

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

**CV 119 of 2009**

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**BETWEEN:       ROLAND LEONG                               -       PLAINTIFF**

**AND            :       1.     CAROLINE FUSIMALOHI  
                              2.     TANIELA FUSIMALOHI  
  -       DEFENDANTS**

**Mrs Stephenson for the Plaintiff**

**S. Tu'utafaiva for the Defendants**

**JUDGMENT**

1. This is an action in defamation commenced in May 2009. The Plaintiff says that the Defendants co-authored a letter containing a number of false, derogatory and defamatory statements about him and then, actuated by malice, published the letter by sending it to the general manager of Plaintiff's employer, Total Fiji Limited.
2. The publication of the letter and the circumstances leading to the publication are largely agreed and may briefly be stated. The only witness was the plaintiff. At the request of the parties the hearing took place without a jury.

3. The Plaintiff told me that he joined Total in 2007. Previously, he had worked in various senior positions for companies in the Pacific. In March 2009 he was posted to Tonga as Marketing and Operations Manager for Tonga with overall responsibility for Total's operations in the Kingdom. He reported directly to the Managing Director of Total Fiji Ltd.
4. The Plaintiff arrived in Tonga on 10 March 2009. He needed somewhere to live and shortly after his arrival he was taken to see an apartment at Halaleva owned by the Defendants. The apartment had previously been inspected by Total employees. The Plaintiff agreed to rent the apartment and a tenancy agreement (document P1) was signed by the Plaintiff and the second Defendant on 14 March 2009.
5. The agreement is quite short and is apparently "home-made". It does not describe the demised premises and does not contain a number of the usual covenants. It does however provide that the tenant will pay a bond of \$800 and pay "one month rent in advance, the amount of \$800." The agreement was stated to be "effective for 24 months and can be renewed another ..... months upon mutual agreement". There is no termination clause. The Plaintiff told me that he had paid \$800 on or about the day that the agreement was signed, but whether this was by way of bond or rent I was not told. The Plaintiff moved in on the same day.
6. On 26 March 2009 the Plaintiff wrote to the second Defendant. A copy of the letter is document P2. Among other matters, the Plaintiff

complained that the apartment was infested with insects, that he was awoken by barking dogs and church bells, that the television did not work and that the flat was poorly ventilated. The “last straw” was the appearance of a “fairly large rat” which he discovered consuming a packet of his breakfast cereals. In these circumstances, the Plaintiff advised the second Defendant that he intended to vacate the flat on 31 March. He raised the question of a refund of part of the \$800 pointing out that he had only resided at the flat for 13 days.

7. The Plaintiff told me that after delivering the letter at the second Defendant’s office, he returned to the office a few hours later and spoke to the second Defendant. He thought that this would be courteous but unfortunately the second Defendant looked at the matter very differently. He was extremely annoyed : he accused the Plaintiff of breaching a signed agreement ; he made a number of threats including a threat to have the Plaintiff deported from Tonga and a threat to tell the Tongan government Minister what had happened “to affect the operations of Total in Tonga”.
8. The Plaintiff told me that he was shocked and embarrassed by the second Defendant’s reaction. In his view the problems arising from the conditions of the flat were personal between the Plaintiff and the Defendant and had nothing to do with Total.
9. On 3 April 2009 the Defendants replied to the Plaintiff’s letter of 26 March. A copy of the reply is exhibit P4 and it is the document which contains the material which the Plaintiff says defamed him. Despite

suggestions to the contrary in the letter, it is accepted that the letter was in fact only sent to the General Manager of Total Fiji Ltd. The other named addressees did not receive copies.

10. On 15 July 2009 a statement of defence and counterclaim was filed. The Defendants do not deny authoring P4 and neither did they deny sending a copy of the letter to the General Manager of Total Fiji Ltd. The Defendants however denied that the letter contained derogatory remarks about the Plaintiff and denied that it was defamatory. In the first alternative, the Defendants pleaded that the words complained of were fair comment on a matter of public interest. In a second alternative defence it was pleaded that the letter was published in circumstances of qualified privilege. The counterclaim was not pursued.
  
11. The only challenge to the Plaintiff's evidence was a suggestion that he had concocted his complaints since he wished to move to premises previously occupied by his predecessor. This was denied. The Plaintiff told me that he had moved to premises which were not premises which had previously been occupied by his predecessor. I was generally impressed by the Plaintiff who gave his evidence clearly and without hesitation. I found him to be a witness of truth and accept his denial. I also accept his assertion that the complaints made about him about the condition of the flat and set out in his letter were entirely untrue.

12. At the conclusion of the short trial both counsel asked to file written submissions. Helpful submissions were in due course filed by counsel for which I am grateful.
13. The first question is whether the words complained of in letter P4 were defamatory. Half way down the first page of the letter the Defendants wrote:

“We will also be providing a copy of this with the appropriate authorities and officials in Tonga, as well as your staff here so that they know how unprofessional you behave and how poor your conduct is.”

From this it is clear that the Defendants, by publishing the letter, intended it to be damaging to the Plaintiff reputation. Given this clearly expressed intention, denial that the intention was achieved does not seem to be an attractive option. Intention apart, there cannot, in my view, be any doubt that each of the phrases complained of and set out in paragraph 7 of the statement of claim in their ordinary and natural sense describe what was said individually and collectively to be the Plaintiff's reprehensible attitudes and conduct. The Defendants did not attempt to prove that the words, when read by Total's General Manager, would not have been understood in their ordinary and natural way.

14. Having found that the words complained of are defamatory they are presumed by law to be untrue. No attempt was made by the Defendants to rebut that presumption. The focus rather was on the defences of fair comment and qualified privileged.

15. It is a complete defence, in an action for defamation, to establish that the words complained of are fair comment on a matter of public interest. In order to succeed in that defence the onus rests on the defendants to show:

- (i) that the words are comment and not statements of fact;
- (ii) that there is a basis in fact for the comments contained or referred to in the matter complained of; and
- (iii) that the comment is on a matter of public interest.

Since no attempt was made by the Defendants to prove the basis of any of the facts to which the comments allegedly referred, the defence of fair comment must inevitably fail.

16. The remaining argued defence was qualified privilege. Section 10 of the Defamation Act (Cap 33) is as follows:

“No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill will or other improper motive.”

When this defence is set up it is for the Defendant to allege and prove all such facts and circumstances as are necessary to bring the words

complained of within the privilege unless such facts are admitted before or at the trial of the action.

17. It has already been found as a fact that the words complained of were untrue and defamatory. The intention of publishing letter P4 is stated on its face to be damaging to the Plaintiffs reputation and that of his company. No evidence was called by the Defendants and no attempt was made to prove that the Defendants acted bona fide or that the General Manager of Total Fiji Ltd had any interest in receiving the letter which he was sent. The Plaintiff's evidence was that the letter was actuated by the Defendants anger and ill will towards him and I accept that evidence. In these circumstances the Defence of qualified privilege must fail.
18. The Plaintiff is seeking general damages which are quantified at \$300,000 plus aggravated damages of \$200,000. These are very substantial amounts. Mr. Tu'utafaiva says they are excessive. Neither party cited any authority in support. Mrs. Stephenson suggested that further submissions might be made. I accept that suggestion.
19. There will be judgment for the Plaintiff against both Defendants with damages to be assessed. The question of costs will be reserved for argument.

**DATED: 18 MAY 2012**

**CHIEF JUSTICE**

N. Tu'uholoaki

8/5/2012