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

CV 1 & 2 of 2018

CV 1 of 2018

BETWEEN: LORD SEVELE-'O-VAILAHI

Plaintiff

AND: THE KINGDOM OF TONGA

Defendant

CV 2 of 2018

BETWEEN: SAKOPO LOLOHEA and eight others

Plaintiffs

AND: THE KINGDOM OF TONGA

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. W Edwards Jnr for the plaintiffs
Dr. R Harrison SC, QC and Ms. S. Moa for the defendant

Date of Hearing: 22 February 2019
Date of Ruling: 15 March 2019

RULING

The applications

[1] This ruling concerns applications filed by the Kingdom (the defendant) in the actions CV 1 of 2018 and CV 2 of 2018 to strike out the plaintiffs' amended statements of claim dated 4 December 2018.

[2] The applications are made in reliance upon O. 8 rule 8(1) of the Supreme Court Rules. The grounds relied upon are that the amended statements of claim disclose no reasonable cause of action or are otherwise an abuse of the process of the Court although the arguments focused on the absence of any reasonable cause of action.

[3] The amended statements of claim follow a similar format and the allegations made by all of the plaintiffs are in substance the same. There are differences on some facts as well as to the terms and statutory underpinning of the plaintiffs' respective employment contracts that are in issue. These differences are not material for present purposes.

[4] Counsel focused their arguments on the application to strike out the pleading in CV 1 of 2018, it being common ground that the fate of that application would determine the other. That was appropriate and I follow counsels' approach in this ruling.

Background

[5] Tonga agreed to hold the 2019 South Pacific Games (the Games). In 2013 the Pacific Games Organization Act was passed (the Act). The long title of the Act stated that it was:

> An act to establish a statutory authority independent of Government to organize, oversee and conduct the South Pacific Games in Tonga in 2019 and generally provide for the good organization of those Games.

[6] The statutory authority referred to was the Tonga Pacific Games Organizing Committee (the Committee). It was established under s. 3 of the Act. The purpose and function of the Committee included being responsible for the preparation, management and conduct of the Games (s. 5(1)(a)).

[7] Lord Sevele (the plaintiff) was appointed by the Committee as its Chief Executive Officer and Chairperson under s. 9 of the Act. He was engaged pursuant to a written contract dated 9 May 2014. It is said that the contract was varied on two occasions but, as I shall relate, most relevantly on 27 July 2017.

[8] On or about 17 May 2017, the Government of Tonga made a decision to withdraw from hosting the Games. On 29 June 2017, the Legislative Assembly passed the Pacific

Games Organization (Repeal) Act 2017 (the Repeal Act). Section. 2 of the Repeal Act repealed the Act (subject to Royal Assent).

[9] The Repeal Act's only operative provision states 'The Principal Act is hereby repealed'. The Repeal Act says nothing about what will become of the Committee or its assets or the manner (if at all) in which the incurred or accrued liabilities of the Committee, such as might be owed to its employees, would be satisfied.

[10] At a meeting of 27 July 2017, the Committee decided to wind up its affairs and agreed to terms upon which the plaintiff's employment would be terminated. The Committee agreed to make payment of a sum (said to be $TOP105, 869.89) in consideration for the early termination of the plaintiff's contract of employment (the settlement sum).

[11] On around 3 August 2017, the Committee notified the Government of the terms of the settlement. The Government did not respond.

[12] On 5 September 2017, the Repeal Act received Royal Assent and became law.

[13] On or about 27 September 2017, the plaintiff's counsel wrote to the Minister of Finance asserting that the Government was responsible for payment of the settlement sum. Again the Government did not respond.

[14] The plaintiff commenced this action on 9 January 2018. Originally the Committee was named as a defendant. Damages were sought in the amount of the settlement sum.

[15] Unsurprisingly, the Committee, which since the enactment of the Repeal Act has not existed as a legal entity, did not file a statement of defence. No statement of defence was filed by the defendant either.

[16] Judgment in default of defence as to liability was entered against the defendant on 2 August 2018. The defendant applied to set aside the default judgment on 22 August 2018. In a written ruling of 8 November 2018 I set the judgment aside.

[17] On 15 November 2018, the defendant filed this application to strike out the plaintiff's statement of claim. An amended statement of claim was filed on 4 December 2018. Amongst other things, this removed the Committee as a named party. On 14 December 2018, I directed that the defendant's application (which was

directed to the original statement of claim) would apply *mutatis mutandis* to the amended statement of claim. The application was argued on that basis.

Strike out principles

[18] The principles upon which the Court will act on strike out applications are well established. I set them out in *Friendly Islands Satellite Communications (Tongasat) Ltd and others v Pohiva and others* [2015] Tonga LR 199, 209 and *Pacific Games Council v Kingdom of Tonga* (Unreported, Supreme Court, 19 November 2018, CV 16 of 2018, Paulsen LCJ).

[19] In the *Pacific Games* case I said, at [8] and [9]:

> [8] There are well settled principles that the Court applies when deciding strike out applications. The principles were stated in *Friendly Islands Satellite Communications (Tongasat) Ltd and others v Pohiva and others* [2015] Tonga LR 199, 209 and by the Court of Appeal of New Zealand in *Attorney General v Prince & Gardiner* [1998] 1 NZLR 262, 267 and *Carter Holt Harvey Ltd v Secretary for Education* [2015] NZCA 32. These principles are summarized as follows:
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> (a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. This is so even though they are not or may not be admitted.
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> (b) Before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.
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> (c) 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. The case should only be precluded from proceeding where it is so certainly or clearly bad and the court must be particularly careful in areas where the law is confused or developing.
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> (d) The fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction.
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> [9] Relevant to the approach I take in this case is *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 182 where the New Zealand Court of Appeal also said:

> It is common ground that the claim is not to be struck out unless it is so clearly untenable that it could not possibly succeed even after amendment in a manner proposed by the plaintiff, and on the assumption that all facts alleged in the statement of claim can be proved true ..... The statement of claim must be beyond repair. It must be plain that even if it is reformulated the claim cannot succeed.

[20] I accept Dr. Harrison's submission that the assumption that the facts pleaded in the statement of claim are true even though not admitted will not extend to pleaded allegations which are entirely speculative and without foundation or contrary to otherwise uncontroversial facts which are already before the Court (*Sheffield Properties Ltd v Kapiti Coast District Council* [2018] NZHC 3290 at [18]).

[21] Finally on this aspect, it has often been said that Court should be reluctant to strike out any claim in a new or evolving area of the law. The following comments by Hammond J in *Hobson v Attorney General* [2007] 1 NZLR 374, 386 at [55] and [59] are instructive:

> [55] In my view, it is important to get back to first principles.....the reason why a Court is justified in striking out a claim is if the Court can be confident that no further investigation or argument of any kind could provide any appreciable assistance to the task of reaching a correct outcome.
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> and
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> [59] What the Court may need is further consideration of the facts, or it may need much closer argument and consideration of the wider implications of recognising a particular duty of care and how it is to be articulated...

The amended statement of claim

[22] The amended statement of claim begins by pleading that the plaintiff was the Chairman of the Committee and that the defendant is sued 'for breaches of its statutory and/or contractual duties and/or obligations in law to the...[*Committee*]... and/or the Plaintiff' ([1] and [2]).

[23] Various provisions of the Act, specifically the provisions establishing the Committee and the Audit and Governance Authority (which had oversight of the Committee) and the Committee's functions and powers, are pleaded ([3] to [9]).

[24] Section 17 is set out in full. It provided for the funds that were to be available to the Committee to perform its function. These included 'money from time to time appropriated by the Legislative Assembly for the purpose' (s. 17(1)(a)). Under s. 17(2) the 'Government of Tonga' was to ensure 'as a funder of last resort' that the Committee had sufficient funds to generally organize and conduct the Games.

[25] There follows a pleading that 'the Defendant legislated through Parliament' for the imposition of a foreign exchange levy and that the Government appropriated and approved the collection of departure tax revenue for the Games which has been retained as public funds ([10]-[11]).

[26] At [12] to [15], it is pleaded that the plaintiff was appointed the Chairman of the Committee from 15 April 2014 until 14 October 2019, along with terms of his contract of employment.

[27] It is then pleaded that on 17 May 2017 the Prime Minister gave notice to the Pacific Games Council that Tonga had withdrawn from hosting the Games, that on 27 July 2017 the Committee agreed to pay the plaintiff TOP$105,869.89 as a settlement sum for 'all of his claims under his contract of employment' which he was 'prepared and willing to accept' and that the 'proposed settlement' was submitted to the Minister of Finance on 3 August 2017 and has not been paid. It is also pleaded that the plaintiff was paid up to the end of July 2017 but that he was required, by instructions from the Ministry of Finance, to continue working for the months of August and September 2017 and was not paid for those months ([16] to [22]).

[28] There follows a heading 'Cause of Action'. The enactment of the Repeal Act is pleaded and that under the Act, and particularly s. 17, the Government of Tonga was obligated to ensure that the Committee had sufficient funds to meet its contractual obligations to pay the salaries of the plaintiff and staff and/or to hold the Games ([24] to [26]).

[29] At [27], and notwithstanding the exclusive reliance in [26] upon the terms of the Act (and in particular s. 17), it is alleged that the Government breached its statutory 'and/or contractual duties and/or obligations' to the plaintiff. Six particulars follow, which are in certain respects contradictory. It is pleaded, for instance, that the repeal of the Act did not 'expropriate the Plaintiffs contractual rights' but also that it 'deprived the Plaintiff of the benefits of his contract of employment'. The particulars also include the following:

(e) The repeal of the Pacific Games Organizing Act was contrary to Clause 20 of the Constitution insofar as it affected and removed the Plaintiff's existing rights and privileges under his contract of employment; and

(f) The Defendant failed to ensure that the organizing committee was provided with sufficient funds to pay the Plaintiff's salary under his contract.

[30] At [28] to [30], it is pleaded that despite being notified of the terms of the Committee's settlement with the plaintiff and the Government's responsibility 'for payment of the Plaintiff's employment contract' the Government had not responded.

[31] At [31], there is an 'alternative' pleading to [27] which is that the Government breached its statutory duty under s. 17 to 'meet payments of the contract of employment' of the plaintiff and in particular to pay the settlement sum. The relation between the pleadings in [27(f)] and [31] is not clear.

[32] The primary remedy claimed under the first cause of action is damages in the amount of the settlement sum.

[33] There is then what purports to be an 'alternative cause of action' at [32]. It anticipates an argument that the variation of the plaintiff's employment agreement for payment of the settlement sum was unlawful. It pleads that if the variation is ineffective then the plaintiff is entitled to damages represented, I infer, by his salary and benefits for the full term i.e. to 14 October 2019.

What causes of action are relied upon?

[34] The amended statement of claim is not a satisfactory pleading. In what appears to have been an effort to cover all possible bases it contains allegations that are broad and unmeaning. It makes contradictory allegations. Some allegations are irrelevant to any possible cause of action. A number of distinct causes of action appear to have been blended together in the first cause of action without any attempt to differentiate them. Furthermore, and most fundamentally, it is not clear what causes of action are relied upon.

[35] Dr. Harrison submitted that the amended statement of claim appeared to plead breach of contract and breach of statutory duty with a 'tacked-on' complaint about alleged

retrospectivity of the Repeal Act. That was a fair assessment on the face of the document but with the benefit of Mr. Edwards' submissions I perceive there to be three lines of argument.

[36] Mr. Edwards renounced any reliance upon breach of contract as a cause of action. He submitted that there is no pleading of a breach 'by the other party to [*the plaintiff's*] contract of employment.'

[37] The principal argument that Mr. Edwards did advance was that the Repeal Act could not, as a matter of law, retrospectively deprive the plaintiff of his contractual right to payment by the Committee. He referred to cl. 20 of the Constitution, s. 15 of the Interpretation Act, *Pacific Games Council v Tonga Sports Association and National Olympic Committee v Kingdom of Tonga* (Unreported, Supreme Court, CV 16 of 2018, 19 November 2018, Paulsen LCJ) and *Wells v Newfoundland* [1999] 3 SCR 199.

[38] Secondly, Mr. Edwards maintained that the Government breached a statutory duty, based primarily upon s. 17 of the Act, when it failed to put the Committee in funds to meet its contractual obligation to the plaintiff.

[39] Thirdly, it is argued that the plaintiff was required by instructions of the Ministry of Finance to work for the months of August and September 2017 for which he was never paid.

[40] In the following paragraphs I consider whether the plaintiff's claims are clearly untenable justifying the summary termination of the action. The analysis is under the following headings:

(a) Breach of contract;

(b) Breach of statutory duty;

(c) The directive to work; and

(d) Retrospectivity and the repeal of the Act.

Breach of contract

[41] Although the plaintiff does not now maintain a claim based on breach of contract, the amended statement of claim pleads that the defendant is being sued for breach of its

'contractual duties'. There is no further pleading as to the source and content of such duties. For completeness, I will address why such a claim is untenable.

[42] The amended statement of claim contains no allegation of an employment contract between the plaintiff and the defendant (or the Government). The possibility of such a contract is not contemplated by the Act. Under the Act it was the Committee that appointed the plaintiff (s. 9). In addition to being the source of the power to appoint the plaintiff, s. 9 was also the source of the Committee's power to terminate his employment.

[43] More broadly, the recognition of contractual duties between the plaintiff and the defendant would be inconsistent with the scheme establishing the Committee as a body corporate with separate legal personality capable of doing all acts and things bodies corporate may lawfully do or suffer (s.3).

[44] The plaintiff's contract of employment has been put before the court and relied upon by him in support of his application for judgment by default. Mr. Edwards conceded that the plaintiff and the Committee are the named contracting parties.

[45] It is therefore undoubtedly the case, as Dr. Harrison submitted, that the defendant was not in fact and could not in law have been a party to the plaintiff's contract of employment nor could it be a party to any variation of that contract entitling him to payment of the settlement sum (or damages).

[46] At times, it appeared that Mr. Edwards was arguing that the defendant was vicariously liable on the contract between the plaintiff and the Committee because the Committee was a statutory authority or because the plaintiff's appointment was approved by the Audit and Governance Authority, of which representatives of the Government were members. Such arguments are misconceived.

[47] I have previously held, in my ruling on the defendant's application to set aside the default judgment, that I know of no principle that would make the defendant liable on the Committee's contracts simply because the Committee was a statutory authority. Nothing has changed. Furthermore, the Audit and Governance Authority was not the Government.

[48] Mr. Edwards placed reliance upon *Wells v Newfoundland* (supra) which I had referred to in the *Pacific Games* case. That case is distinguishable and does not advance the plaintiff's cause because Wells was a Government servant; the plaintiff was not.

Breach of statutory duty

[49] The plaintiff has no tenable cause of action either for breach of statutory duty arising out of the Act. Whilst asserting the existence of such a duty, Mr. Edwards did not refer me to any relevant principles of law or authorities to support its existence in this case.

[50] The leading Tongan case on the circumstances under which liability for breach of statutory duty may arise appears to be *Clark v Pikokivaka* [1993] Tonga LR 50, 55 in which Ward CJ held that four things must be established:

(a) That the injury claimed is within the scope of the statute and the statute is directed at the plaintiff;

(b) That the duty imposed by the statute can give rise to liability in civil proceedings;

(c) That the duty prescribed by the statute was not properly carried out; and

(d) That the breach produced the damage claimed.

[51] I find this formulation unhelpful. To ask whether a statute 'can' give rise to civil liability does no more than state the issue the Court must decide and provides no guidance as to how it is to be resolved. Furthermore, I do not accept the view expressed by Ward CJ that this tort is a form of negligence (see for instance Todd, Hawes and Cheer, '*The Law of Torts in New Zealand*', 7th Ed at 452).

[52] I take as a correct statement of the position to be what Hammond J said in *Hobson v Attorney General* [2007] 1 NZLR 374, 384 at [43]:

> To put all of this another way, carelessness is actionable under the tort of negligence but only in situations in which the criteria for the recognition of a common law duty have been satisfied. The tort of breach of statutory duty may impose a standard of reasonable care, but it does so only when the statutory duty in issue has been determined as intended to confer a private law cause of action on a

defined class of persons. These constraints mean that there is not some sort of intermediate tort of careless performance of a statutory duty.

[53] In deciding whether a statute imposes a duty that is enforceable by way of a private civil action the court is primarily concerned with whether from a consideration of the whole Act and the circumstances it can be ascertained that the intention of the Legislature was to create a private law remedy for its breach.

[54] In determining the Legislature's intention the principal test adopted by the courts has been whether the statute in question was passed for the benefit of a limited and ascertainable class. If so, it is more likely to be actionable by members of that class.

[55] In *X (Minors) v Bedfordshire County Council & ors* [1995] 2. A.C. 633, 731, Lord Browne-Wilkinson said:

> The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty....
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> ..... The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

[56] For a court to find that a statutory duty is actionable in damages is to imply into the Act something not expressly contained in its words and the court will not lightly arrive at such a conclusion. It has been said that the court 'must be driven to the view that something is necessary to achieve the purpose of the statute and, therefore, objectively within the intention of the legislation, yet was not provided for' (*Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2011] NZLR 442 at [188]).

[57] It is plain that in so far as s. 17 can be said to impose any duty at all it was not a duty owed or directed to the plaintiff. The section has not been enacted to protect the interests of a limited class. In so far as the Government was required to provide funding to the Committee that funding was for the specific purpose of enabling the

Committee to 'generally organize and conduct the Games'. It is general in its terms and directed at benefitting the public as a whole. It cannot have been the Legislature's intention to provide a cause of action in favour of any individual member of the public claiming to have suffered loss as a consequence of alleged default by the Government of this funding obligation.

[58] Furthermore, to the extent that s. 17 imposed a duty on the Government it was qualified by the words 'as a funder of last resort' and 'to generally organize and conduct the Games'. Whether there has been a breach of such a qualified obligation would necessarily require consideration of the Committee's and the Government's budgetary decisions and priorities, the public nature of which is inimical to the existence of a private right of action by individual members of the public.

[59] Relevant also is that, as noted earlier, the Act established the Committee as an independent and autonomous body with the rights of a body corporate to acquire and hold property and to sue in its own name. The Committee had the power to seek its own legal redress against the Government for any failure to fulfil its funding obligation.

[60] Mr. Edwards argued that the defendant's position was contrary to evidence given by the Prime Minister in other civil proceedings (*Sevele v Prime Minister of Tonga & Ors* [2016] Tonga LR 342). Mr. Edwards is not correct in his submission and he misstates the Prime Minister's evidence which went no further than to acknowledge that the Audit and Governance Authority had a responsibility to ensure that the funds of the Committee were properly applied. In any event, the views of the Prime Minister are not a relevant consideration in the present context.

[61] Mr. Edwards also argued that the existence of a duty to provide funding should be implied from the Government's supervisory role over the Committee under s. 16 of the Act. This submission again incorrectly conflates the Audit and Governance Authority and the Government.

The Ministry' directive to work.

[62] The directive cannot have taken effect as variation of the plaintiff's employment contract for reasons I have already given. There is nothing else in the amended statement of claim or in Mr. Edwards' submission from which I could infer that it

created an obligation on the Government (in law or in equity) to pay the plaintiff for those two month's work.

Retrospectivity and the repeal of the Act

[63] The heft of the plaintiff's complaint is that his right to payment of the settlement sum (or salary/entitlements) by the Committee was defeated when the Committee was abolished by the Repeal Act. However, to date the plaintiff's case has proceeded on erroneous premises that he has 'contractual rights', or alternatively 'statutory rights' arising from the Act, that are enforceable directly against the defendant by way of a private law action for damages.

[64] To my mind the real issue in this case is whether the plaintiff has a public law right to compensation/damages arising from breach of cl. 20 of the Constitution, which provides:

> **Retrospective laws**
>
> It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.

[65] There is a great deal of jurisprudence in other countries recognizing breach of constitutional rights as a cause of action. Whilst the right to bring such a claim in Tonga has never been established, in *Edwards v Pohiva* [2003] Tonga LR 231, 240 the Court of Appeal left open for later consideration whether 'the Constitution of Tonga gives rise to a separate cause of action for damages or compensation for a proved breach of a constitutional provision'.

[66] In *Taione anor v Kingdom of Tonga* [2005] Tonga LR 67, 127 Webster CJ expressed the view that there might well be a right to constitutional damages. He also held as invalid cl. 103A of the Constitution that provides that the remedy for breach of any provision of the Constitution shall be declaratory relief and not damages.

[67] Dr. Harrison argued that there was no breach of cl. 20 because the Repeal Act had only prospective effect. He also submitted that to the extent that the Repeal Act was not prospective by applying s. 34 of the Interpretation Act it would necessarily fall to be

'read down' so as to only have prospective effect. I am unable to accept these submissions.

[68] The concept of retrospectively is not clear cut. Although appearing to be prospective, statutes may operate retrospectively by having an effect on things that have happened or rights and expectations acquired in the past (Burrows and Carter, '*Statute Law in New Zealand*' at 585-586 and *Tu'ifua ors v Public Service Association and anor* [2016] Tonga LR 105).

[69] I consider that it is certainly arguable that the Repeal Act had retrospective effect. In repealing the Act without any transitional or saving provisions the Repeal Act removed the plaintiff's rights *vis á vis* the Committee. If this analysis is correct, I do not see how s. 34 can retrieve the situation. As the Committee ceased to exist, how is it possible to 'read down' the Repeal Act so that the plaintiff's rights against it are preserved?

[70] If the plaintiff advances a constitutional claim it will face very significant hurdles. The existence of the cause of action is not yet established in Tonga. It may ultimately be found not to exist. It must undoubtedly be the case that not every breach of the Constitution is actionable. If the court were to find that a breach of cl. 20 is actionable the plaintiff must establish that it was breached. If his constitutional rights were breached, s. 103A may be a bar to an award of monetary compensation notwithstanding *Taione.* If an award of monetary compensation is available the plaintiff must establish an entitlement to it. Based on overseas case law, compensation, if awarded, may not be assessed on the same basis as a private law claim (see for instance *Taunoa v Attorney General* [2008] 1 NZLR 429 (SC)).

[71] Notwithstanding all of that, a claim for breach of the plaintiff's constitutional right is not untenable. To adopt the words of Hammond J in *Hobson*, the claim cannot be confidently excluded without further consideration of the facts and much closer argument and consideration of the wider implications of recognizing a constitutional duty.

My assessment

[72] The amended statement of claim presently pleads no tenable causes of action and is otherwise defective but a claim based on breach of the plaintiff's constitutional rights cannot be excluded.

[73] Dr. Harrison argued that the plaintiff should not be given another chance to reformulate his claim because he has twice attempted to present a valid pleading and failed and because a claim based on constitutional grounds is radically different from what has been presented before. In my view, this case raises an important issue and whilst the amended statement of claim should be struck out the justice of the case requires that the plaintiff (and the plaintiffs in CV 2 of 2018) be given a further opportunity to amend his claim should he wish to do so consistent with the findings in this ruling .

Result

[74] The defendant's application is successful. The amended statements of claim in both actions are struck out. The plaintiffs may file amended statements of claim on condition that they do so within 42 days from the date of this ruling.

[75] Costs should follow the event. The defendant is entitled to its costs of these applications which are to be fixed by the Registrar if not agreed.

SUPREME COURT TONGA

NUKU'ALOFA: 15 March 2019.

O.G. Paulsen
LORD CHIEF JUSTICE