



was exported and when, from time to time, a ship arrived to take on the oil, it was transferred to the ship via a pipeline. In 1999 the Second Plaintiff bought this pipeline (but not the other assets of the Company) from the Second Defendant for T\$5000. [Exhibit P-H].

- [3] Also at Touliki there was a diesel tank farm known as the Touliki Tank Farm which was then owned by Triad Petroleum Tonga Limited. In 1999 the Second Defendant purchased the tank farm from Triad. According to Exhibit P-E the assets of the tank farm included an 880 metre long pipeline which was valued at T\$132,000. This pipeline was used to transfer diesel oil from the tank farm to Queen Salote Wharf.
- [4] The position at the end of 1999 was therefore that the Second Plaintiff was the owner of two pipelines, one for transferring diesel oil and the other for transferring coconut oil. It will be convenient to refer to these two pipelines as the diesel line and the coconut line.
- [5] On 25 August 2007 one Peni Vea went to a pipeline running along Vuna Road in front of the 'Apifo'ou College rugby field and cut it into 1.5 metre pieces, effectively destroying its use as a pipeline.
- [6] The Plaintiffs' case is that the pipeline that was destroyed by Peni Vea was the diesel line and that the destruction was the direct result of the First Defendant's negligence. It is said that the First Defendant was negligent in that she authorised Peni Vea to remove the pipeline when, had she taken due care before granting authority, she would have discovered that the true position was that the pipeline was

owned by the Second Plaintiff. [see *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465].

- [7] In the alternative it was said that by authorizing Peni Vea to remove the pipeline, the First Defendant had converted the same. Although this claim was referred to by Mr Fa'otusia in his opening, it was not again mentioned. Since the pipeline was not removed either by or at the direction of the First Defendant, my view is that the alternative claim was unarguable.
- [8] The Plaintiffs seek damages for the loss of the pipeline as well as consequential loss.
- [9] The Defendants did not deny that Peni Vea had cut up a pipeline but they denied that it was the diesel line and they denied that he had been authorised to cut the pipeline by the First Defendant. The Defendants denied that the pipeline cut by Peni Vea was worth T\$132,000 and they denied consequential loss.
- [10] The first question is which pipeline was cut; was it the oil line or the diesel line? The second question is whether Peni Vea cut the pipeline after being authorised to do so by the First Defendant. Depending on the answer to these two questions the third and fourth questions arise : what was the value of the pipeline cut and did this cutting result in consequential loss?

First question : which pipeline did Peni Vea cut?

[11] During the course of the trial a plan (Plan A) of the area in question was prepared by Mr Niu and was tendered by consent. This plan shows the Tonga Oil Mills Site and, marked "Zuvva Company" shows the site of the Touliki Tank Farm. The plan also shows the route of two pipelines, the diesel line and the oil line. The route of the former was not disputed but the First Plaintiff, in her evidence, told me that the oil line, after running along the (unnamed) Side Road towards the sea, did not turn left along Vuna Road as shown on the plan but went under the road to the shore on the other side of Vuna Road.

[12] Peni Vea told me, and it was not disputed, that when he cut the pipeline running along Vuna Road there was only one pipeline there. He told me that he did not know whether it was the oil line or the diesel line. He did, however, identify the pipeline that he cut as being the one depicted in the lower photograph in Exhibit P-G. He explained that when he arrived at the site to cut the pipe it was already partially cut at both ends as partially depicted in Exhibit P-G. He also told me that as he remembered it, the oil from the Coconut Mill ran along a pipeline which, after following the Side Road, turned left and then ran along Vuna Road until it went under the road before emerging on the other side of the road and running on to Queen Salote Wharf.

[13] The third plaintiff witness was Paula Taulafo Taufu who is the Manager of Pacific Energy Tonga and who has worked in Energy Distribution for over 10 years. He told me that at point "X" marked on Plan A there are the remains of two sections of pipe running under

Vuna Road. One is a 4 inch while the other is a 6 inch pipe. In his opinion the 4 inch section is a segment of the diesel line while the 6 inch section is a segment of the oil line. As he remembered it, the oil line ran along Vuna Road on concrete supports while the diesel line ran along beside and below it.

[14] The first defence witness was Pesi Kaulave, now retired, who told me that he worked for the Tonga Oil Mill from 1978 to 1993. He told me that he remembered the oil line since he used to work on it. It was a 6 inch line which ran along the Side Road on concrete posts before turning left and continuing along Vuna Road, again on concrete posts. Eventually, it went under Vuna Road before emerging on the other side and continuing on to Queen Salote Wharf. He also remembered that there was another pipeline which ran along Vuna Road, below the oil line. In cross examination Pesi accepted that he did not know whether the pipeline depicted in the lower photograph was the oil pipeline that used to run there or whether it had been replaced.

[15] The second defence witness was Sione Tafolo who told me that from about 2003 to 2008 he had operated a bowser from the Zuvva Company Site on the corner of Vuna Road and the Side Road. In 2005 he cut pieces from both ends of a 6 inch pipe that ran along Vuna Road. At that time there was only one pipeline running along the road.

[16] On the morning of 23 May the Court went to inspect the site. We started at point "X" on Plan A and walked east along Vuna Road to the corner and then south along Side Road to the site of the former

Tonga Oil Mill. We also went onto the Zuvva Company site. About half way down the Side Road we stood at the approximate point from which the First Plaintiff told us that the right hand photograph in Exhibit P-1 had been taken. In her evidence the First Plaintiff had explained that this showed the oil line and that had been removed and disposed of after Zuvva purchased it in 1999. On the Zuvva Company site we located about 6-8 concrete posts which were plainly similar to those depicted in the two photographs in Exhibit P-1. These posts are square, about 1 metre in height above the ground and have four bolts embedded in them to secure the metal arch above from which it appears that the pipe was suspended. There was no sign of any of these posts standing along the side road and it seems that the posts dumped on the Zuvva Company Site formerly stood along that road.

[17] In Vuna Road the Court found a number of similar posts. Next to these posts (Post 1) were round posts (Post 2) supporting a metal bracket and a third type of posts (Post 3) the purpose of which was not identified. A photograph of the posts is Exhibit D2, produced by consent on 28 May. It will be noted that while Exhibit P-G depicts posts similar to Post 1 (together with what appears to be one example each of Posts 2 & 3) none of the posts in Exhibit 2 now supports the metal arches depicted in Exhibit P-G and in Exhibit P-I. Two of the posts closest to point X do, however, have these metal arches.

[18] Since it was crucial to the Plaintiffs' case that the pipeline cut up by Peni Ve'a was the diesel line and not the oil line I asked the First Plaintiff what the foundation was for her belief that this was the case.

She was unable to provide any more firm foundation than her strong belief that the line that was cut was the diesel line that the Second Plaintiff had purchased in 1999.

[19] As I find it, the evidence before me leaves no doubt that the Plaintiff was mistaken in her belief. Her belief that the oil line ran along Vuna Road was contradicted not only by one of her own witnesses but also by two others. From the site inspection it is plain that the pipe supports (Post 1) running along Vuna Road are identical to those which, until removed, supported the oil line along the Side Road. The First Plaintiff suggested (& see paragraph 46 of the Statement of Claim) that the diesel line had been "fully renewed" in 2000. This renewal, it was argued, might have involved rehangng it on the posts previously used to support the oil line. There was, however, nothing apart from the suggestion and some hearsay to support the possibility, no witness to say that he had actually carried the work, no invoices, no details of what "full renewal" entailed.

[20] I find as a fact that the pipeline there was cut up by Peni Vea on 25 August 2007 was a stretch of the oil line running from the western corner of the Zuvva Company compound to point 'X' marked on Plan A. I further find as a fact that by the time Peni Vea came to cut up the oil line the diesel line which had previously run alongside the oil line on posts 2 had disappeared.

Second Question : was Peni Vea authorised to cut the pipeline by the First Defendant?

- [21] The only admissible evidence given on this question was by Peni Vea and by the First Defendant.
- [22] Peni Vea told me that he had known the First Defendant since they worked together at Tonga Development Bank. In April 2010 he swore an affidavit which was Exhibit P-S in the Plaintiff's production of documents. This affidavit explained the background to Peni Vea's interest in the pipeline on Vuna Road. It is consistent with the fact, already noted, that the Second Defendant sold the oil pipeline separately from the rest of the Oil Mill assets, to the Second Plaintiff.
- [23] Peni Vea told me that in 2007 he again expressed an interest in the pipeline : "I spoke to the First Defendant and said I was interested in the pipeline in front of 'Apifo'ou College. She said she would talk to Frank to see if it was included in the [Oil Mill] tender. Later, she said it was not included in the tender so I could go ahead and remove it". "I had no reason to doubt the information given to me by the First Defendant". "After I spoke to the First Defendant about the letter I received threatening legal action, she denied that she had authorised me to cut the pipeline." Peni Vea told me that his conversation with the First Defendant took place about two weeks before he cut the pipeline.
- [24] The First Defendant's evidence was somewhat different. She told me that she had been in charge of the tendering for the Oil Mill assets. The Second Plaintiff bought the oil line in 1999. In 2007, after he was appointed CEO of MAFF, Peni Vea was investigating the possibility of MAFF taking over the land previously occupied by the Oil Mill but that the plan was not pursued. Around that time, Vea first asked the

First Defendant whether the oil pipeline was included in the Oil Mills assets. After checking the position she told him that the oil pipeline had been sold previously and was not part of the tender. "I told him I did not know who had bought it. He said it was just lying there. I had previously told him I could not sell him any pipe". After the pipe had been cut, the First Defendant, who was at home ill in bed, had received a telephone call from an agitated First Plaintiff asking her "why I had authorised someone to cut her pipe." "I told her I remembered someone. I said I would try to remember who it was. After the police got in touch I recalled that I had spoken to Peni Vea about pipes and they should ask him". "If I thought we owned the pipes we would have sold them, not given them away". In cross-examination the First Defendant agreed that she had spoken to Peni Vea many times but that she told the First Plaintiff that she could not remember who had asked about the pipe. She thought that Peni Vea may have misunderstood her: she did not authorise him to remove the pipe, she merely told him that the Second Defendant did not own it but she did not know to whom it now belonged.

[25] Both Peni Vea and the First Defendant are respected persons of good standing in Tonga. I do not think either told me any deliberate untruths. Peni Vea's evidence was clear and consistent, the First Defendant's evidence less so. Even allowing for her illness at the time, I do not think that she was entirely straightforward when she told the First Plaintiff that she could not remember who had inquired about the pipeline as we now know, a mere two weeks before.

[26] I find the First Defendant's suggestion that the Second Defendant would not have given away anything that it thought it owned

consistent with Peni Vea's evidence that the First Defendant told him that the Second Defendant did not own the pipeline. I do not accept that the First Defendant told Peni Vea that she did not know who had bought the oil line. Exhibit P-H clearly sets out the position. A copy would presumably be easily available from the Oil Mill file. I do not think Peni Vea misunderstood the First Defendant. As I find it, the First Defendant gave Peni Vea the impression that the pipeline was not something that the Defendants were interested in and as far as they were concerned he could go ahead and help himself. In my view, by conveying that message, the First Defendant, a person upon whose skill and knowledge Peni Vea could reasonably depend, was misled into the belief that he could help himself to the pipeline. While not directly "authorised" to cut the pipeline I find that the First Defendant, perhaps because of her illness, did not exercise due care when handling Peni Vea's query and therefore must be held responsible for what later occurred.

Third Question : what was the value of the destroyed pipeline?

[27] The oil line was bought for T\$5000 in 1999. It had not been used since 1993. The portion along the Side Road was dismantled by the Second Plaintiff shortly after its purchase. In 2005 portions of the line were cut off at each end by Sione Tafolo. The substantial piece that was removed at one end can be seen from Exhibit P-G. What became of the section from Vuna Road to Queen Salote Wharf, I was not told. The diesel line which I find as a fact ran alongside the oil line was 880 metres in length from Zuvva Company to Queen Salote Wharf. Peni Vea told me that he thought he had cut no more than 60 metres of pipe "which we all was left". The First Plaintiff told me that

she had measured what was cut and put it at 160 metres. The problem is that the original length of the oil line is not known.

[28] Taking the length of the diesel line to be 880 metres, then by comparing the routes of the two lines as depicted in Plan A (which of course is not to scale) then it seems reasonable to assume that the oil line was not less than 120 metres longer since it did not originate at the Zuvva Company compound but instead came from the Tonga Oil Mill further down the Side Road. Doing the best I can, I estimate that the length of the oil line to have been 1000 metres. On this basis it was purchased by Zuvva for T\$5 per metre. I do not include the value of the concrete posts upon which it ran as these plainly have no scrap value.

[29] I found Peni Vea's evidence to be credible and accurate. I do not know how the First Plaintiff carried out her measurements after the case adjourned following the first day of the trial. I accept Peni Vea's evidence that he cut 60 metres of pipeline which I have found was the oil line and (generously) valued at T\$5 per metre. I assess the value of the pipeline lost by reason of the First Plaintiff's negligence at T\$300.

Fourth Question : was there any consequential loss to the Defendant?

[30] As will be seen from the Statement of Claim, the Plaintiffs' claim for consequential loss was based on two assumptions. The first was that the pipeline which was destroyed in August 2007 was the diesel line. It was said that Second Plaintiff had lost the opportunity to lease the pipeline for T\$2000 per month to Reef Bulk Fuels and had also

lost the opportunity to make further substantial profits from the Touliki Tank Farm.

[31] As was accepted by the First Plaintiff, Exhibit P-M, stated to be a copy of an agreement with Reef Bulk Fuels to rent the "pipeline facility" (a phrase not explained) is actually only part of a proposal (the first page of which is missing) and was not in fact a concluded agreement. Secondly, it is clear that the purpose of the proposal was to store and supply diesel, not coconut oil. The pipeline that was cut has been found as a fact to have been the oil line, not the diesel line. The cutting of the oil line could not in any way cause damage to a proposed diesel - based operation. As I find it, there was no consequential loss to the Plaintiffs as a result of the loss of part of the oil line cut by Peni Vea.

### Result

There was no evidence of default on the part of the Second Defendant however there will be judgment for the Plaintiffs against the First Defendant in the amount of T\$300. I will hear counsel as to costs.

**DATED: 15 June 2012**

  
M.D. Scott

**CHIEF JUSTICE**

N. Tu'uholoaki

15/6/2012.