Solicitor General
28/09/22

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

CV 55 of 2022

IN THE MATTER OF an application for leave to apply for judicial review
BY **FATAI HELU** and **PAULA PIVENI PIUKALA**
OF A DECISION BY the **ELECTORAL COMMISSION**
IN RESPECT OF the election of **LORD NUKU**

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
To: Mr S. Fonua for the Applicants
The Electoral Commission
Lord Nuku
Date: 29 August 2022

Background

1. On 6 September 2017, judgment was entered against Lord Nuku and Yan Jiang Group Ltd in the sum of TOP$3,380,335.[1] The company was subsequently placed in liquidation.

2. On 2 September 2021, His Majesty issued Writs of Election for the nine Nobles' Representatives and 17 Peoples' Representatives of the Legislative Assembly[2] to be held on 18 November 2021.

3. The PTOA[3] party, also known as the Democratic Party, fielded candidates for the peoples' representatives of a number of constituencies in the general election. Fatai Helu is the President of the party. Paula Piukala is an executive member. He was also one of the candidates for Tongatapu 7.

4. Lord Nuku nominated for re-election as a representative of the Nobles. As at that date (and now), the judgment debt against him remained outstanding.

Clause 65

5. Clause 65 of the Constitution provides, relevantly:

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[1] *Nuku v Luani* [2017] TOCA 5
[2] Per clauses 56 and 60 of the Constitution.
[3] Paati Temokalati 'a e 'Otu Motu 'Anga'ofa.

65 Qualification of representatives

Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer:

Provided that a person resident outside of Tonga who is qualified to be an elector will qualify as a candidate only if he is present in Tonga for a period of 3 months within the 6 months before the relevant election.

The Applicants' contention

6. The Applicants herein contend that the restriction in clause 65 should be interpreted as also applying to nobles' representatives, for if it doesn't, it conflicts with clause 4 which provides:

> 4 Same law for all classes
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> There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.

7. Between 7 and 12 July 2021, Mr Fonua, on behalf of the Applicants, exchanged emails with the former Acting Attorney General, Mr Kefu, on this issue. Mr Kefu opined (for reasons discussed further below) that clause 65 only applied to peoples' representatives. Mr Fonua disagreed.

8. On 8 July 2021, Mr Fonua wrote to Lord Fakafanua as 'Chairman' of the Legislative Assembly for his view on the issue. Mr Fonua added that if Lord Fakafanua agreed with Mr Kefu, than "an application ought be made to the court for the correct interpretation of clause 65". Lord Fakafanua did not reply.

9. Following the election on 18 November 2021, Lord Nuku was elected as the nobles' representative for his electoral district of 'Eua.

The decision

10. On 10 December 2021, Mr Fonua wrote to the Electoral Commissioner on the issue and specifically in relation to Lord Nuku. He enquired as to why the Commission had allowed Lord Nuku to be a candidate while there was an "unpaid judgment debt against him".

11. On 14 December 2021, the Supervisor of Elections, Pita Vuki, responded that clause 65 only applies to the election of the "representatives of the people" ("***the decision***").

This application

12. On 17 August 2022, Mr Fonua filed this application for leave to apply for judicial review of the decision. The application is supported by an affidavit of Mr Piukala and a proposed Statement of Claim should leave be granted.

13. Mr Piukala deposed, among other things, that the objective of the PTOA is 'to promote the principle of equality before the law in the Kingdom' and that the PTOA and its members 'are interested in this case because it believes that the laws of the Kingdom should be applied equally to the nobles and the people'.

14. The relief sought by the Applicants, as set out in their proposed Statement of Claim, includes a declaration that clause 65 applies to nobles' representatives and an order that the election of Lord Nuku to the Legislative Assembly is invalid.

Hearing

15. On 26 August 2022, in accordance with Order 39 rule 3(1) of the *Supreme Court Rules*, the matter was called, and I heard from Mr Fonua. Notwithstanding that rule 2(3) provides that applications for leave are to be ex parte, Mr Fonua had for some reason served the notice of listing on the offices of Mr Edwards SC, who once acted for Lord Nuku. It appears Mr Fonua also served the Electoral Commission because Lord Dalgety, the Chairman of the Commission, also appeared, and from whom I also heard.

Consideration

16. Order 39 rule 2(1) of the *Supreme Court Rules* provides that no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with the rule. 'The purpose of the requirement of leave is to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive *inter partes* judicial review hearing, and to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full *inter partes* hearing': *Karalus v Royal Commission of Inquiry into the sinking of the MV*

Princess Ashika [2010] Tonga LR 133 at [7] ("***Ashika***");[4] *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [10].[5]

17. After considering the material filed and having heard from Mr Fonua (at some length), and for the reasons which follow, the application for leave must be refused.

Contravention of the Electoral Act

18. The proposed proceedings are a collateral attack on the validity of Lord Nuku's election. As such, they contravene s. 25 of the *Electoral Act*, which provides, relevantly:

> **25 Method of questioning election**
>
> (1) No election and no declaration of poll shall be questioned except by a petition complaining of an unlawful election or unlawful declaration (in this Act referred to as an election petition) presented in accordance with this Part of this Act.

19. As the Court of Appeal observed in *Tapueluelu v Attorney General* [2016] TOCA 6 at [30], the Applicants here seek to 'stand outside this legislative scheme' but they are not able to do so in the face of the clear words of ss 25(1) that "No election ... shall be questioned except by a petition ...." presented in accordance with Part V of that Act.

20. When faced with this realization during oral submissions, Mr Fonua equivocated over whether his clients might maintain the second limb of the relief sought, namely, an order that Lord Nuku's election is invalid. As at the conclusion of Mr Fonua's submissions, that relief had not been withdrawn.

21. Further, s. 26 limits those who may present election petitions to:

    (a) a person who voted or had a right to vote at the election;

    (b) a person claiming to have had a right to be elected or returned at the election; or

    (c) a person alleging himself to have been a candidate at the election.

22. In *Tapueluelu*, ibid, the Court of Appeal described such persons as having a

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[4] Referring to the 1991 edition of the [UK] Supreme Court Practice (the White Book) states (53/1-14/8).
[5] Referring also to *Davey v Aylesbury Vale District Council* [2008] 2 All ER 178.

"direct interest in the outcome" including "all who had a right to vote in that constituency". Mr Fonua confirmed during oral argument that neither of the applicants are electors within the district of 'Eua. Therefore, even if the current proceedings could be regarded as falling within Part V (which they cannot), the Applicants do not fall within any of the categories of persons who may present an electoral petition in respect of the election of Lord Nuku.

23. Mr Piukala was well familiar with the provisions of the *Electoral Act*. At the election, Mr Piukala lost to Sione Sangster Saulala. Mr Piukala filed an electoral petition challenging the validity of Mr Saulala's election and conducted those proceedings in person. On 2 May 2022, Mr Saulala's election was declared void for bribery: *Piukala v Saulala* [2022] TOSC 50. Mr Saulala appealed that decision and on 9 August 2022, his appeal was dismissed (AC 10 of 2022). A by-election has been called for 3 November 2022.

24. Further, even if the Applicants did fall within s. 26, the proceedings have not been commenced within 28 days after the day on which the result of the poll has been declared as prescribed by ss 28(1). The importance of strict adherence to that timeframe was explained by the Court of Appeal in *Tapueluelu*, ibid, as follows:

> *"[27] While the Constitution contains some provisions relating to elections it does not flesh them out with a detailed scheme for how an election should be conducted and disputes about its outcome resolved. That is left to the Legislature and the scheme is found in the Electoral Act. The peace, order and good government of Tonga obviously requires as much stability as possible in the membership of the Legislature. Elections, whilst essential in a democratic society, have the potential to create some degree of instability until the composition of the Legislature is settled, especially if the result of an election is generally, or in particular constituencies, a close one. It is highly desirable, therefore, that challenges to an election outcome are made and determined with all due speed. It is accordingly to be expected that any sensible electoral scheme will so provide and, in particular, that there will be a strict time limit within which any challenge must be made.*
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> ...
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> *[29] Those restrictions are a reasonable and proportionate limitation upon the disqualification provisions found in the Constitution. They do not "infringe the Constitution", to adopt the expression of this Court in Touliki Trading v Fakafanua and Kingdom of Tonga (No.2) [1996] Tonga LR 145, 152. They merely ensure that the bringing of belated challenges does not create instability in Tongan society and that only persons with a direct interest can bring challenges. They therefore further legitimate constitutional goals. Similar provisions are found in other democratic societies."*

25. Further, in *Piukala v Saulala* [2022] TOSC 50, it was observed that:

> *"[28] Provisions such as ss 27(1) and rule 17(2)(c)[6] serve a critically important purpose. They are plainly intended to ensure that the outcome of an election can be known with certainty within defined and relatively short timeframes. Thus, the longer the period between an election and the determination of election petitions challenging the results of the election, the greater the risk of uncertainty in the relevant electorate and within Parliament. Further, where, as here, a Respondent has, in the interim, been appointed to Cabinet, delays in the determination of the petition will prolong and may exacerbate the potential for uncertainty in respect of Cabinet decisions made during that period."*

Hypothetical

26. As a consequence of the above refusal to permit the Applicants to circumvent the requirements of the *Electoral Act*, their proposed relief in the form of an order or declaration that Lord Nuku's election is invalid is not available. Accordingly, the issue they seek to agitate in respect of the interpretation of clause 65 becomes purely academic or hypothetical.

27. Ordinarily, the court will not grant declaratory relief in order to decide hypothetical or future questions where there is no current dispute between the parties.[7] In the case of a hypothetical issue there is no decision which can properly be made the subject of an application for judicial review. Any conclusion reached by the court is necessarily obiter and therefore does not establish a precedent.[8]

28. Notwithstanding, the court has a discretion to adjudicate on academic questions. However, even in the public law area that discretion should be exercised with caution and only if there is good reason in the public interest to do so.[9]

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[6] Of the Election Petition Rules, which requires the Court to set a trial date within three months of the filing of a petition unless extended by special leave of the Court.

[7] *Re Barnato, Joel v Sanges* [1949] 1 All ER 515–521, CA; *Re F* [1990] 2 AC 1; *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125, [1994] 36 LS Gaz R 36, CA; Taylor *v Lancashire County Council & Anor* [2005] EWCA Civ 284.

[8] *R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2003] 3 All ER 784; *R (on the application of Grenville College London Ltd) v Secretary of State for the Home Department* [2014] EWHC 1065 (Admin), [2014] All ER (D) 174 (Apr).

[9] *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, [1999] 2 All ER 42, HL, in which the House of Lords declined to exercise its discretion on the basis that the unusual facts of the case did not provide a good basis for deciding a question of principle. Cf *R v Secretary of State for the Home Department, ex p Adan* [1999] 4 All ER 774–782, [1999] 3 WLR 1274–1283, CA, per Lord Woolf MR, where the Court of Appeal did adjudicate on an academic question on the grounds that there was a point of importance which arose in numerous other cases and which it was in the public interest to determine. In *Abdi v Secretary of State for the Home Department* [1996] 1 All ER 641, sub nom *R v Secretary of State for the Home Department, ex p Abdi* [1996] 1 WLR 298, HL, the House of Lords addressed an academic issue which it described as 'a question of fundamental importance and a very difficult case' (see at 645 and 302 per Lord Slynn of Hadley).

29. In my view, and for the reasons developed below in relation to whether the Applicants have presented an arguable case for leave, I do not consider that there is good reason in the public interest to exercise discretion in favour of granting leave.

Delay

30. However, if I am wrong about any of the preceding findings, Order 39 rule 2(2) of the *Supreme Court Rules* provides:

> (2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.

31. In light of Mr Fonua's enquiries about (i.e. being 'alive' to) this issue in July 2021, it would be reasonable to calculate the three month period from the date the Electoral Commission accepted Lord Nuku's nomination for election (which itself was a manifestation of the Commission's view as to the application of clause 65); alternatively, the date his election was announced later in November 2021. At the very latest, time ran from 14 December 2021, when the Supervisor of Elections responded to Mr Fonua's enquiry. At all events, this application was filed more than eight months from the date when the grounds for it first arose. Subject to there being any 'good reason' for an extension of time, the application is out of time. The Applicants ask for an extension of time.

32. The Court's discretion to extend time is a wide one. Where, as here, there has been significant delay, '[t]he question is whether, on the facts, there is a reasonable excuse for the delay and there are good reasons for extending time'. For instance, the Applicants' circumstances may have been such that they could not with reasonable diligence file an application within three months. In other circumstances, the issue arising in the case might be of such general importance that leave should be granted notwithstanding an unacceptable delay: *Tauafaeteau v Supervisor of Elections* [2015] TOSC 12 at [12].

33. However, even if good reasons are established, the Court retains the discretion to refuse leave if the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice, not only the instant parties, but the wider public and/or the rights of any person or would be detrimental to good

administration: *Ashika*, ibid, at [8], [9].

34. The reasons for the delay deposed to by Mr Piukala are that he was busy with his own election campaign and subsequent court case, and that the volcanic eruption (on 15 January 2022) and the Covid-19 pandemic (from 1 February 2022) 'affected the filing' of the application.

35. In my view, none of those constitute a good reason to extend time:

    (a) There was no attempt in the Applicants' material to explain why, given Mr Fonua has been raising the issue since at least July 2021, the application was not brought much earlier and certainly before the election.

    (b) Similarly, there was no explanation for the approach to the Electoral Commission being in December 2021, that is, after the election.

    (c) The delay takes on a far more onerous complexion in the context of the provisions of the *Electoral Act* as referred to above. Promptitude of certainty within Parliament following an election is a matter of high public importance.

    (d) That Mr Piukala was busy with his own court proceedings is irrelevant given that Mr Fonua has been engaged or consulted on this issue for over a year.

    (e) No explanation was forthcoming from Mr Helu.

    (f) While some latitude might be given for the disruptions caused by the volcanic eruption, resulting tsunami and the Covid-19 restrictions, they at best, may account for two to three months of delay. But they do not answer the antecedent failure to commence proceedings well before those disruptions or before the election, or at the latest, within 28 days of the result of it.

    (g) For the reasons discussed below, the asserted general importance of the clause 65 issue is more chimerical than real.

    (h) Further, and in any event, to extend time now, after the election has been concluded, eight election petitions from it have been determined including appeals therefrom, three peoples' representatives have been unseated and by-elections for those constituencies have been called, would:

        (i) likely cause substantial hardship to Lord Nuku by dragging him into this litigation and presenting very belated uncertainty over his election

until the substantive proceeding could be heard and determined;

(ii) substantially prejudice the wider public interest in certainty in Parliament; and

(iii) for the reasons stated in the sections above concerning the proper procedure under the *Electoral Act*, be detrimental to good administration.

No sufficient interest

36. Even if time were extended, Order 39 rule 3(2) provides that the Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

37. Sufficient interest is the first and foremost consideration on an application for leave to apply for judicial review; and it is a broad flexible concept: *Taufa v Rex* [2005] TOCA 1. It is a mixed question of fact and law, a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case. The Court will be loath to take a 'short cut' by finding against an applicant on the topic of sufficient interest, or of standing: *Lau Lava Ltd v Minister of Labour Commerce and Industries* [2004] TOSC 62.[10]

38. A decision at the initial stage on sufficient interest is not, except in simple cases where it is obvious that the applicant has no sufficient interest, a matter to be determined as a jurisdictional or preliminary issue in isolation on the applicant's ex parte application for leave to apply. Instead, it is properly to be treated as a possible reason for the exercise of the Court's discretion to refuse the application when the application itself has been heard and the evidence of both parties presented, since it is necessary to identify 'the matter' to which the application relates before it is possible to decide whether the applicant has a sufficient interest in it.

39. In simple cases in which it can be seen at the earliest stage that the applicant has no interest at all, or no sufficient interest to support the application, it would be quite correct at the threshold to refuse him leave to apply. The right to do so

[10] Referring to *'Akau'ola v Pohiva* [1990] Tonga LR 159 at p165, where this was referred to as a "draconian" step which should only rarely be taken.

is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications.

40. But in other cases, it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context: *Flyniu Airlines Ltd v Faletau* [2004] TOSC 49.[11]

41. The interest asserted by the Applicants here is that the Commission's decision is 'contrary to their belief' and that the PTOA has a 'keen interest in pursuing justice when necessary'.[12]

42. In my view, those interests are not sufficient to warrant a grant of leave. Neither Applicant is an elector in 'Eua. It is obvious that neither of them have, or could have, any direct or personal interest in the issue or the Commission's decision on it. The decision amounts to no more than the Commission's view on the interpretation of clause 65. It does not relate to the Commission's statutory functions in respect of either of the Applicants or their rights or obligations under the Constitution or the *Electoral Act*. The PTOA has no direct interest in the election of Nobles' Representatives. As is evident from its mandate, the party is concerned with the election of peoples' representatives. During submissions, Mr Fonua was equivocal about whether the PTOA membership includes any nobles other than to say that he believed some 'aligned' themselves with the PTOA from time to time. In my view, the true interest in bringing the application is purely a political one focussed, in an electoral context, on challenging a Constitutional distinction between nobles and commoners.

43. Beyond that, it has been said regularly that at this stage of the analysis of an application for leave, the applicant need only show that he has a prima facie or arguable case or reasonable grounds for believing that there has been a breach of a public duty: e.g. *Flyniu Airlines Ltd v Faletau*, ibid.

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[11] Citing IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] UKHL 2; [1981] 2 All ER 93 (HL).

[12] [15] and [18] of Mr Fonua's memorandum accompanying the application.

No arguable case

44. In considering that requirement, the Court must be satisfied that there is an arguable case for review. The purposes of the requirement for leave in respect of proceedings for remedies in public law also include to:

    (a) prevent the time of the court being wasted by busybodies (cranks and other mischief makers) with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived; and

    (b) protect against abuse of legal process'. [13]

45. The burden upon the applicant in that regard is not onerous. No in-depth analysis by the court is required. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, grant leave to apply for that relief: *Public Service Commission v Public Service Tribunal* [2019] TOSC 53.[14]

46. The controversy presented by the Applicants here rises no higher than the proper interpretation of clause 65 and its relationship with clause 4. There are no factual issues revealed on the material. In my view, and after hearing from Mr Fonua,[15] the Applicants' contentions may be conveniently addressed at this stage.

47. Mr Fonua explained that his clients' contention is based essentially on two propositions:

    (a) firstly, the reference to 'no person' in clause 65 (may be chosen if he/she has an outstanding judgment debt) must mean 'any person', including nobles and commoners; alternatively, it is ambiguous; and

    (b) secondly, if clause 65 does not apply to nobles, then it conflicts with clause 4 which is to be regarded as 'paramount' and therefore clause 65 must be

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[13] *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 (HL).

[14] Citing Flyniu Airlines Ltd v Faletau, ibid; Public Service Association (PSA) v Government of Tonga [2016] TOSC 34 at [9].

[15] Who, during argument, appeared to exhaust his submissions when he said he could not take the matter any further.

read subject to that provision.

48. The modern common law approach to statutory interpretation involves consideration of the text, context and purpose of the relevant enactment: *Attorney General v Ikamanu* [2021] TOCA 3. The natural and ordinary meaning of the words of the Act must be read in their context and in the light of the purpose of the Act: *Crown v Schaumkel* [2012] TOCA 10.[16] The overarching requirement is that the Court must give effect to the ascertained purpose of the legislature when it enacted the contested law.

49. The Applicants' first proposition illustrates the vice of selectivity or 'cherry picking' words in isolation rather than considering the entirety of the relevant text: *Wiebenga v 'Uta'atu* [2005] TOCA 5. When the full text is considered, the following observations present and the fallacy in the first proposition is revealed.

50. First, the opening words of clause 65 refer to "Representatives of the people". There is no reference elsewhere in the clause to nobles or representatives of the nobles. That may be seen as an application of the linguistic maxim *expressio unius est* exclusio *alterius* (to express one thing is entirely to exclude another). As an aspect of the principle *expressum facit cessare tacitum* (to state a thing expressly ends the possibility that something inconsistent with it is implied), the *expressio unius* principle is applied where a statutory proposition might have covered a number of matters but in fact mentions only some (or as here, one) of them: *Attorney General v Ikamanu*, ibid, at [47].

51. Second, the phrase following in the first line: 'any person' (who is qualified to be an elector may nominate as a candidate) is referable to, and informed by, the opening words and can only mean any person wishing to be chosen as a representative of the people.

52. Third, such person may nominate as a representative for the electoral constituency in which he/she is registered. Clause 60 provides that the Legislative Assembly shall determine the boundaries of electoral districts for the election of representatives of the nobles and shall establish an independent Commission to determine the boundaries of the electoral constituencies for the

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[16] Referring to *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17. See also *Pacific International Commercial Bank Ltd v National Reserve Bank of Tonga* [2018] TOSC 26 at [88].

election of representatives of the people. Clause 65 does not contain any reference to "electoral districts", the term used in relation to nobles' representatives.[17] Therefore, the reference only to "electoral constituency" is consistent with an interpretation of clause 65 as applying only to peoples' representatives.

53. Those first three reasons align with the views expressed by Mr Kefu when he was consulted by Mr Fonua.

54. Fourth, it follows that the subject exclusion - "that no person may be chosen..." – must be referable to and informed by the preceding text, which, as demonstrated above, relates solely to peoples' representatives. In other words, the only 'persons' with which the provision is concerned are persons wishing to nominate for election as peoples' representatives. On that interpretation, no ambiguity arises. While Mr Fonua maintained an assertion of ambiguity, he was unable to specify or explain it without resorting to the vice described above.

55. Fifth, the final part of the substantive provision refers to a "nomination paper". The submission of nomination papers forms part of the procedure prescribed by Part III of the *Electoral Act* and the *Electoral Regulations*. Subsection 9(2) of the Act provides that every candidate shall be nominated in writing in accordance with Form 4 of the Schedule signed by 50 persons who are qualified electors for that electoral constituency. The candidate shall assent to the nomination and make the declaration therein in writing by fixing his signature to the nomination paper. In accordance with clause 65 of the Constitution, a candidate may nominate as a candidate only in the electoral constituency where he is registered as an elector. Subsection (6) provides that the section does not apply to elections of representatives of the nobles. Subsection 12(7) provides that the procedure for voting in respect of each constituency does not apply to nobles' elections. Section 9B provides that elections of the representatives of the nobles shall be in accordance with such Regulations as the Prime Minister with the consent of His Majesty in Council may make. The election of nobles' representatives is otherwise governed by the *Electoral (Elections of Representatives of the Nobles)*

[17] Although the distinction is not as clear in the *Electoral Act* which appears to use the two terms more interchangeably.

Regulations 2017.

56. As for context, clause 65 appears within Part II of the Constitution which established the law in relation to the form of Government. Specifically, the provision is within the section of the Part concerned with the composition, powers and procedures of the Legislative Assembly. It follows on from clauses 63, qualifications of nobles, and 64, qualifications of electors. The first provides that every noble shall be competent to vote in an election for representatives of the nobles and to sit in the Assembly if chosen according to law. The second disqualifies nobles from being entitled to vote in an election for representatives of the people. Clause 65 prescribes (and proscribes) the qualifications for the third category of persons involved in the electoral process, namely, representatives of the people.

57. The intended purpose in excluding only persons with outstanding judgment debts from standing for election as a peoples' representative, and not nobles in a similar condition, is not apparent from the text of the provision or elsewhere in the Constitution. Mr Fonua was unable to posit any likley explanation.

58. However, where, as here, the words of clause 65 are clear and unambiguous, they themselves indicate what must be taken to have been the intention of King George Tupou I in 1875 and successive Parliaments since, and there is no need to look elsewhere to discover their intention or their meaning: *Gough Finance Ltd v Westpac Bank of Tonga* [2005] Tonga LR 390 at 394.

59. Otherwise, the Applicants' first proposition effectively asks the Court to read in or insert words into clause 65 to include a reference to nobles' representatives. In that regard, Mr Fonua relied on the 'Golden Rule'. In *Tu'itavake v Porter* [1989] Tonga LR, Webster J described the rule thus:

> *"The Golden Rule, based on the words of Parker CB in Mitchell v Torrup (1766) Park 227, allows for a departure from the literal rule of interpretation when the application of the words in the ordinary sense would be repugnant to or inconsistent with some other provisions in the statute or even when it would lead to what the court considers to be an absurdity. The usual consequence of applying the Golden Rule is that words which are in the statute are ignored, or words which are not there are read in. Often the Golden Rule simply serves as a guide to the court where there is doubt as to the true import of the words in their ordinary sense. When there is a choice of meanings there is a presumption that one which produces an absurd, unjust or inconvenient result was not intended, but it is emphasized that the Rule is*

> *only used in the most unusual cases as a justification for ignoring or reading in words. Cross, "Statutory Interpretation" p. 14-15; Halsbury's Laws (4th Ed) Vol. 44 para 896."*

60. A judge has a limited power to add to (alter or ignore) statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute, or in very clear and exceptional cases of apparent inadvertence by the draftsmen and Parliament: *'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2019] TOSC 52.[18] For the reasons which follow in relation to the Applicants' second proposition, no such mischief or defect arises here.

61. The Applicants' second proposition relies on the so-called "one law for all" provisions of clause 4 and an apparent conflict between it and clause 65.

62. On the above interpretation of clause 65, the restriction against persons with outstanding judgment debts from being permitted to stand for election applying only to peoples' representatives clearly distinguishes between nobles and commoners.

63. Whilst not referred to explicitly by Mr Fonua, it is implicit in the Applicants' contention that if the Court is not prepared (or has no power) to effectively rewrite clause 65 so that it applies to nobles' representatives, then as it offends clause 4, which the Applicants contend is a 'paramount provision', it must follow that clause 65 would have to be declared invalid to the extent of any inconsistency. Such an outcome would also likely lead to the floodgates opening in respect of other provisions of the Constitution which also arguably offend clause 4.

64. Pursuant to clause 90 of the Constitution, this Court has jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to land). Clause 82 provides that the Constitution is the supreme law of the Kingdom and that if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void. 'It is accordingly not in doubt that an Act of the legislature (or an Order-in-Council) may be declared invalid by the Supreme Court, or by the Court of Appeal, if it be found to infringe

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[18] Citing Sir Rupert Cross on Statutory Interpretation (3ed, 1995) 49, referred to in the 2003 article by the Hon. Justice Susan Glazebrook then of the Court of Appeal of New Zealand entitled "Filling the Gaps"; *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586; *Sheehan v Watson* (supra); *Air New Zealand Ltd v McAlister* [2008] 3 NZLR 794.

the Constitution': *Touliki Trading Enterprises Ltd v Fakafanua* [1996] TOCA 1.[19]

65. Most previous decisions concerning clause 4 have involved conflicts or inconsistencies between it and provisions of other statutes,[20] not another provision within the Constitution.

66. There is no provision within the Constitution which stipulates that clause 4 or any other provision or Part (declaration of rights, form of government and the land) is to be regarded as 'paramount' or have primacy in the event of inconsistency with any other provision or Part within the Constitution. It is therefore doubtful that a case such as the present arises 'under the Constitution' or that the Court's jurisdiction extends to declaring one provision of the Constitution invalid for inconsistency with another.

67. However, for present purposes, if one assumes the existence of jurisdiction, then in interpreting the Constitution, the Court must first pay proper attention to the words actually used in context, avoid doing so literally or rigidly, look also at the whole Constitution, consider further the background circumstances when the Constitution was granted, and be flexible to allow for changing circumstances: *Tukuafu v Latu* [2005] TOCA 12 at [23].[21] The Court must also attempt to give reasonable meaning and proper effect to all parts of the Constitution without contradiction, straining the natural and ordinary meanings of the words concerned or breaking the sound principles of interpretation: *Tu'itavake v Porter* [1989] Tonga LR 14.[22] Provisions relating to personal freedoms should be given a generous interpretation: *Lali Media v 'Utoikamanu* [2003] Tonga LR 186.[23]

68. In *Tu'ipulotu v Kavaonuku* (1938) 2 Tonga LR 143, Stuart CJ described the task as: [24]

> *"Through a confused and much amended Constitution we must reach out to fundamental principles and modify them only so far as we are absolutely*

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[19] Citing *Fuko v. Vaikona* [1990] Tonga L.R. 148 at 150 - 151, citing *Minister of Lands v. Pangia* (Scott J., unreported, 1932); *Fotofili v. Siale* (Privy Council, unreported, 3 August 1987).
[20] For example, *Tu'itavake v Porter* [1989] Tonga LR 14 re foreign diplomats; *Touliki Trading v Fakafanua* [1996] Tonga LR 145 re the *Licences Act*; *Primary Produce Exports Ltd v Masima* [1996] Tonga LR 234 re then s. 16 of the *Land Act*; *Lali Media v 'Utoikamanu* [2003] Tonga LR 186 re the *Customs and Excise Act*.
[21] Applying *Tu'itavake v Porter* [1989] Tonga LR 14 and *Taione v Kingdom of Tonga* [2004] TOSC 48.
[22] Citing *James v The Commonwealth* [1936] UKPCHCA 4, (1936) 55 CLR 1.
[23] Citing *Minister of Home Affairs v Fisher* [1979] AC 319 as adopted in *Tu'itavake v Porter*, ibid, and *Kingdom of Tonga v Pohiva* [1993] Tonga LR 25. The principle was re-stated by the Court of Appeal in *Touliki Trading v Kingdom of Tonga* (No 2) [1996] Tonga LR 145.
[24] At 146.

> *compelled so to do. We must read it as a whole to find its intent. We must not pick at solitary sections to annihilate legislation and to embarrass the Judiciary."*

69. In *Touliki Trading v Fakafanua* [1996] Tonga LR 145, the Court of Appeal emphasised the necessity to read the Constitution:

> *"...with an eye to its continuing effectiveness both as the people's guarantee of fundamental rights and as a practical instrument of government."*

70. *Tu'ipulotu v Kavaonuku*, ibid, is a rare example of a case involving apparent conflict between provisions of the Constitution. There, the Privy Council considered that clauses 4 and 67 (privilege of nobles)[25] were 'repugnant or inconsistent'. Stuart CJ opined that the earlier clause 4 'dominated' clause 67 'limiting it to very special cases'. If not, then the Golden Rule applied so that the wording of 67 had to be modified to remove the inconsistencies. The Committee reconciled the inconsistency by effectively inserting the word 'only' after the word 'relating' to give effect to an interpretation that clause 67 only applies to 'obviously intentional attacks' aimed at the titles and estates of nobles, and only when aimed at individual nobles.

71. However, what the Applicants here seek goes far beyond the extent of that remedy.

72. In an endeavour to resolve this issue and give effect to the principles stated above, the background circumstances when the Constitution was granted take on greater than usual significance.

73. As Mr Fonua acknowledged during submissions, Tonga has been the subject of what he described as a 'class system' from before the inception of the Constitution and since. That system, comprising the Monarch,[26] the nobles, Parliament [27] and commoners, is part of the fabric of Tongan society. It is expressly provided for and reflected in numerous provisions of the Constitution which overtly confer and qualify various rights and impose obligations within and between classes, whether they be intended to provide universal protections as in

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[25] 'It shall be lawful for only the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the nobles and after any such bill has been passed three times by a majority of the nobles of the Legislative Assembly it shall be submitted to the King for his sanction.'

[26] Clause 30.

[27] Clauses 31 and 56.

the case of clause 4 or different conditions in divers applications such as the composition and operation of Government and quintessential Tongan land and succession rights.[28] The 2010 Constitutional reforms provided a further instalment in the development of Tonga's unique system of Constitutional Monarchy and unicameral Legislative Assembly.

74. The distinctions between classes in the Constitution are not all one way. Some also operate to the exclusion of nobles.[29]

75. That the restriction in clause 65 only applies to peoples' representatives, without any obvious reason for that distinction, may certainly be regarded as curious.[30] Mr Fonua suggested that Lord Nuku may be the first nobles' representative with an oustanding judgment debt.

76. However, as noted above, where the language of the provision is clear and unambiguous, it indicates what must be taken to have been the intention of the Monarch when the Constitution was granted and subsequent Parliaments with power to promulgate amendments thereto. That intention was also evinced in the clear knowledge of the provisions of clause 4 and the other provisions of the Constitution which are arguably inconsistent with a broad interpretation of that clause. It is also notable that despite the numerous amendments to the Constitution over the past almost 150 years, including the suite of reforms in 2010 and the replacement of clause 65,[31] the restriction remains only in respect of peoples' representatives.

77. This apparent paradox of Tongan Constitutional law was considered recently by the Court of Appeal in *Tu'alau v Tu'alau* [2021] TOCA 2. There, the Court was asked to consider whether s. 87 of the *Land Act* was *ultra vires* principally because it was said to be inconsistent with clause 113 of the Constitution. Mr Fonua also appeared for the Appellant in that case. In response to his alternative argument, which bears many of the hallmarks of the instant application, the Court of Appeal observed:

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[28] For example, clauses, 32, 44, 49, 56, 61, 63 to 68, 71, 74, 79, 104 and 111.
[29] For example, clause 64.
[30] As noted in the corrigendum in *Luani v Nuku* [2020] TOLC 9.
[31] *Act of Constitution of Tonga (Amendment) Act* 2010, s. 4. Although, the primary provisions remained unchanged with only the proviso being replaced.

> *"[17] Mr Fonua raised an alternative ground to support his ultra vires submission. He submitted that s 87 was void under clause 82 of the Constitution because it infringed clause 4 of the Constitution which provides for one law for chiefs and commoners. Referring to clause 111 of the Constitution which prescribes the law of succession to hereditary estates and titles, Mr Fonua submitted that the Lords were treated differently from commoners because in the case of the former, there was no equivalent to the time prescribed by s 87.*
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> *[18] There are considerable difficulties in applying the 'one law for all' provision in clause 4 of the Constitution. In fact, there are a number of inconsistent provisions under the Land Act applicable to nobles and commoners. To take just one example, there does not appear to be any equivalent for commoners to s 37 of the Land Act under which holders of hereditary estates may lose their rights in certain circumstances.*
>
> *[19] The reality is that the Constitution itself differentiates between nobles and commoners. This necessarily arises from the complex land holding system in Tonga which provides differently for estate holders and Tongan subjects and recognises the distinct roles each of the key participants play in the system according to their respective functions and status. For example, all the land in Tonga is the property of the King who may grant hereditary estates to the nobles and titular chiefs or mataboules; the law of succession for hereditary estates is set out in the Constitution; and in the absence of legitimate heirs to an estate, it reverts to the King who may then confer the estate on someone else. In contrast, commoners have the right to apply for allotments under clause 113 with certain limitations and conditions on the grant of allotments to Tongan male subjects; rights of succession are not set out in the Constitution but in the Land Act; and s 83 of the Land Act provides for different rights of reversion when there is no person entitled to succeed to an allotment, depending on whether the land is Crown land or a hereditary estate.*
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> *[20] ... In circumstances where the Constitution itself necessarily differentiates between nobles and commoners, we are not persuaded that the attenuated argument advanced by Mr Fonua establishes an inconsistency of the kind contemplated by clause 82. This argument also fails."*

78. Further to the above, in my respectful view, there can be little doubt that there is no one universal law in Tonga for chiefs and commoners and for non-Tongans and Tongans as aspirated by the first limb of clause 4. That observation, in turn, begs a rhetorical question as to what is 'the law' in Tonga?

79. In his submissions, Mr Fonua repeatedly referred to his clients' cause as being in accordance with 'the law'. When asked what law he was referring to, Mr Fonua could only revert to clause 4, which, self-evidently, amounted to circular or

'bootstraps' reasoning.[32] The law in Tonga comprises the Constitution (as the supreme law), other statutes as passed by Parliament and assented to by the King, subordinate legislation and curial decisions in respect of legislation, the common law and rules of equity as they apply in the Tongan context.[33]

80. In my view, it is highly unlikely that the first limb of clause 4 was intended to condition or constrain the other provisions of the same Constitution which gave birth to it. Further, the opening words in the second limb of clause 4 – "No laws shall be enacted" – connote prospectivity; that is, laws enacted after the Constitution. As subsequent decisions have demonstrated,[34] where such later 'laws' are inconsistent with the Constitution, they are susceptible to being declared invalid to the extent of any such inconsistency.

81. Accordingly, as matters presently stand, if the restriction in clause 65 is to be extended to nobles' representatives, it will require amendment to the Constitution in accordance with clause 79.

82. For those reasons, I am not satisfied that the Applicants have presented an arguable case or a case fit for further investigation on a full *inter partes* hearing.

Result

83. The application for leave to apply for judicial review is dismissed.

NUKU'ALOFA
29 August 2022

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE

[32] *Norma Lavemai v Kingdom of Tonga (Director of Civil Aviation)* (CV 67 or 2021, Supreme Court, 9 August 2022) at [71] citing *Advantage Group Ltd v Advantage Computers Ltd* [2002] NZCA 282; [2002] 3 NZLR 741 at [45].
[33] *Civil Law Act*, ss 3 and 4.
[34] Fn 17, supra.