trust property.[35]

34 A different illustration of the general rule is provided by *Spartan Steel & Alloys Ltd v Martin*, ibid, where the claimant had to shut down its manufacturing operations due to a power cut caused by the defendants negligently cutting the supply line owned by a third party electricity supplier. The Court of Appeal held that the claimant was entitled to recover the profits that were lost due to its own property being damaged by the power cut (a "melt" that had to be removed from an electric arc furnace) because those losses were the result of physical damage to the claimant's property. That was not regarded as pure economic loss, but economic loss consequent on physical damage. However, the claimant was unable to recover the lost profit on four other melts that would have been processed in the period when the power supply was cut because they constituted pure economic loss, unrelated to any physical damage to the claimant's property. In *Spartan Steel*, the claimant's operations were dependent upon property owned by a third party. Such dependence may arise where there is no contract.[36]

35 The reasons given by the English courts for the no recovery rule fall under the heads of both proximity and fairness. In *Cattle*, the court was primarily concerned with the possibility of indeterminate liabilities should a duty be recognised. Blackburn J suggested that but for the no recovery rule, there might be claims for loss of wages by the workmen affected by physical damage to their place of

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[35] *Colour Quest Ltd v Total Downstream UK Plc* [2011] Q.B. 86 (CA).
[36] *Weller v Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569.

employment, and he endorsed the view that the court should redress "*only the approximate and direct consequences of wrongful acts*". A similar consideration influenced Lord Denning in *Spartan Steel.* He commented that "*if claims for economic loss were permitted for this particular hazard (a power cut) there would be no end of claims. Some might be genuine, but many might be inflated or even false.*" The English view is that to allow all claims for such economic loss would lead to unacceptable indeterminacy because of the "ripple effects" caused by contract and expectations. Proximity requires some special relationship between the defendant and the person suffering relational economic loss, one which goes beyond mere contractual or noncontractual dependence on the damaged property.

36 However, there are some "no recovery" situations where proximity and indeterminacy would not be a problem. The *Aliakmon* was such a case. Shippers are aware that damage to cargo may cause economic loss to the buyer who bears the risks under a C&F contract. The relationship is close and direct and the recognition of a duty to such a purchaser would not open the floodgates to unlimited liability to an indefinite number of other persons whose contractual rights were adversely affected. Nevertheless, Lord Brandon, giving the leading judgment in the *Aliakmon*, argued that any detraction from the general rule of non-recovery would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that certainty, which is of utmost importance in commercial matters, would be seriously undermined. He went on to counter the suggestion that denying liability was depriving the buyer of a fair remedy, with the argument that the lack of remedy was the buyer's fault in failing to include in the sale contract a provision requiring the seller to assign its rights to the buyer or exercise them on the buyer's behalf.

37 Departures from the exclusionary rule, outside England, emerged in *Caltex Oil*, ibid, where the High Court of Australia allowed recovery where the oil supply to the claimant's refinery was cut because the defendant damaged the supply pipeline which was not owned by the claimant. Although the ratio decidendi is said to have been not entirely clear, what seems to have influenced the High Court most was the fact that the damage to the claimant's refinery was specifically foreseeable. By the turn of the last century, in *Perre v Apand Pty Ltd* (1999) 164 ALR 606, the Australian High Court cautiously expanded the scope of exceptional recovery. The defendant there negligently supplied diseased potato seed to a grower who produced a diseased crop. That resulted in a quarantine being imposed on all growers within a 20 km radius of the outbreak. The claimants fell within the quarantine area and suffered losses both as growers and processors. McHugh J considered that the law in this area "*should be developed incrementally by reference to the reasons why the material facts in analogous*

cases did or did not found a duty". He identified the key reasons in pure economic loss cases as being indeterminacy, autonomy, vulnerability and knowledge. In *Perre*, there was little risk of indeterminacy, the autonomy of the defendant was already limited by its liability for the physical damage, the claimant was vulnerable as there was nothing he could do by way of contract to protect himself, and the defendant knew of the risks of supplying diseased seed. Hence, a duty was imposed.

38 Although the law of negligence in New Zealand also has its origins in the common law of England and other Commonwealth countries, over the last 20 years or so, the approach of the Courts there in determining whether a duty of care will be imposed in a novel fact situation has also diverged from the English approach. New Zealand Courts have adopted a modified and refined two-stage approach of analysing all the factual and policy factors in a particular case, and then asking whether it is just and reasonable that a duty of care of the scope contended for should be imposed.[37] In so deciding, the Courts have, in a number of cases, been particularly influenced by the desirability on policy grounds of consistency between common law and statutory rules.[38] The New Zealand Court of Appeal has indicated that it does not intend to modify its approach to the imposition of a duty of care even in light of decisions of the House of Lords.[39]

39 In *Canadian National Ry Co v Norsk Pacific S.S. Co* (1992) 91 D.L.R. (4th) 289, the Supreme Court of Canada developed an exception based on the notion of "joint venture". The defendant negligently damaged a railway bridge owned by a third party with the result that the claimant had to re-route its trains and suffered economic loss as a consequence. In the lead judgment, McLachlin J held that the close connection between the claimant and the bridge (the predominant use of the bridge was an integral part of the claimant's railway system and it supplied inspection and consulting services for the bridge) brought the situation within the joint venture categories and justified a finding of proximity. She rejected the policy (or fairness) argument that the claimant should have ensured or protected itself by the terms of its contract with the bridge owner arguing that little weight should be given to those factors as against that of the moral culpability of the defendant.

40 In Tonga, *Candlewood* and the English exclusionary rule were referred to (somewhat tangentially, but with apparent approval) in *Polynesian Airlines (Investments) Ltd v Kingdom of Tonga* [1998] Tonga LR 178. Counsels'

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[37] E.g. see *Attorney-General v North Shore City Council [The Grange]* [2011] 1 NZLR 178.
[38] *Kavanagh v Continental Shelf Co (No 46) Ltd* [1993] 2 NZLR 648 (CA).
[39] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), (affirmed at [1996] 1 NZLR 513; [1996] 1 All ER 756 (PC)).

submissions and my own research have not revealed the issue having been raised in any other published decision in the Kingdom to date. The rule continues to be applied in some other Commonwealth jurisdictions in the Pacific region.[40] Slightly further afield, Singapore has departed from it.[41]

41 In the present case, Ezinet does not assert any legal, beneficial or possessory interest or right in TCL's cable which might exempt it from the application of the rule. Instead, Ezinet seeks to circumvent the operation of the exclusionary rule by arguing, in essence, that s 4 of the *Civil Law Act*:

41.1 permits this Court to follow and apply the relevant jurisprudence of other common law jurisdictions, such as Australia, which has departed from the exclusionary rule in favour of an incremental approach for all novel duty cases involving economic loss claims;

41.2 requires the exclusionary rule to be necessarily qualified by reason of Tongan custom or norms; and

41.3 limits the application of the exclusionary rule, and/or qualifies it, by reason of s 103 of the Communication Act.

Section 4 of the Civil Law Act

42 Section 3 of the *Civil Law Act* provides that, subject to the provisions of the Act, the Court shall apply the common law of England and the rules of equity in force in England.

43 Contrary to Ezinet's submissions, the 2003 amendments to s 4 of the *Civil Law Act*[42] did not have the effect of 'broadening the application of the English common law in Tongan courts'. The amendments substituted the word "and" for the comma after the word "England" and deleted the words "and the statutes of general application". Consequently, Ezinet's recitation of s 4, as set out above, was inaccurate. In its current form, s 4 actually provides:

> **4 Extent of application**
>
> The Common Law ***of England*** and the rules of equity referred to in section 3 of this Act shall be applied by the Court —
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act in force in the Kingdom; and
>
> (b) only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> [emphasis added]

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[40] E.g. in Papua New Guinea, see *Mack Contractors Ltd v Wailo* [2009] PGNC 279 and, in Fiji, see *Manubhai Industries Ltd v Lautoka Land Development (Fiji) Ltd* [2002] FJCA 96.
[41] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37.
[42] Civil Law (Amendment) Act 2003

44 The enquiry therefore calls for consideration as to whether:

44.1 there is any other provision of any Act in force in the Kingdom which governs claims in negligence for economic loss and displaces or modifies the exclusionary rule;

44.2 the circumstances of the Kingdom and of its inhabitants permit (or prohibit) application of the exclusionary rule; and/or

44.3 there are any local circumstances which necessarily require qualification of the exclusionary rule.

45 Ezinet did not seek to identify any statutory provision in Tonga relevant to claims in negligence for economic loss which might displace the exclusionary rule. Nor has my research unearthed any. Ezinet does rely on s 103 of the *Communications Act* as a basis for qualifying the exclusionary rule, which is considered further below. I am therefore satisfied, subject to the discussion below in relation to s 103, that there are no other provisions of any Act in force in the Kingdom which govern claims in negligence for economic loss or which displace the exclusionary rule.

46 I did not understand Ezinet to submit that there are circumstances in the Kingdom, or of its inhabitants, which prevent application of the exclusionary rule. On the contrary, I consider the policy factors underlying the rule, as contended for by DSV, such as protection against indeterminacy (particularly in the local context) as well as certainty and predictability in the law to be powerful reasons to apply the exclusionary rule in Tonga.

47 I did understand Ezinet's submissions to focus on:

47.1 its 'moral duty' borne of a cultural norm in Tonga that expects members of civil society, the private sector and the general public, to assist or work together with the Government to discharge its duties when Government lacks the resources or technology to do so, especially in times of crisis;

47.2 the fact that Tonga is a very small island state, whose economy relies primarily on foreign aid and remittances; and

47.3 that the Tongan Government has 'enormous budgetary restraints' and is 'constantly lacking in resources',

as local circumstances which ought 'delimit' the effect of the English common law. By that, I understood Ezinet to contend that the rule should not apply in this case.

English common law vs 'common law world'

48 I turn first to consider Ezinet's argument that this Court should not follow the

common law of England but should instead apply the law of negligence and claims for pure economic loss, as it has developed in other jurisdictions within the 'common law world', specifically, Australia.

49 The submission amounts to urging this Court to act contrary to the express requirements of ss 3 and 4 of the *Civil Law Act*. Save for the limitations or qualifications set out in the subsections to s 4, only the common law of England is to be applied, not that of any other common law based jurisdiction. Nor does the provision enable the Courts to choose whichever common law developments elsewhere might be thought to best suit the conditions and requirements of Tonga or a particular litigant. That is not to be confused with s 166 of the *Evidence Act* which provides that judgments of superior courts of Commonwealth territories will be regarded as having persuasive authority.

50 Further, the Court of Appeal in *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 did not endorse the course advanced by Ezinet for this Court to adopt not the common law of England but of elsewhere in the 'common law world'. Relevantly, the Court of appeal stated:

> *"[11] A convenient starting point in considering the issues raised in this appeal is what is the applicable law. This is potentially important because in the common law world there have been incremental and significant changes to the common law as it applies to contracts of employment. The applicable law is identified in sections 3, 4 and 5 of the Civil Law Act Cap 25. The common law of England is to be applied with such modifications as may be required by these provisions which focus attention on the circumstances prevailing in the Kingdom of Tonga...."*

51 *Leiola* was concerned with employment law in the Kingdom, where there is (still) no general legislation covering that topic. In particular, the Court of Appeal did not embark upon a comparative analysis of English common law and any other before deciding which to apply. The Court identified two related 'strands' to the common law in England, namely, the implication into contracts of employment of terms of reasonable notice for termination and mutual trust and confidence. The Court concluded, in that case, that although the common law in Tonga would ordinarily imply a term into contracts of employment that the employer can dismiss an employee by giving the employee reasonable notice, such term could not be implied in that case because it would have conflicted with the detailed express terms of the employment contract under consideration.

52 The above statement from *Leiola* was referred to recently in *R v Tu'ivakano* [2019] TOSC 46 at [17]. The issue there was whether a single joint trial could be conducted in respect of multiple accused and separate indictments.[43] In

[43] Notwithstanding its title, there is nothing within the *Civil Law Act*, which confines its operation only to civil cases. That is particularly the case where, in Tonga, there is no dedicated legislation governing criminal procedure or process.

surveying the common law of England on the subject, the Court also considered how the issue had been addressed in Australia, New Zealand and Canada. It was observed that the prevailing English common law rule prohibiting such joint trials had been consistently applied in Australia where statute has not otherwise intervened or altered the rule; in New Zealand, the procedure was governed by statute; and that the Canadian jurisprudence on the issue had developed in a different direction to England, Australia or New Zealand and was also subject to a statutory Criminal Code. It was held, inter alia, that regardless of the merit or persuasiveness of the reasoning in the Canadian decisions, Tongan Courts were statutorily required to apply the common law of England.

53 Notwithstanding the passing of more than 50 years since Tonga was a British protectorate and the legislative abandonment of certain English statutes, Parliament has seen fit not to amend ss 3 and 4 in a manner which might support Ezinet's suggested course. Any shift away from the common law of England, where Tongan statutes are silent, or as otherwise provided by s 4, even where the English common law may appear to be 'dated', will require actual statutory amendment.

54 Accordingly, Ezinet's first argument fails.

55 However, if it transpires that the above conclusion is considered elsewhere to be wrong, then the following observations about the Australian position in relation to claims for economic loss arising from novel duties and Ezinet's claim herein may be instructive.

56 Firstly, a common key feature of the two decisions relied upon by Ezinet in *Caltex Oil* and *Perre v Apand* was actual knowledge. That is, the defendant tortfeasors in those cases specifically knew of the plaintiffs and that negligence on the part of the defendants would or might cause those plaintiffs financial harm. In the instant case, Ezinet has not pleaded either. There is no reference to knowledge on the part of DSV that Ezinet was a licensed internet provider in Tonga who was dependent upon TCL's cable remaining intact nor is there any reference to any basis upon which DSV could reasonably have been expected to know of the existence and location of the subsea cable at the time the ship was approaching the Nuku'alofa port.[44]

57 Secondly, let it be accepted for the sake of analysis, that the principal rationale for the English exclusionary rule - indeterminacy of potential claims - would likely apply in Tonga in respect of claims by end users but would be unlikely to arise in

[44] Cf paragraph 10(b) of the Further Amended Statement of Claim in which Ezinet pleaded that DSV 'knew or ought to have known that the TCL cable was located in or close to the Dugsit Venture's course and that the TCL cable was the only communications cable that supports the entire country online communications and in a small country like Tonga's limited resources and access to satellite technology, a breach of the TCL cable will cause a national crisis, which it indeed did'.

relation to claims by the very few licensed internet providers in Tonga such as Ezinet. If that assumption might be seen to potentially 'open the door', as it were, to acceptance of the Australian departure from the English exclusionary rule, then what of the other requirements for the existence of a duty of care in such cases as developed in that country?

58 Indeterminacy and other coined 'salient features' have been developed as part of a multifactorial approach in the Australian decisions where the posited duty is a novel one. [45] In *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258, Allsop P catalogued those features as including foreseeability of harm; the nature of the harm alleged; the degree and nature of control able to be exercised by the defendant to avoid harm; the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself; the degree of reliance by the plaintiff upon the defendant; any assumption of responsibility by the defendant; the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant; the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff; the nature of the activity undertaken by the defendant; the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant; knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff; any potential indeterminacy of liability; the nature and consequences of any action that can be taken to avoid the harm to the plaintiff; the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests; the existence of conflicting duties arising from other principles of law or statute; consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law. There is no suggestion in the cases that it is compulsory in any given case to make findings about all the features. Nor is the list seen as exhaustive. Rather, it provides a non-exhaustive 'universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content' by a close analysis of the facts bearing on

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[45] *Caltex Oil*, ibid, at 555 and 593; *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424; *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 162 CLR 340; *Hawkins v Clayton* (1988) 164 CLR 539 at 576; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551; *Bryan v Maloney* (1995) 182 CLR 609 at 619; *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Perre v Apand* (1999) 198 CLR 180; *McMullin v ICI Australia Operations Pty Ltd (No 7)* (1999) 169 ALR 227; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Agar v Hyde* (2000) 201 CLR 552; *Sullivan v Moody* (2001) 207 CLR 562 at 576; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185.

[45] *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1 at 76;

the relationship between the parties by reference to the salient features.[46]

59 Apart from allegations of knowledge (discussed above), Ezinet's pleaded bases for the posited duty specified reasonable foreseeability[47] and vulnerability.[48] However, those aspects of the pleading were disconnected from and did not support Ezinet's actual claimed loss and damage. Putting its case at its highest, Ezinet did not in fact suffer the losses it claims, as a licensed internet provider, by reason of the cable breakage per se. The claimed costs and losses have been suffered as a result of Ezinet acceding to TCL's request to provide satellite support services and (either by choice or failure) not to have entered into normal commercial arrangements with TCL in relation to the costs of those services or to have since taken any steps to recover those costs from TCL, whether in contract, restitution or otherwise. Viewed through that prism, DSV, being a ship owner based in Malta, could not reasonably be expected to have foreseen that in the event of the cable break, Ezinet would have agreed to provide satellite support services to TCL effectively for free. Had Ezinet entered into a commercial arrangement with TCL, such as it evidently did with TCC and Digicel, any costs paid by TCL to Ezinet for the temporary provision of the satellite services during the period that TCL's cable was out of commission, could easily have been recovered as part of TCL's economic loss claim against DSV resulting from the latter's negligent damage to TCL's property.[49]

60 For similar reasons, Ezinet was not vulnerable to the risk of suffering the actual loss and damage it now claims. It had the ability to protect itself from the financial consequences of DSV's want of reasonable care, by entering into a commercial arrangement with TCL, as it did with TCC and Digicel, for reimbursement of the costs of the temporary satellite services. The only evidence about that was from Mr Chapman who, notwithstanding his belief that Ezinet would always be reimbursed, failed to explain why he did not pursue TCL for that reimbursement, other than to say, that at the time, there was some expectation on his part that the Government and/or TCL might buy Ezinet. That that expectation did not come to pass is also not something which DSV could reasonably have been expected to foresee.

61 Thirdly, and beyond what has already been addressed, Ezinet did not present any further salient features analysis to support its contention that application of the Australian approach might support its claim that DSV owed it a duty of care or as to the scope of that duty.

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[46] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [173].
[47] [6]
[48] [11]
[49] Much like a claim for a hire car while the plaintiff's vehicle, damaged by the defendant's negligence, is being repaired.

Tongan custom

62 Ezinet's second argument was based on a pleaded assertion to the effect that it should be permitted to recover its claimed losses from DSV because it incurred them in honouring a Tongan cultural norm which required Ezinet to assist the Government to discharge its duties when Government lacked the resources or technology to do so, especially in a time of crisis.

63 Section 5 of the *Evidence Act* provides:

> **5 Custom**
>
> Where in any proceeding a question arises as to the existence of any right or custom, evidence may be given of —
>
> (a) any transaction by which the right or custom in question was created, modified, recognised, asserted or denied or which was inconsistent with its existence;
>
> (b) particular instances in which the right or custom was claimed, recognised, or asserted, or in which its exercise was disputed, asserted, or departed from.

64 Given the nature of DSV's challenge to the legal admissibility of Ezinet's claim, the directions made (without objection) for the hearing of the challenge, and consistent with s 5 above, it was incumbent on Ezinet to adduce evidence of the pleaded custom relied upon.

65 In its submissions,[50] Ezinet referred to paragraph 24 of Mr Chapman's affidavit, in which he deposed, relevantly, that:

> *"We were all working together to do what was best for Tonga and the notion of 'all hands to the pump' in national crisis was an expectation that we all held as Tongans".*

66 In his affidavit, Mr Ma'u deposed that:

> *"[8] MEIDECC was comfortable with TCL requesting help from local providers to assist the rescue effort. In a small economy like Tonga where there are enormous government budgetary restrictions as well as restrictions on resources and technology, it is not unusual in our culture (and in fact necessary as was in this case) to work together with the private sector (in this case a licensed communication provider) and civil society and call upon them to help government with the rescue effort in a national emergency for the good of the whole country as it had occurred in this case."*

67 Mr Piukala had a slightly different perspective, when he deposed:

> *"17. ... TCL's expectation was that everyone who could assist in Tonga, would need to scramble and that was what happened, especially with TCC and Digicel as they were part owners of TCL together with the government...."*

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[50] [4]

68 On that 'evidence', the following observations may be made.

69 Firstly, by definition, a 'custom' is a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time. The subjective beliefs or expectations of the two individuals who mentioned the topic, and only in the context of this incident, was not evidence of a custom widely accepted in Tonga of either personal or corporate citizens assisting the Government in times of crisis. Ezinet did not plead reliance upon, nor did it adduce, any authoritative work which might exist on the subject, expert opinion evidence or any evidence of any previous occasions on which the private and public sector have 'worked together' to assist the Government in a time of crisis.

70 Secondly, in this case, the asserted cultural norm appears to have been selectively invoked and without the altruistic intent suggested. Mr Chapman, in his position within Ezinet, admittedly did not agree to provide the satellite services to TCL free of charge for the good of the Government or the country. He expected that Ezinet would be reimbursed for the costs of those services. Ezinet pursued and recovered some of its costs from TCC and Digicel. That it chose not to, or failed to, do so in relation to TCL was never explained either in Ezinet's pleading, its evidence or submissions.

71 Thirdly, there was no evidence of the Government calling upon Ezinet for assistance, nor of Ezinet providing the Government with assistance. The relevant dealings were between Ezinet and TCL. TCL is not the Government and vice versa. As Mr Ma'u explained, TCL is a commercial company whose shares are owned by the Government, TCC and Digicel.[51] Section 19 of the *Companies Act* reminds that, as such, TCL is a separate legal entity from its shareholders, with its own assets (including the cable in question) and liabilities (including, arguably, to its wholesale customers such as TCC, Digicel and Ezinet).

72 For those reasons, I am unable to accept that the Tongan custom or norm asserted by Ezinet constituted local circumstances which necessitate qualification of the exclusionary rule.

73 Accordingly, that argument fails.

A 'small island state'

74 As to the other local factors advanced by Ezinet, namely, that Tonga is a very small island state, whose economy relies primarily on foreign aid and remittances and that the Government has 'enormous budgetary restraints' and is 'constantly lacking in resources', there was in fact no admissible evidence adduced to prove those assertions.

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[51] [3]

75 In this day and age, every developed or developing nation is dependent upon telecommunications and internet capability for the increasing multitude of every day financial transactions, whether subject to subject, government to government or between government and subject. If that factor alone warranted abandoning the exclusionary rule, one would expect England to have done so decades ago.

76 Further, the assertion that the Tongan Government has a limited budget and lacks resources, had little bearing on the actual facts of this case. That is because the Government's resources had nothing to do with the internet blackout. The secondary reason for the outage, and the only reason it lasted for as long as it did (notwithstanding the assistance of Ezinet and Kacific) was that, despite several years in the process, TCL had failed to honour its international obligations by not having a back-up system in place.

77 Accordingly, that argument fails.

Section 103 of the Communications Act

78 The preamble to the *Communications Act* describes it as an Act to regulate communications services in Tonga. Part VI of the Act provides for the licensing of 'network operators'. Section 26 prohibits a person from owning or operating a communications facility used to provide communications services to the public, without a network operator licence. 'Communications service' is defined in s 2 as a service for carrying communications by means of guided or unguided electromagnetic energy (including a broadcasting service). 'Broadcasting service' is defined as a service that delivers television programs or radio programs (including advertising or sponsorship matter, whether or not of a commercial kind, and matter, the primary purpose of which is to entertain, to educate or to inform an audience) to persons having equipment appropriate for receiving that service, whether the delivery uses the radio frequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but *does not include*:

78.1 a service (including a teletext service) that provides no more than data, or that provides visual images (whether or not combined with sounds) that consist predominantly of alphanumeric text;

78.2 a service for delivering subscription content;

78.3 *an internet service*; or

78.4 a service or a class of service of a kind specified in a declaration made by the Minister as not falling within this definition.

79 Mr Chapman described[52] Ezinet as a 'communication service provider registered

[52] [2]

and licensed under' the Act whose 'business is to offer internet services to Tongan consumers'.

80 A 'service provider' is defined in s 2 of the Act as a person registered under ss 41(2) within Division 3. That section provides that a person registered as a service provider may provide communications services to the public. Section 42 of the Act requires service providers to comply with the standard licence conditions specified in Schedule 2 of the Act. Those conditions include compliance with the provisions of the Act and other instruments made under it; compliance with international conventions/agreements; an indemnity in favour of the Government against any actions, suits, claims or proceedings arising out of or in relation to any breaches or failings on the part of the licensee; and provision of telephony, internet access services and other communications services provided by the licensee to His Majesty free of charge.

81 Part IX of the Act is entitled "Social Regulation". Division 1 relates to content applications services. Section 93 provides that the Division applies to content supplied by a licensee by means of a content applications service.

82 Within that division, and relevant to the present case, s 103 provides:

> **103 National emergency**
>
> During any period of national emergency, a licensee shall place its facilities that are used to provide content applications services, free of charge, at the service of Government, and shall also supply competent persons to operate such facilities and provide content applications services.

83 For the purpose of interpreting s 103, and in the context of Ezinet's reliance upon it, s 2 of the Act defines:

83.1 "*content*" as:

> text, sound, still picture, moving picture or other audiovisual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically, however, organised, formatted or programmed for delivery to end users.

83.2 "*content applications service*" as:

> (a) a broadcasting service (including a service that delivers content that enhances or provides information about content delivered by a broadcasting service);
>
> (b) a service for delivering subscription content;
>
> (c) an on-line information service (for example, a dial-up information service or audio-text service);
>
> (d) an on-line entertainment service (for example, a video-on-demand service or an interactive computer game service);

(e) any other on-line service (for example, an education service provided by the government); or

(f) a service or a class of service of a kind specified in a declaration made by the Minister as falling within this definition, but which *shall not include an internet service*.

83.3 "*subscription content*" as content which is made available to an end user only upon payment of a subscription fee;

83.4 "*internet service*" as a communications service that enables end users to access the internet;

83.5 "*internet service provider*" as a person who supplies, or proposes to supply, an internet service to the public; and

83.6 "*licensee*" as a network operator or service provider;

84 The term "on-line" is not defined in the Act. However, it is a term commonly understood and defined variously as operating under the direct control of, or connected to, a main computer; or connected by computer to one or more other computers or networks, as through a commercial electronic information service or the internet.

85 Ezinet contends, in terms, that the requirements of s 103 constitute a particular aspect of the relevant Tongan statutory framework which ought displace or qualify the exclusionary rule in cases such as the present, to which the provision is said to apply, and to permit recovery of losses suffered by Ezinet resulting from DSV's negligence.

86 In my view, at a high level of abstraction, there is merit in the proposition that if the relevant statutory framework of a country imposes an obligation on a local service provider to provide its services to Government during a national emergency, free of charge, the service provider should be able to recover it costs of having to comply with that statutory requirement, from the party whose negligence caused the emergency. In such circumstances, the wrongdoer will be presumed to have known the relevant law of the land in which it is operating. It will therefore have direct or imputed knowledge that, if its negligence were to cause a national emergency which invoked the said provision, licensed service providers would or might suffer financial harm. That statutory framework also becomes relevant in terms of proximity between the wrongdoer who is operating in a field to which the provision might relate, and the service provider. The risk of the relevant loss would be reasonably foreseeable. In the knowledge referred to above, the putative tortfeasor will have assumed responsibility to exercise reasonable care not to cause a relevant national emergency. The service provider would be reasonably entitled to rely on the other party to exercise reasonable care not to cause a relevant national emergency. The service

provider would be highly vulnerable to harm from the other party's conduct and would have little capacity (apart perhaps from insurance) to take steps to protect itself. In the context of the Tongan regulatory communications environment, the limited number of licensees at any given time would avoid any potential for indeterminate liability. The exclusionary rule could be seen to conflict with the duty arising in s 103 and the imposition of a duty of care on a party such as DSV would be consistent with the terms, scope and purpose of s 103.

87 That limited assessment by reference to only a number of the salient features discussed above from the Australian approach tends to favour the imposition of a relevant duty on DSV. Even the English three-part test, summarised by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605, as foreseeability of damage, proximity and that the situation ought be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other, would, but for the exclusionary rule, also support a duty by reason of s 103.

88 However, the real issue, as agitated by DSV in its submissions, is whether Ezinet's claim actually engages s 103.

89 For the reasons which follow, I find that s 103 does not apply to Ezinet's claim.

90 Firstly, and taking the relevant elements of s 103 in turn, I am not satisfied that the cable break and internet outage for approximately three weeks in January/February 2019, constituted a 'national emergency' for the purposes of s 103.

91 The term 'national emergency' is not defined in the *Communications Act*. As submitted by Ezinet, and deposed to by Mr Ma'u, assistance may be derived from the *Emergency Management Act*, where, on this issue, the two statutes are *in pari materia*.[53] Section 2 of that Act defines "emergency" as an event, actual or imminent, which endangers or threatens to endanger life, property or the environment and which requires a significant and co-ordinated response. However, s 32 provides:

> **32 Declaration of state of emergency**
>
> (1) The Prime Minister may declare a state of emergency for the Kingdom, or a part of the Kingdom, if satisfied that —
>
> (a) an emergency has happened, is happening or may happen in the Kingdom; and
>
> (b) it is necessary for emergency powers to be exercised to prevent or minimise —

[53] *Touliki Trading Ltd v Fakafanua* [1995] Tonga LR 8 citing Lord Diplock in *Hinds v The Queen* [1976] 1 All ER 353 at 359.

(i) loss of human life;

(ii) illness or injury to humans;

(iii) property loss or damage; or

(iv) damage to the environment.

92 For an example of that power in operation, and an explicit 'national emergency', one need look no further than the current Covid-19 pandemic and the state of emergency declared by the Prime Minister in March 2020 which has been renewed on a monthly basis since.

93 Even though s 103 of the *Communications Act*, by its terms, does not expressly require a declaration of a state of emergency pursuant to the *Emergency Management Act*, in my view, it is more likely than not, at least as a matter of consistency, that Parliament intended that s 103 could be invoked during a period of declared national emergency.

94 In this case, the Government never declared a state of emergency as a result of the cable break. The purported explanations for that by Mr Ma'u[54] were unconvincing. So too was his assertion[55] that even though a state of emergency was not declared under the *Emergency Management Act*, "Government had treated the incident for all intents and purposes as an emergency" under that Act.

95 There is no pleading and no evidence that the Prime Minister at the time or the relevant Minister responsible for the *Communications Act* or any other member of Parliament considered the communications outage to have been a national emergency. That is reflected in the Parliamentary minutes exhibited by Ms Mafi. It is remarkable that, if as contended by Ezinet, the days and weeks following the incident were times of actual national emergency, Parliament did not sit to discuss the matter until 19 February 2019, a month after the event. Further, a careful search of those minutes fails to reveal even one reference by any of the honourable members recorded that day to the word "emergency" or "crisis". There was no discussion whatsoever of whether to declare a state of emergency or why one had not been earlier declared. Most of the discussions centred around the causes for the outage including the possibility of a nefarious terrorist attack, that the damage to the cable was expected to cost the Government "millions" (none of which has been claimed in this proceeding) and the establishment of an investigative committee. The balance of the record was devoted to disagreements among members in relation to the operation of clause 51 of the Constitution (concerning the function, constitution and powers of Cabinet) and the establishment of the committee. The only reference to Ezinet in

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[55] [15]

the minutes was when the Honourable Minister for Trade stated:[56]

> *" ... there has been information received and TCC has come, and Digicel as well as EZINET. Also, part of it is the wholesaler of that industry which is TCL. And we have met several times. There was a debriefing of Cabinet and all the teams at the Tanoa, and they invited everyone to attend. That is, regarding the question."*

96 Alternatively, and putting aside for the moment the lack of any declared state of emergency, and focusing more on the definition of 'emergency' in the *Emergency Management Act*, the only evidence to support Ezinet's contention was from Mr Piukala[57] that he told the media that the problem was "*a national problem - a national crisis*", and from Mr Ma'u[58] who described the problem in terms of "*the characteristics of the incident and impact of the communications environment in Tonga, and also the potential threat to national security, which required the significant coordinated rescue effort...*", none of which reflected the definition of 'emergency'.

97 Secondly, even if be accepted that the outage constituted a national emergency, by reason say of the outage endangering or threatening to endanger property in the form of the inability to receive remittances from overseas, it is unclear from Ezinet's pleading and its evidence as to whether the satellite facilities it supplied were used to provide "content application services". That is because the definition of that term includes a "broadcasting service" but the definition of that term excludes an internet service. Further, even though the other elements of the definition of "content application service" which refer to various online services might naturally include internet services as provided by Ezinet, the last element in subsection (f) refers to other services or a classes of service of a kind specified in a declaration made by the Minister, "but shall not include an internet service".

98 Thirdly, there is no pleading or evidence to the effect that Ezinet supplied its satellite services free of charge. The evidence is that it always expected to be reimbursed for those costs.

99 Fourthly, and perhaps most importantly, there is no evidence that Ezinet supplied its services to, or placed its facilities at the service of, the Government. As discussed above, Ezinet supplied its services to TCL (as well as TCC and Digicel, from whom it recovered some costs) and TCL is not the Government. Moreover, there was no evidence of any request from Government for Ezinet to make its satellite services available to Government.

100 Fifthly, there is no evidence of any direction or request to Ezinet from the relevant

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Minister invoking s 103.

101 Sixthly, there is no evidence that, at the relevant time, Ezinet agreed to supply, or considered itself compelled to supply, its satellite services by reason of s 103 and/or the conditions of its licence requiring compliance with that provision.

102 Accordingly, the s 103 argument fails.

Result

103 For those reasons, I am satisfied that, pursuant to ss 3 and 4 of the *Civil Law Act*, the English common law exclusionary rule applies to the instant case and that there are no other statutory provisions in force in the Kingdom nor are there any local circumstances which require departure from or qualification of that rule.

104 As such, Ezinet is precluded from recovering against DSV for losses claimed to have been suffered by reason of DSV's negligent damage of TCL's communications cable.

105 Further, as the said exclusionary rule does not permit of the existence of an actionable duty of reasonable care on the part of DSV not to have caused Ezinet economic loss, Ezinet's pleaded claim:

105.1 does not disclose a cause of action in negligence; and/or

105.2 has no prospects of success.

106 Accordingly, Ezinet's claim on the limitation fund is refused.

107 Given the relatively novel issues raised in this matter, my provisional view is that each party should bear its own costs. If any party seeks a different order in relation to costs, an application is to be filed within 14 days of issuance of this ruling.

108 I will also hear from DSV and TCL as to the form of final orders to be made for the administration and distribution of the limitation fund, including TCL's costs of the claims phase.

NUKU'ALOFA
29 September 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE