

- [3] The First Respondent was the Prime Minister of Tonga when the payments out were made and the Second Respondent was the Minister of Justice.
- [4] The Leader of the Opposition in the Legislative Assembly was Mr Samuela 'Akilisi Pohiva, now the Prime Minister. The opposition took the view that the grant aid was "public money" as defined in the Public Finance Management Act and that its application to Tongasat and Princess Pilolevu was unlawful.
- [5] In February 2013 Mr Pohiva commenced private criminal prosecutions against the First and Second Respondents and against Tongasat and Princess Pilolevu. The four accused were variously charged with conspiracy, theft, conversion or receiving the grant aid.
- [6] Owing to the seriousness of the charges, the Magistrate's Court held a preliminary enquiry. On 26 April 2013 the Magistrate held that there was no case for the accused to answer and they were discharged.
- [7] On 17 January 2014 this Court dismissed Mr Pohiva's appeal (AM 20/2013). There is an application for the costs of the appeal awaiting judgment.

[8] When he found no case to answer the Magistrate awarded substantial costs against Mr Pohiva. Mr Pohiva sought leave to move for judicial review of the Order against him (CV 75 of 2014), however that application was withdrawn on 7 November 2014 and in its place an appeal against the Magistrate's order was filed on 10 February 2015 (AM 4/2015). That appeal is awaiting judgment.

[9] On 8 July 2014 the first Applicant herein and Mr Pohiva commenced proceedings (CV 48/14) in the civil Jurisdiction of the Supreme Court against (i) The Kingdom of Tonga (ii) The Attorney General and (iii) Tongasat seeking:

- (a) a declaration that the grant aid money was unlawfully paid out; and
- (b) an order that Tongasat repay the money received, or alternatively damages in lieu.

[10] There are three applications filed by the Defendants:

- (a) Seeking security for costs to be provided by the Plaintiffs;
- (b) To have the claim struck out; and
- (c) Opposing the Plaintiffs' (belated) alternative application to move for judicial review.

Those applications are also awaiting judgment.

[11] On 17 July 2014 four separate fresh actions were commenced in the Supreme Court (CV 55-58) by Lord Tu'ivakano, William Clive Edwards, Tongasat and Princess Pilolevu against Mr Pohiva claiming that his private prosecution against them was motivated by malice and seeking damages. In November 2014 it was agreed by counsel that further consideration of those actions would await the outcome of the present application.

[12] This application follows the initiation in May 2014 of two actions in the Magistrate's Court against the Public Service Association and its Secretary General Mele 'Amanaki (MC CV87 & 95/2014) by Lord Tu'ivakano and William Clive Edwards claiming damages (limited to \$10,000) for defamation arising out of the publication of various statements in which the Plaintiffs say the Defendants untruthfully claimed that the payment out of the grant aid funds was unlawful and, inter alia, that the Plaintiffs were dishonestly responsible.

[13] The Applicants say that the actions for defamation in the Magistrate's Court will inevitably involve consideration of whether the payments out were indeed unlawful and, if so, whether Lord Tu'ivakano and Mr Edwards are to be held to account. It is said that consideration of this vexed and as yet unresolved issue will involve difficult question of law and fact which cannot suitably be disposed of in the Magistrate's Court. They seek orders transferring the actions to the Supreme

Court, alternatively to have them stayed until final judgment in CV 48/14. Dr Harrison's arguments and authorities are set out in full in his written submissions filed on 25 November 2014.

[14] The application was opposed. Mr Stanton and Mr Edwards set out their grounds of opposition in full in a written submission also filed on 24 November. Mr Stanton rejected the suggestion that consideration of the claimed defamation would inevitably involve consideration of the lawfulness of the Plaintiffs' actions:

“A fair reading of the Magistrate Court's claims has nothing to do with the legality but rather that in the course of a publication which is alleged to be defamatory, is coincidentally concerned with the issue of payment.”

[15] Mr Stanton also pointed out that CV 48/14 could be taken no further until the outstanding applications mentioned in paragraph 10 had been resolved in the Plaintiffs' favour and this, he suggested was by no means certain.

[16] Where numerous proceedings are commenced arising out of substantially the same facts there is a danger of inconsistency and the Court must intervene to ensure that confusion is avoided. “If there are two Courts which are faced with substantially the same

question, it is desirable to be sure that the question is debated in only one of those Courts if by that means justice can be done" (*Thames Launches Ltd v Trinity House* [1961] 1 All ER 26; *Royal Bank of Scotland v Citrusdal Investments* [1971] 3 All ER 558).

[17] Having read the Respondents' claims in the Magistrate's Court as "fairly" as I can, I have no doubt that the unlawfulness or otherwise of the payments to Tongasat, if not already determined elsewhere, would inevitably fall for consideration. I also agree with Dr Harrison that the Magistrate's Court is not at all suitable for an enquiry into that alleged unlawfulness.

[18] The problem however facing these alternative applications, either for transfer or stay, is that they are procedurally defective. RSC O.6 requires an action to be commenced by writ. These proceedings were however commenced by "Application Notice". There is no writ on the file. An application is commenced under RSC O.13 which makes it quite clear (as is well understood) that save in cases of exceptional urgency and upon undertaking being given by counsel, an application cannot be made until proceedings have already been commenced.

[19] Secondly, where it is wished to apply for stay as transfer, that application should be made to the Court which is already seized of

the proceedings in respect of which the application is made. In this case it is the Magistrate's Court.

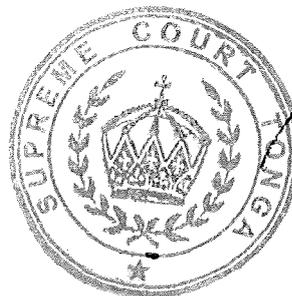
[20] True, the Magistrate's Court is subject to prerogative orders issued by the Supreme Court but no such orders have been applied for in this case. These are not judicial review proceedings.

[21] Thirdly, I have examined the provisions relied on by Dr Harrison and set out in paragraph 13 of his written submissions. I do not accept that any of them authorise either a stay or a transfer in the circumstances of this application.

Result: Application dismissed.

Dated: 6 March 2015.

M. Taufa
4/3/2015




M.D. Scott
JUDGE