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

BETWEEN	:	1.	FELETI SAAFI	-	**Plaintiffs;**
		2.	MASIMA TELEFONI		
		3.	FONONGA TU'IPEATAU		
		4.	LAVAKA FOTUKAVA		
AND	:	1.	SAMI VEIKOSO	-	**Defendants.**
		2.	PENISONI MAFI		
		3.	MALAKAI TAPEALAVA		
		4.	TEVITA HAVEA		
		5.	CHURCH OF TONGA		

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Niu for the Plaintiffs
Mr Veikoso for the Defendants

Date of hearing: 20, 24-28, 31 January, 1-4, 7-9, 11,14,28-29, February,
1-3, 13-14 March 2000.

Date of judgment: 19 April 2000.

JUDGMENT

The Church of Tonga was established in 1929 with its own Constitution, Laws and Rules.

At the annual Conference of the Church in 1997, the first defendant, Sami Veikoso, was elected President for three years. The outgoing President was Finau Katoanga.

At that time, the first plaintiff, Feleti Saafi, was the Head Minister of Tongatapu district and, although there are other parties involved in both sides of this action, most if not all the events central to this action stem directly or indirectly from the actions of these two men following the 1997 Conference.

Whilst many of the complaints of the first plaintiff and the defences of the first defendant are founded on Church procedure, the true background that emerged as the evidence unfolded is the

clash of two strong characters each of whom is willing to use or to ignore the procedures of the Church as it suits the moment.

The first plaintiff is now 82 years old and the President is 78 years. In broad terms, the first plaintiff complains that the President is high handed in the way he conducts Church business and disregards the rules when it suits him. The first defendant considers the first plaintiff behaved improperly in important aspects of his duties as Head Minister of Tongatapu and found him a vociferous and increasingly irritating critic.

The other parties play relatively minor roles. The third plaintiff was the Church Auditor and the fourth plaintiff the first defendant's driver. Both complain they were wrongly dismissed by the first defendant. The second plaintiff did not appear at the trial and, whilst he may have some interest in the conclusions the court draws, Mr Niu who represents all the plaintiffs does not seek to pursue those parts of the case that refer solely to him. On at least one critical aspect of the case (the change of name of an account in the Bank of Tonga), his evidence would have been of considerable interest to both sides. His part in that matter is questionable and his absence may well have saved Mr Niu from possible problems of conflict between the interests of his various clients as the evidence unfolded.

The second and third defendants, Penisoni Mafi and Malakai Tapealava, were two of the five Chief Trustees of the Church as was the President. The fourth defendant, Tevita Havea, was the Treasurer of the Church.

Numerous orders are sought by the plaintiffs but it is convenient briefly to set out the main events that make up the factual background of the case before examining each group of orders in detail. Much is not disputed although the reasons for the actions are generally matters of sharp dispute and, all too often, clearly manifest personal animosity.

The Church owned a building in Fatafehi Road in Nuku'alofa that had been built in 1979 to mark the Church's 50th anniversary. The building had been severely damaged since by a cyclone and, although still used for church functions, it was in a bad state of repair.

Shortly after his election as President, the first defendant ordered the sale of a property in New Zealand which the Church had bought in 1975. It realised $NZ 165,000.00 and most of the funds were used to pay for the demolition and rebuilding the Fatafehi Road property. He also ordered the disposal of a truck the Church had owned for some years by offering it as a prize in a raffle to raise further funds for the rebuilding. The Church still required a truck and a replacement was purchased the following year at a cost of $24,200.00. These actions had the concurrence of the second and third defendants as Chief Trustees

All those matters together with the manner of disposal of the material from the demolition of the old building give rise to the first series of complaints and orders sought against the defendants.

The Church of Tonga had always held the misinales for Kolofo'ou and Kolomotu'a on the same day and, effectively, as one event. The first held after the election of the first defendant was in November 1997. The Kolofo'ou collection was held first and was chaired by the first plaintiff, as Head Minister of the district, assisted by his district secretary and treasurer. However, when

the turn came for Kolomotu'a to make their offering, the President took over and effectively ordered the plaintiff and his helpers to leave.

After the misinale was complete, the President ordered that there should be paid out of the two collections an increase in the salary of the building steward.

His authority to carry out either of those actions is disputed. The plaintiffs sought an account of the money donated in the misinale he conducted but that part of the claim is no longer pursued.

Some time later, the President ordered the first, second and third plaintiffs to withdraw the Tongatapu district misinale money from the account where it had previously been held and to pay it into a new account with the ANZ bank. His daughter worked in that bank and it was to her that the money was delivered in order to open the new account. The right of the President and Trustees to do that and the true reason for so doing is another area of conflict that must be resolved.

Previously, the first and second plaintiffs and the district secretary had opened a deposit account with the Bank of Tonga and placed $40,000 in it from previous misinales. After opening it, the Bank received a letter from them seeking to change the name of the account from the Church of Tonga to the names of the three officials personally. The President received information from the bank that this had occurred and summoned the first and second plaintiffs to his residence. During the course of the conversation he made offensive comments to them, accused them of embezzling the money and repeated that later at the Tongatapu district meeting in April 1998 in front of members of the Church.

The questions arising from the misinale and the bank accounts give rise to the next series of orders sought by the plaintiffs. In order to determine those, it is also necessary to consider the allegations of the defence against the first and second plaintiffs over their handling of the Bank of Tonga accounts which gave rise to the allegations of embezzlement and are one of the reasons put forward by the defendants for the transfer of the misinale funds to the ANZ bank.

By this time, events had come to a head and the hostility between the first plaintiff and the first defendant was only too plain. In March 1998 the first plaintiff filed a series of charges against the President relating to the matters already described. They were raised at the various meetings of the Church up to the Conference in May 1998. They were not determined until the district meeting in April at which the President asked for them to be discussed. He went through each charge and the meeting voted against the charge.

When the first plaintiff tried to put the charges before the Conference, he was prevented from so doing because, it was said, they had been dealt with already.

The whole question of the procedures used in those meetings and the propriety of the manner in which they were conducted is the subject of the next series of orders sought by the plaintiffs.

In his defence, the first defendant has suggested other impropriety by the first plaintiff in the way in which he had used the misinale funds as his contribution to future misinales and the withdrawal of some of the church funds to pay for the legal costs of this court action.

The third and fourth plaintiffs' cases may be dealt with separately.

The third plaintiff was appointed as Church auditor at the 1994 Conference and still held the post when the first defendant was elected President. In the previous year, the first defendant had been Head Minister of the New Zealand district and he had prevented the third plaintiff from looking at the books of account of that district. The third plaintiff had returned and reported the matter to the, then, President, Katoanga. In November 1997, following his election in May, the first defendant dismissed him from his position.

The fourth plaintiff was the driver for the previous President and he also was dismissed by the first defendant.

The manner in which these dismissals were carried out and the power of the President to do so give rise to other orders sought by the plaintiffs.

Whilst the plaintiffs in particular would suggest a link between many of the matters, it is clearer to deal with them as separate topics although cross reference may be necessary in some instances.

The New Zealand and Fatafehi Road Properties.

These transactions are the major part of the first plaintiff's complaint against the defendants.

There is no dispute that the Church purchased a house in Papakura, New Zealand, in early 1975 for $NZ 30,000.00 and sold it in August 1997 for $NZ 165,000.00. The sale was ordered by the first, second and third defendants as Chief Trustees of the Church.

The plaintiffs claim the Trustees had no such right and that only the Conference could make such a decision. They also claim that the money from the sale has not been properly accounted for.

They seek a declaration that the first three defendants acted wrongly in selling the property and an order that they provide detailed audited accounts of the transaction.

The defence is that the Chief Trustees are given power to deal with the Church's property without the express consent of Conference. Alternatively they claim that there was authority given by the Conference and they were acting on that.

The relevant part of clause 8 of the Constitution provides;

> "8. Properties of the Church. All leaseholds owned by the Church whether on Crown Land or Hereditary Estate shall be signed for on behalf of the Church by five Trustees appointed by the Conference.... The quorum required for the Meeting of the Trustees shall be at least three members and all resolutions shall be by a majority vote. It is for the Chief Trustees to keep all properties and to control them."

Mr Niu, for the plaintiffs, accepts the word pule is 'to control' but suggests the word tauhi'a was more than simply 'to keep' and included an element of taking care. I note the meaning in Churchward's Tongan Dictionary is "to look after, take care of, attend to the needs of" and I therefore accept the wider meaning suggested by Mr Niu. Clearly clause 8 is charging the Chief Trustees with a duty not just to keep but to look after Church properties.

Church funds are the subject of clause 9 which clearly gives to Conference the power to raise funds and the responsibility to ensure the funds are properly used:

> "9. Church Funds. The Meeting of the Conference shall have the power to decide the manner of collection and raising Church Funds and the employment of such Funds for the Church maintenance and of provisioning of Ministers.... and it shall be the duty of the Conference to ensure that Church Funds are not put to waste and to ensure the safe keeping of Funds collected by the Church to be employed only in the interests of the Church of Tonga."

I have no doubt that the intention of those clauses is to leave the power to control funds with the Conference. Although counsel for the defence challenged that meaning and the third defendant told the court he certainly considered the Trustees had the right to make such a decision without the involvement of Conference, the first defendant has always claimed the authority for the sale and the use of the funds for the rebuilding of the Fatafehi Road property came from resolutions of the Conference. When answering the charge by the first plaintiff at the district meeting in April 1998, he claimed the sale was the result of a resolution of Conference. In court he also claimed the use of the funds to rebuild the hall was in accordance with a further resolution by Conference that it be rebuilt. I take that as acknowledgment by him that Conference has overall control in such matters - a point of view from which he resiled during the course of the hearing and which was not shared by the third defendant initially.

In his evidence he referred to the minutes of the Conference in 1979 which he had attended. The, then, President, Seluipepeli Mafi, asked Conference for suggestions regarding the New Zealand property and the first defendant moved that it be sold. That motion was carried unanimously.

The following year the minutes of the Conference record the President, Mafi, saying that the New Zealand property was currently being advertised for sale.

It was clearly not sold but that is the authority relied upon by the defendants to justify the sale in 1997.

The plaintiffs argue that such a decision was not acted upon and the failure to do any thing more over a period of 17 years clearly showed Conference did not wish to proceed. During that period there has apparently been no further direction by Conference as to the disposal of the property.

I cannot accept that it is right or practicable to regard every resolution of Conference as remaining binding for an indefinite period unless and until it is expressly revoked. It would always be better for such matters to be ruled upon clearly. If the members of Conference checked such matters by raising them as matters arising from the minutes of the previous

Conference, such a situation would be less likely to arise. However, it appears this was not the case and I am satisfied the 1979 resolution to sell had lapsed long before the defendants directed the sale in 1997. Circumstances had changed since that time and I have no doubt the first defendant was well aware it could no longer be regarded as valid authority.

The plaintiffs further suggest that the use of the funds for the rebuilding of the Fatafehi Road property was not authorised. They point out that the minutes of the Conference in 1995 show a motion was put before the meeting to rebuild the memorial building. It was felt that the rebuilding would have taken too much of the total money the Church had at that time and it was agreed to defer the matter for two years. However, the next year Conference again discussed the memorial building on a motion brought by Tongatapu district. It was suggested that the building could be rebuilt and rented out in order to bring in funds for the Church. The first plaintiff was present and suggested that the overseas churches be asked to assist. The motion was put to the vote and passed.

It has been emphasised by the plaintiffs that the Conference agreed to build in order that it could be let to bring in funds for the Church. That has not been done. It was agreed that the money for the rebuilding was to be raised by the Church and would include a substantial sum out of the funds of Tongatapu district. The next Conference did not deal with this topic and that was where the matter rested. It was at that meeting the first defendant was elected President. Thus the only decision was that of 1996 which was to try and raise funds to rebuild the Fatafehi Road property so it could be let. There was clearly no authority to use funds from the sale of the New Zealand house for the work or to rebuild it otherwise than as a property to let. Despite the lack of authority, by the time of the next Conference, the New Zealand property had been sold and the memorial building rebuilt.

No doubt those actions were the result of impatience by a newly appointed President to get things moving. However laudable that may have been, the President is bound by and should be vigilant to uphold, the rules of the Church. It may be, I know not, that the members of the Church applauded the President's initiative and drive in relation to the new building. However they must realise that the rules are made to protect all the members and, once the rules are ignored to permit a popular cause, the power to use them to curb future and possibly unwelcome actions by the elected officials will have been eroded.

The third defendant gave evidence about the New Zealand sale and the memorial building. He was an impressive witness and gave every impression of a man who was careful always to try to speak the truth. However, he was also clearly uncertain of his exact role as a Chief Trustee and the right he had to act in the way he did. His first account of the powers of the Chief Trustees was that they had virtually unfettered power to deal with all matters of money and other property of the Church. The only fetter on their total discretion he described at first was that they should act wisely.

However, as he was asked more about it, it became clear that he was unable to justify that view. I considered it a measure of his honesty that, when the questions placed him in a position that cast doubt on his actions, he was willing to consider the possibility that the Trustees may have been wrong. This was in stark contrast to the first defendant who reacted to the same suggestion by becoming more certain of his right to act as he saw fit.

The third defendant agreed that Conference had the ultimate authority but suggested that, in cases of urgency, the Trustees could take decisions without seeking the approval of Conference first.

Despite his basic standpoint that they had inherent power to act as they did, he, like the first defendant, also sought to suggest they were acting on the specific authority of Conference in both the sale and the rebuilding. He agreed, however, that he had never read the earlier resolutions and also that it was he who had been directed after the 1996 conference to draw up plans for a building to rent. As with the first defendant, this inconsistency in the manner in which it was attempted to justify the actions of the trustees is significant in determining their true attitude to the right to sell the New Zealand property and rebuild the Fatafehi Road property with the proceeds.

I do not go through the evidence on this part of the case in any more detail. The picture that unfolded during his evidence and that of the first and second defendants was of the Trustees meeting to decide matters well outside their power. Their meetings and decisions were, to a large extent, simply a way of confirming the President's views and implementing his wishes. They confirmed the impatience of the President and his unwillingness to wait for the Conference.

Although there are five Chief Trustees, those from Ha'apai and Vava'u were not involved in the vast majority of the meetings. The necessary quorum was three and, as long as that could be achieved, no attempt was made to bring them to meetings or to seek their opinion. That clearly ignored the spirit of Chapter II, rule 3 which starts with the words: "If the Trustees hold a meeting, all 5 members must be present..." before going on to deal with the requirements of a quorum of three. It is only too apparent on the evidence as a whole that the President regarded the Trustees simply as a means of rubber-stamping his actions and, as long as he could produce a quorum, was unconcerned whether or not the remaining two trustees in Ha'apai and Vava'u might have wished to express any views on the matter.

Despite the suggestion that the Trustees had the power to deal with all matters to do with money and property under the suggested authority of clause 8, I am satisfied the manner in which they alternatively tried to claim authority from the earlier resolutions of Conference showed they did not really believe they had the unfettered right to act as they did. The third defendant acknowledged that the Conference was the highest authority. I am satisfied they went ahead with these transactions in the hope their actions would be popular and would not, therefore, be questioned in Conference.

It is perfectly clear that the power given by clauses 8 and 9 is limited and subject to Conference. A decision as important and having such an effect on the assets of the Church as the sale of the New Zealand property and the use of the proceeds to rebuild the memorial building was well outside their duty to keep all properties and control them. A matter of such importance in relation to the use of the Church's money was plainly for Conference to decide. The part of the decision to rebuild the Fatafehi Road property to a different design and for a totally different purpose from that decided by Conference only a year before went further and showed a lack of concern for the decisions of Conference.

Although there is nothing to say what should happen in a case of urgency, I accept there may be support for the third defendant's opinion that the Trustees should be able to make decisions in really urgent situations without prior authority from Conference. There was, however, never any suggestion that the sale of the house in New Zealand or the rebuilding of the Fatafehi Road property involved any urgency beyond the impatience of the President and the other two Trustees to go ahead and ignore the need to seek the approval of Conference.

Two further complaints of the Plaintiffs relate to this part of the case. The first is that proper accounts of the whole transaction were never given to Conference. The fourth defendant was the Church Treasurer at that time and he told the court that he gave the financial report to the Conference in 1998. He produced his notes of the accounts and stated they were not questioned by the meeting. If they were given in the form in which he presented them to the court, it reflects very badly on the members of Conference and the way they take their responsibilities to the church members who elected or appointed them. However, I do not need to apportion blame in this because I am satisfied on the evidence produced before me that the accounts were not presented to Conference in 1998.

A cursory glance at the accounts reveals a number of serious deficiencies. I set out only a few. The sale of the property in New Zealand was for $165,000.00. Once legal fees, agent's commission and other expenses had been paid, the net figure passed to the Church was NZ$156,247.59. The accounts show that figure as NZ$157,256.91 and I accept that difference is probably an accounting error. However, the next item in the accounts produced by the fourth defendant is stated to be:

> "Expenses in NZ (Lawyer and Government charges) NZ$5000.91".

The result is that the sum stated to have been received by the Church here and applied to the building was only NZ$152,256.00. The treasurer could offer no explanation of the double charging (and, subsequently, the loss of about NZ$5,000.00) save to say that those figures were given to him by the President and he accepted them.

Later the money is converted to Tongan currency for the accounts and two successive entries show NZ$50,000.00 and NZ$102,256.00 yielding T$38,946.88 and T$100.665.75 respectively. That difference was explained by the fourth defendant as being due to fluctuations in the exchange rate. No attempt has been made by either side to obtain the exchange rates for the period in question and I do not accept they varied to the extent that one pa'anga bought NZ$1.28 at one stage and NZ$1.01 at the next within a period of months. I am satisfied it is a mistake and yet the final figures are balanced on that incorrect figure and there is no explanation of or accounting for the incorrect figures.

Once the remaining money from the sale in New Zealand is shown to have been brought into Tonga, T$20,000.00 is removed and paid into the office of the Church by the defendants for expenses in that office. That was, of course, the office in which both the first and fourth defendants were working at the time. I was given no details of how or by whom that decision was reached and neither has there been any attempt to justify it. It was the more remarkable because, shortly afterwards, the funds for the new building had been nearly exhausted and it was necessary to borrow $13,000.00 from the President's daughter. It is perhaps also worthy of

mention that the entry in the accounts credited the President with this timely and generous gesture towards the completion of the memorial building and it is described not as a loan but as a deposit. However, there is nothing on the evidence before me that shows he knew he was being given the credit for such apparent generosity.

I do not list the other problems with those accounts. It is clear they are totally inadequate to demonstrate what must certainly have been one of the largest single financial transactions of the Church that year and possibly for many years.

The plaintiffs finally allege for this part of the case, that, when the building in Fatafehi Road was being constructed, the President took some of the rubble and fill from the site and had it delivered to his son's home and did not pay for it. A considerable number of truck loads were also removed by a friend of the President, Kali Vailahi, and used for his own benefit and not paid for. I am not satisfied the evidence has revealed the full nature of these events. It is clear a number of people were removing material at the time including the first plaintiff. I am unwilling to attach blame on the evidence I have heard. I leave this part of the case with the comment that it is a lesson in the danger of slovenly accounting and the results of failure properly to follow correct procedures. Even if there was no impropriety, it has given scope for suspicion and malicious comment, which would have been avoided if everything had been done according to the proper controls.

The Kolofo'ou and Kolomotu'a Misinales

The first misinale collection for Kolofo'ou and Kolomotu'a following the election of the first defendant as President was in November 1997. At that time the first Plaintiff was Head Minister of Tongatapu district and his case is that he should properly have conducted the misinale for the villages in his district including the Nuku'alofa churches. When the collection took place that year, he conducted the Kolofo'ou collection assisted by his district treasurer and secretary. However, when he had finished and before he could start the Kolomotu'a misinale, the President, in a loud and angry voice, told him and his two assistants to get out. When they had moved, the President took over the conduct of the misinale.

The first defendant admits he told the first plaintiff to leave so he could conduct the Kolomotu'a collection but insisted it is traditionally the role of the President to conduct both misinales.

Chapter XL, rule 3 provides that the misinale "shall be conducted by the District Head Minister or by some other Minister that he has ordered to conduct" it. However, even with written rules there may be room for tradition and, if this was a practice followed for some years by previous Presidents as the first defendant and some of his witnesses claim, it may fall into such a category. The first defendant was the Head Minister of Tongatapu immediately before the first plaintiff took over and he insists that was the procedure throughout his tenure. The first plaintiff points out that, as the District Head Minister in 1997, he could have invited the President to do so and that may be the reason previous Presidents have conducted the misinale if that has occurred. I do not consider I have heard enough evidence to be able to rule on the correctness or otherwise of that. However, I am satisfied on the evidence that the first defendant did speak in a rude and unpleasant manner to the three district officials. Even some of the defence witnesses testified to this and it is clear that he acted in a manner that ill-befitted a President of the Church.

Sadly, it is clear that, by this time, the rancour between these two men was becoming apparent to everyone.

The procedure at all misinales is that the money is added up and the church steward is then given 10% of the total figure. The remainder is divided in two. One half goes to the village for its own needs and is the responsibility of the village trustees. The other half is taken by the Head Minister and put into a bank account together with the contributions from the other villages in his district.

Usually, one of the first things that the village trustees have to do is to decide how much should be paid to the building steward in the village. However, in the November 1998 misinale, before he left the chair, the President announced that the building steward should be paid a total from the two villages of $6,000.00. That was a decision, the plaintiffs say, that he was not entitled to make and it should have been left for the trustees of the two villages to decide between them.

The first defendant agrees he gave that money to the building steward. He points out that, whilst the laws deal with the church steward, they are silent about the building steward. He considered that he was right to make the order he did and insisted that it had been done in that way previously. The laws give no guidance on this. It would seem that the decision was a direct interference in matters for which the village trustees should have been responsible and the records of previous misinales do not support the first defendant's contention. It was clearly a matter of some bitterness to the first plaintiff and I am satisfied on balance that first defendant should not have ordered the payment to the building steward.

The half (in fact 45%) of the misinale from each of the villages that is paid into a bank account by the Head Minister is retained until the district meeting. That meeting directs that it be divided after the Conference so that one third goes to the Head Minister to use for the district and the other two thirds goes to the head office of the Church.

It is in relation to the bank accounts of the district that the most serious allegations and counter allegations have been made in this case and they are central to each of these two men's complaints about the other and their subsequent actions.

The Bank Accounts

There are two accounts involved. The first was a term deposit with the Bank of Tonga.

In 1997 the first plaintiff decided that the money for the district from the previous misinale was substantial and they would not need it all immediately for the district works. The sum was approximately $80,000.00 and so he advised the second plaintiff, Telefoni, who was the district treasurer, to put $40,000.00 into a short-term deposit account. The deposit of this money was no secret and had, according to the district secretary at that time, Siaiku Tapa, been mentioned at the district meeting.

It was clearly a church account but shortly afterwards the bank was asked to change the name of the account from the Church of Tonga to the names of the first and second plaintiffs and Tapa.

This came to the attention of the first defendant and he summoned the three officers involved to explain. I do not need to go through the evidence of the meetings but there is no real dispute that, at one, the President made some extremely strong and angry comments about the first and second defendants in which he accused them of embezzling the money. These remarks were spoken so loudly and in such strong terms that some of the office staff came to see what was going on. The first defendant subsequently repeated them publicly at a district meeting.

During his enquiries into the account, the President went to see the Manager of the Bank of Tonga. Before going to that meeting, he told the first plaintiff that, if he had done wrong, he would be dismissed from his office. The first plaintiff disputed he had done wrong but said that, if he had, it should be taken to the Conference. When the first defendant returned from the bank, he again summoned the first plaintiff and Tapa to his office. The first plaintiff cried and apologised if he had done wrong. The President said that he should go and do his work for the Church. It was the impression of Tapa that this meant the matter was over and had been resolved. The account was transferred to the names of other officers and the funds were still in the account when the first plaintiff resigned at the 1998 Conference.

The first plaintiff later included the matter in the charges he brought against the President by alleging the first defendant had no authority to transfer the funds from that account after the attempt to change the name had been discovered.

In court it was clear both the first plaintiff and the first defendant feel very strongly about this part of the case. The former considers he has been wrongly accused and that he never knew about the alleged dishonesty; the latter that this was a deliberate attempt to take Church funds.

During the evidence of the first defendant the document requesting the bank to change the names on the account was produced. Surprisingly, although the first defendant had seen it at the time he spoke to the bank, it had not been produced previously. Its production changed the direction in which the evidence about this account had appeared to be going up to that point.

It is a letter addressed to the Manager of the bank simply asking to open a term deposit account and is signed by Saafi, Telefoni and Tapa. Below those signatures is written: "P.S. And change the name to the above persons. Thank you". That is signed again by the second plaintiff.

The document produced initially was a typed copy but, when the original was called for, it was a manuscript letter clearly written by Telefoni. The case of the first plaintiff and Tapa has always been that they were asked to sign a document to open the term deposit account and they knew no more. They have consistently denied seeing the postscript when they signed the letter. The letter supports that. The postscript not only appears after their signatures but is written in a slightly different colour ink. The signature of Telefoni following it is different from that used by him after the main text.

Having seen it and bearing in mind the manner in which the document appeared at the trial, I am satisfied the first plaintiff had no knowledge of the attempt to change the account to his name.

The first defendant was not willing to take the same view. He told the court he had seen the letter shortly after it was written when he was shown it by a member of the bank staff and it was

that which raised his suspicions and started his enquiry. He claimed he did not understand what 'P.S.' meant and was not willing to concede that it had been added after the body of the letter. He would not accept that the signatures above did not apply to the postscript and saw no significance in the fact that Masima had felt it necessary to sign the postscript but the others had not.

Although the first defendant denies many of the actual words used in his office and the district meeting, he does not deny raising his voice and accusing the three men of dishonesty and embezzlement. In court he continued to seek to support his allegation by reference to two other alleged misappropriations by Saafi. These were his use of money from the misinales as his contribution to further misinales and the use of some of the district funds to pay a lawyer for this case. Neither of these appears to be disputed by the first plaintiff but I have insufficient evidence to say whether they were against the practice of the Church. It is clear the President did consider they were wrong and was angered by them but, whatever the rights and wrongs, I am satisfied those two additional matters were not part of his reason for accusing the district officials of embezzlement and abusing them at his house and at the district meeting. I accept he thought they were trying to change the name of the account and was so sure that they were dishonestly involved that he simply refused to see the matter in any other light and made no proper enquiry before he accused them.

It was this incident more than any other that lead to all the subsequent bitterness and allegations and counter allegations involved in this case.

The second account referred to was in the ANZ bank.

In November 1997, following the events I have described in relation to the Bank of Tonga account, the President ordered the district officials to take the misinale monies from the account in which they were being held until the district meeting and put them in an account with the ANZ. The plaintiffs allege he had no right to do so and that it was done to benefit his daughter in the bank by giving her the credit for bringing a large customer to the bank.

I am satisfied the first defendant ordered this because he, mistakenly as the evidence shows, believed that the three district officials had been dishonest over the term deposit account. However, he told the court that his reason for doing this was because the interest rates in the ANZ were, at that time, higher than in the Bank of Tonga. There was evidence that the rates were higher but it was a strange comment in light of an earlier assertion that much of his objection to the district money being deposited in a term account was that it was wrong for the church to lend money for interest. The evidence as a whole showed that the money was left in the Bank of Tonga account to complete the term for the interest. That, together with his claim that he did not consider the Church should receive interest, demonstrated how the first defendant all too often gave the impression to the court that his bitterness towards Saafi lead him to make statements that were based more on a determination to condemn him than a strict regard for the truth.

I do not find there is any evidence that the reason for transferring the money was for the benefit of his daughter. I am satisfied, though, that the President and the Trustees should not have taken charge of those funds before the Conference. I have already found that there was no foundation

for the suggestion that the first plaintiff had been dishonest in the conduct of the term deposit account and the defendant has not been able to suggest any improper conduct in relation to the way the district officials were handling the funds in the misinale account to explain his order to transfer it to the ANZ Bank. I do not consider there was any proper reason for their intervention.

Before passing to consider the attempts of the first plaintiff to bring charges against the President, it is convenient to deal with the cases of the third and fourth defendants.

The Dismissal of the Church Auditor.

The third plaintiff, Fononga Tu'ipeatau, had been a member of the Church all his life. Since 1977 he had been a quest worshipper and, in 1985 he was appointed as one of the Chief Trustees.

In 1994 he finished his term as a Trustee and was appointed as the Church auditor at the Conference in that year. The President dismissed him from that position in 1998 and he challenges that dismissal. The first defendant claims that he was properly dismissed because he was removed as a quest worshipper and, therefore, lost all positions in the Church.

The court was told of an earlier incident between this plaintiff and the first defendant when the latter was the Head Minister of the New Zealand district. The third plaintiff went to New Zealand to advise the staff of changes in the system of accounting but was denied any access to the office papers. It clearly left the two men with bitter feelings and each side has prayed it in aid of his case to some extent. The first defendant, in particular, claimed this was a reason for his subsequent dismissal of the auditor. Whilst I am satisfied the President harboured bitter memories of this incident in his mind, I do not think it has been demonstrated to have any other relevance to the matters upon which I am now asked to rule.

The events leading to the dismissal started at a Preachers meeting in June 1997. The minister of the third plaintiff's village, Houmakelikao, made two complaints against the third defendant. He said that he was not attending church because of disagreements he was having with the minister and that he had been drunk and passed out on the church premises. The third plaintiff was not present at that meeting. His case was that he was not notified that there was a complaint against him. Saafi chaired the meeting as Head Minister and, following discussion by the meeting, he asked the minister to seek to reconcile with the plaintiff.

The matter was raised again in the quarterly meeting in September 1997 at which the third plaintiff was also not present. The Head Minister asked if the village minister had raised it with Tuipeatau and was told he had not. Despite that and the fact that the person involved was not present, it was proposed that there should be a vote. The vote was 60:21 to have him removed from the church list of lay preachers. This plaintiff denies the allegation of drunkenness.

Shortly after the quarterly meeting, the third plaintiff was in the United States and he received a letter from the President telling him that he was being dismissed. He has no copy of the letter and the terms cannot be seen because the Church also has not been able to produce a copy. However, he wrote to the President in April asking about the situation and asking to attend the Conference in May 1998.

The reply is produced and is dated 7 May 1998. It is in terse terms. The President advised him that he was dismissed from any positions with the church at the Quarterly meeting, that the President no longer wished him to be a member of the Conference because he had been removed from his position of auditor and advised him that he had no involvement or interest in the Conference.

The third plaintiff did attend that Conference and asked a member to raise the matter but the President refused to allow it to be discussed.

The first defendant disputes that the appointment of the auditor was by the Conference. He claims that the, then, President simply announced the position and there had been no resolution by the Conference to appoint an auditor. His case is that the appointment and the dismissal were not matters for the Conference.

He suggested that, once the quarterly meeting removed his name from the roll of preachers, his name was automatically taken from the roll of quest worshippers. As no one may hold a position in the Church unless he is a quest worshipper, he could not remain as the Church auditor.

Despite those statements, the first defendant also justified the dismissal on other grounds. He said the third defendant had used funds wrongly when he visited Australia following his trip to New Zealand, that he should, as a preacher, have attended the quarterly meeting and also that he was abroad too often when he should have been carrying out his duties as auditor. He stated that the third plaintiff "just pleased himself to do as he wished...He often went to America when the Church had work for him to do."

I am satisfied on the evidence I have heard that the principal motive of the President was to get rid of an officer he did not like. That, in itself, is an improper basis upon which to exercise his powers but I need to consider the Church rules in relation to his claim that the third plaintiff was properly dismissed from his post as a quest worshipper and, as a direct and inevitable consequence, auditor.

Although the third plaintiff challenges the reason for the decision of the quarterly meeting to strike his name off the roll of lay preachers, there has not been any evidence to persuade me that it was outside the powers of such a meeting. That was as far as the decision of that meeting went.

The first defendant was pressed about the foundation of his assertion that, when anyone is struck off the roll of lay preachers, he is no longer a quest worshipper. His explanation was that there was no regulation but it was simply the procedure that has been used. Once his name is removed he will automatically cease to be a quest worshipper. It is not written in the law. It is, he said, a working procedure. I found this a remarkable statement in the light of the provisions of the Church law.

The laws of the Church include the "Law relating to Quest Worshippers". It sets out what is required of a person if he is to be a quest worshipper. They are largely rules of conduct and section 13 (i) states:

> "This is the fundamental law of the Church of Tonga, if anyone breaches it, he shall be rebuked for the wrong doing which he has done, and if he shall not repent, he shall be dismissed as a quest worshiper, he shall not have any connection to us by order of the Conference."

However, section 114 sets out a procedure for the dismissal of a quest worshipper:

> " It shall not be allowed to just dismiss any quest worshipper unless he is tried (or examined) in the people's court, and if any person is tried in accordance with this section and it appears to be true, it is upon them all in the meeting to order any punishment against such person involved in the matter that has been decided."

This is reinforced by Chapter XVI, rule 8 of the Rules:

> "It is strictly forbidden to remove a quest worshipper unless he is tried in the Adjudicating meeting as provided under section 114."

Mr Niu suggested to the first defendant that it was clear that any quest worshipper who was found to have fallen short of the requirements of the law should be rebuked and given a chance to repent. The President agreed that if a lay preacher was taken off the list, the meeting that tried him should also consider his position of quest worshipper. If he apologises, that would be an end of the matter and, if he does not, the meeting may decide to suspend him as a quest worshipper. Mr Niu pointed out that the third defendant had not been rebuked, neither had he been given a chance to repent. More importantly, the quarterly meeting had never purported to make any decision about his status as a quest worshipper. How, in those circumstances would the President have known he had been suspended from that status? As happened a number of times in his evidence, the first defendant became angry and the matter was dropped.

I ám satisfied that paragraph (i) makes it clear that a member found guilty of wrongdoing in the terms of section 13 must be rebuked and given an opportunity to repent. He can be dismissed as a quest worshipper if he fails to do so but only after trial in accordance with the Church laws.

The third plaintiff was found guilty by the meeting of conduct that the meeting considered sufficient to require his removal from the roll of lay preachers. Despite the evidence of the village minister to the contrary, the minutes show that the meeting went no further. As the person involved was not present, it was right it did no more.

The third plaintiff was therefore not removed from the status of a quest worshipper. Whether or not his removal from the roll of lay preachers was sufficient for his dismissal as auditor is not relevant because the first defendant's reason for dismissing him was that he no longer held the position of quest worshipper. That was not the case and so I must find that he was wrongly dismissed from that position.

That leaves two other points in relation to the third plaintiff's case. First, he was, he claims, appointed by Conference and therefore only Conference has the power to dismiss him.

Clause 9 of the Constitution deals with the funds of the Church:

"Church Funds. The meeting of the Conference shall have the power to decide the manner of collection and raising of Church Funds and the employment of such Funds for the Church maintenance and of provisioning of Ministers. It shall be lawful for the Ministers to appoint a Minister to be responsible for the auditing of church funds and it shall be the duty of the Conference to ensure the Church Funds are not put to waste and to ensure the safe keeping of Funds collected by the Church to be employed only in the interests of the Church of Tonga."

I note the distinction between the powers and duties ascribed to Conference and the more specific allocation to the ministers of the power to appoint an auditor. Such an appointment would presumably be made at the ministers meeting before the Conference proper. I have no evidence that the decision to appoint the third plaintiff as auditor was made in that way especially as he was not a minister.

However, if the ministers have the power to appoint him, the power to dismiss him, in the absence of any provision to the contrary, should lie in their hands also. What is clear is that the clause does not give the President the right to dismiss the auditor.

However, the evidence as a whole is insufficient for me to find that he was improperly dismissed on this ground as well.

The second point urged on behalf of the third plaintiff is that the final words of paragraph (i) of section 13 would suggest that only the Conference can make the final decision to sever any connection with the Church.

By a letter dated 5 August 1998, all the plaintiffs were told their names would be struck off so they were no longer members of the Church of Tonga. However, the reason given in that letter is that they had brought this action in the courts. It is not suggested in that letter that their loss of the status of quest worshiper was the reason and I do not consider it is appropriate to rule on the meaning of the last part of paragraph (i).

The Dismissal of the Fourth Plaintiff

The fourth plaintiff, Lavaka Fotukava, was appointed in 1996 as the President's driver by Katoanga when he was still President. After the first defendant was appointed President, the fourth plaintiff continued to drive for him.

In April 1998, he was absent from his work for a family funeral. He told the court that he had been given permission by a member of the office staff although when that member of staff gave evidence he was not asked about this. When he returned to work the first defendant asked him to do an urgent driving job but, on his return, gave him $200.00 and told him he was finished in the work.

The fourth plaintiff's case is that only the Conference had the power to dismiss him. There is no other evidence of the terms or conditions of his appointment. The first defendant disputes that

the appointment was by the Conference and suggests it was by the President personally. The fourth plaintiff was not present at the Conference himself.

The district secretary was present and told the court that Fotukava was appointed at the Conference. He recalls his name being announced in the allocations and that it was then confirmed by the Conference. There is no direct evidence apart from that and I accept it is correct.

The first defendant agrees that he dismissed him in the way described and says it was because the plaintiff had been warned about absences a number of times previously. He admits the plaintiff was asked for no explanation insisting that he had been warned twice before. The fourth plaintiff disputes this suggestion.

Fotukava told the court that his principal duty was to drive for the President but, if there was no need to drive for him, he would take any urgent work for the office. The first defendant insisted that his duties were to drive for him only and he was not to do any other work unless told specifically by the President.

I am satisfied on the balance of probabilities that the appointment of the fourth plaintiff was confirmed by the Conference. It would be reasonable to assume therefore that the Conference would have the power to dismiss him or, at least, to confirm his dismissal but the laws are not clear on the procedures in such a case. It is certainly clear, as Mr Niu points out, that the dismissal was done in a preremptory manner and the plaintiff was given no opportunity to explain. Even if the President had good reason to dismiss him peremptorily, it was still up to the Conference to confirm or cancel it.

I appreciate it is a cumbersome and inconvenient procedure but I consider that the only reasonable reading of the laws would suggest that, in such circumstances, the power of the President would be to suspend the person involved until the next Conference and then seek confirmation of his dismissal.

The Charges Against the President

By March 1998, the first plaintiff had decided to bring charges against the first defendant on all these matters. He filed twelve written charges against the President. They are stated to have been filed on 18th but they were first referred to at the Area Meeting in Nuku'alofa on 11 March.

The first plaintiff's case is that the only forum which has the power to determine these charges is the meeting of the ministers immediately before the Conference. They were to be submitted to the lower meetings but that was only a procedure to lead to the Conference.

At the area meeting for Kolofo'ou and Kolomotu'a, the minutes show that the chairman told the meeting there was a statement of charge against the President. It was decided to hold a ballot to decide whether or not the meeting wished to discuss it but the actual motion is not recorded. The minute then records; "it was the unanimous wish of the meeting not to submit this statement of charge to our district meeting".

At the quarterly meeting, the charges were read by the first plaintiff, who was chairman. The minister who had chaired the previous area meeting then said they did not agree to the discussion of the charge. The church lawyer advised the meeting that they should not discuss the charges but they were simply to go to the Conference. The minute does not say the final result but the minister who recorded the minutes told the court that the meeting decided not to send the charges to the district meeting.

However, the charges were raised at the district meeting. This meeting was chaired by the first defendant. The first plaintiff asked to put the charges forward and pointed out that they had not been accepted by the previous meetings. There was some dissent but the chairman asked the meeting to consider the charges and decide whether to submit them to the Conference. The first plaintiff protested that the submission of the charge was simply a formality and they should be left for the Conference to decide. The Church lawyer supported him but the chairman insisted that the charges be read out to allow him to answer them.

That is what occurred. The first plaintiff was asked to read each charge in turn and the President, from the chair, gave his explanation. That was followed in each case by a vote which was overwhelmingly against the submission of the charges to Conference.

The Minute suggests the meeting was conducted in a forceful, hectoring way by the President and the first plaintiff complains that was the case. At the conclusion the President asked that the conduct of the first and second plaintiffs be referred to the Conference because, he claimed, the Church was being put into disrepute by their actions.

Although it is not strictly relevant to the orders sought, it should be stated that, although these matters were indeed raised at the Conference, there had been no attempt by the President or church officials to follow the proper procedures under the rules for such cases.

At the ministers' meeting at the 1998 Conference, the first plaintiff tried again to raise the charges. The President, again from the chair, told the meeting that the charges had been raised at the district meeting which had rejected them all. He is recorded as continuing:

> "In our district meeting....all the charges were rejected and I believe there were more people attending that meeting than the number of us here in this meeting. And now he unlawfully brings these charges again today. But I ask that we hold a ballot to see if this meeting wish it to be resubmitted then I will be willing to go along with it because if I am guilty of any charge then you should punish me, for I do not want to preserve anything bad in our church."

The first plaintiff protested that he was not bringing a motion that they be resubmitted and insisted the charges had to be heard. Two members of the meeting then proposed a ballot and were supported by the President in the following terms:

> "I ask that we hold the ballot to see if you wish to resubmit the charges by Feleti otherwise we will be wasting our time for they were rejected by our district meeting at Nuku'alofa."

The ballot was held and it recorded that all disagreed to any resubmission of the charges.

Saafi's case is that not only was this the wrong procedure but that it was achieved by the domineering manner of the President. He suggests that at the district meeting and the ministers meeting the President stood and glowered at the members, shouted and generally dominated the proceedings.

I was able to watch the first defendant in the witness box over several days and it must be said that he is clearly a person who does not like to be contradicted. He has the tendency to state his views forcefully and not to consider they may be wrong or even that others should be given an opportunity to suggest they may be wrong.

The evidence of the district and ministers meetings certainly gives cause for concern as to the way in which the meeting was conducted. It is quite wrong to continue to use the authority of the chair when matters directly challenging the chairman's conduct are being raised. It is poor conduct for the chairman to state his view before inviting comment from the meeting and it is never proper for the person chairing a meeting and responsible for the conduct of the members to raise his voice, as I am satisfied the first defendant did. Having said that, I am not satisfied the evidence is sufficient to prove that his conduct altered the course the meeting would otherwise have taken.

The question for the court is whether these charges were dealt with in the proper way according to the Church's laws. Although the Constitution, Laws and Rules of the Church provide a detailed framework within which the Church can function, there is no special procedure for discipline or dismissal of the president.

There is some guidance about the ministers and I consider it is clear that the President is not expected to be treated any differently from the other ministers.

Clause 5 (f) of the Constitution provides that there shall be a meeting of the ministers before the meeting of the Conference "to discuss and decide any matters concerning their ministerial work during the period since the last meeting of the Conference". It is only at the conclusion of that meeting that the Chief Trustees and representatives join them for the Conference proper.

Paragraphs (k) and (l) set out the questions to be asked at each of the ministers' meeting and the Conference itself.

At the ministers meeting, the first question required by paragraph (k) after the call of those attending is; "Are there any issues to be decided in relation to any minister?"

Paragraph (l) has no similar question listed for the Conference.

That the ministers are to be tried by the ministers' meeting is confirmed in sections 39, 42 and 164 of the Laws. Section 164 provides:

> "If there is any matter relating to any minister, he shall be tried in the Conference by the ministers only, and he shall be penalised or acquitted by the Conference as it appears proper for them to do."

Chapter XX rule 8 provides for there to be a meeting, before the Conference, of the ministers only " where they shall be questioned and judged on the performance of their duties since the last Conference...'

Section 164 is the first of four sections under the heading "The Examination of Ministers". The following section, 165, provides:

> "If there is any matter relating to any minister, it is upon the President to order the immediate suspension of such minister from the department he presently holds until the Conference is held in which he will be examined."

Chapter I, rule 9 confirms that such a minister shall be tried at the next sitting of the Conference.

I have absolutely no doubt that the proper tribunal for the hearing of the charges brought by the first plaintiff was the ministers meeting of the 1998 Conference.

The reason for his submission of the charges to the earlier meetings is not clear. The laws do not give the area, quarterly or district meetings any power to deal with such matters neither have I been shown anything that suggests they must be informed of charges for the ministers meeting.

However, in the Rules, Chapter XXII is headed; "The Ministers Meeting at the Quarterly Meeting". Rule 4 of the Chapter sets out the questions to be asked at such a meeting of which the second is; "Is there any matter concerning a minister?" Below that is the following instruction:

> "Call the ministers and if there is any matter concerning a minister then have it tried in order to resolve it and if it is an offence that should be taken to the conference or an offence for suspension then the President must be informed for a decision to be made."

The court was not referred to this rule and neither was there any mention of a ministers meeting at the quarterly meeting. I read that rule as setting up a procedure for the meeting to decide whether any charge against a minister should be sent to the Conference. It appears to state that, if there is any matter concerning a minister, the meeting should try and resolve it but, if it is an offence, it will have to be sent to Conference. I mention it because it may be it is the meeting at which charges against a minister should be first submitted. However, whatever the purpose of that rule, it does not apply in this case because, when the charges were brought up at the quarterly meeting, it clearly was not ministers meeting because people other than ministers were present. Equally, even if it had been a ministers meeting, it did not try it and simply refused to have the matter discussed.

As has been stated, the charges were decided at the district meeting. The purpose of the district meeting is very clearly set out in the laws. It is only for the determination of matters of finance.

It is referred to in the laws by the alternative name of fund distribution committee. Nowhere is there any suggestion that it was or could be the proper tribunal to hear the charges against the President and it certainly had no power to determine either whether they were true or whether they should be submitted to the Conference.

The President above all others should be aware of the laws and rules of the Church and it is his duty to ensure they are obeyed. He should have known it was not the proper time to consider the charges at the district meeting. I do not know nor need to know his motive but I am satisfied he insisted on the charges being put and considered at that meeting because he wanted to prevent them being heard at the ministers meeting. I am also satisfied he knew it was not the proper procedure or, at the least, made no effort to try and ascertain the proper procedure.

The reason he gave to the ministers' meeting for not discussing them, namely that they had been rejected at the district meeting, was clearly using the wrong procedures. It is unfortunate that, when the President did not suggest the proper steps, the members of the meeting were themselves so uncertain of the procedures that they were so easily swept along by the President's aim to prevent discussion of the charges he faced. It must surely be every minister's duty to his church members to know the procedures of the Church sufficiently to ensure they are observed.

The Removal of the Plaintiffs as Members of the Church

Before passing to the various orders sought, it is necessary to deal with this aspect of the case because the defence relied on it as an answer to this claim.

Following the events at the Conference in May 1998, the plaintiffs filed this writ in the Supreme Court on 21 July 1998.

On 5 August, the General Secretary of the Church wrote to the first defendant in the following terms and copied it to the other three.

> "I hereby respectfully inform you that you have been cut off from the Church of Tonga on this day (5/8/1998), because of things you said and how you conducted yourself including bringing proceedings against the Church of Tonga, which is the fifth defendant, in the claim that you and other plaintiffs had brought - civil case No.C998/1998, litigating against the Church in the Courts of Law of the Kingdom.
>
> But those issues were already dealt with in the various courts/forums of the church as follows:
>
> 1. Village or Town Meeting - Kolomotu'a/Kolofo'ou (9/3/98)
> 2. Local District Meeting - Kolomotu'a/Kolofo'ou (11/3/98)
> 3. Quarterly Meeting - Tongatapu (18/3/98)
> 4. District Meeting - Tongatapu (22/4/98)
> 5. The full conference Meeting with the Chief Trustees (11-14/5/98)
>
> And none of these forums upheld the charges because the charges were false.

Your name and those of the other plaintiffs will be struck off – that is

1. Masima Telefoni
2. Fononga Tu'ipeatau
3. Lavaka Fotukava

So that you are no longer members of the Church of Tonga.

I therefore inform you and Masima Telefoni of Kolofo'ou and Fononga Tu'ipeatau of Houmakelikao and Lavaka Fotukava of Hofoa you, as of today (5/8/98) had no more interest with Church of Tonga."

Clause 8 (a) and (e) of the Constitution provide:

> "(a) If the President, or any Chief Trustee, or any Minister, or any Preacher, or any Lay preacher, or any member of the Church of Tonga who by any means whatsoever assist or bring any claim in any Court of Law in the country against the Church of Tonga, without notifying or without first bringing such claim to Meetings which are authorised to decide such claim, and has failed to first bring such claim before the Conference and the Conference has not approved that such claim be brought in a Court of Law, the name or names of such persons responsible shall immediately be deleted from membership and they shall cease to be members of the Church of Tonga.
>
> (e) The power to decide any claim against any person as mentioned in clause 8(a) above shall be given to any 3 or more Chief Trustees and the Chief Ministers of each Local District and chaired by the President. Before any person, against whom a charge is brought, is tried, that person must be notified of the time and place of the trial. And he must be served a statement of the charges and he has the right to bring his witnesses to the trial, but should that person fail to attend at trial, after being given sufficient notice, the matter shall be tried in his absence."

The wording of paragraph (a) highlights the difficulty the first plaintiff faced. He brought the claim to the meeting that had the power to decide it but it was not decided. Instead the meeting refused to hear it on the basis that it had already been decided by a meeting with no power to do so. It was pointless, in those circumstances, for him to seek approval to take it to the Court of Law from the same meeting that had wrongly refused to hear him.

However, the answer to the letter of 5 August 1998 is in paragraph (e) where the procedure for such cases is clearly set out. It is perfectly plain that the Church authorities made no attempt whatsoever to follow the proper procedure and, indeed, the defence has not suggested they did.

The removal of a person's membership of his Church is extremely serious. The shame and sadness it evokes was seen by the reaction of the fourth plaintiff when he referred to it in the witness box. The drafters of the Constitution had the wisdom to recognise that and to set up a formal procedure to ensure the power is not used casually or capriciously. Sadly their wisdom appears not to have been shared by the Church officials in 1998.

Whatever the rights and wrongs of the charges brought by the first plaintiff, he can claim with justification to be the only person of those involved who, when he brought them, tried to use the correct procedures. Not only was he prevented from bringing them but he was prevented by a total failure of those who opposed him to follow the rules of the Church.

His only recourse was to seek a hearing by another tribunal but, when he did so, he suffered the consequence of being removed from membership of the Church. Sadly, in that, the Church authorities again showed a total ignorance of or disregard for the rules that were laid down to cover such cases.

The Church is entitled to make laws, which proscribe the right to take legal action against it in the courts of the country. However, there is a line of authority, which shows that the court can still enquire into the internal affairs of a church although, as I have pointed out in Talakai v 'Aipolo and Toe'api, Number 178/97, any such enquiry is limited to a consideration of whether the church or its members have acted in accordance with its own rules and have observed the rules of natural justice.

The Church may take action against its members in consequence but, if it does, it must still follow its own procedures. Failure to do so becomes another matter into which the court may enquire and, it necessary, interfere.

The Orders

When considering the orders sought, the court must first decide if there has been a failure to follow the rules of the Church. If there has, it can then also make consequential orders. That is the basis upon which I have decided whether to make the various orders requested by the plaintiffs.

The plaintiffs sought a large number of orders. Some have been withdrawn and the remainder (retaining the original lettering) is as follows:

(a) for an order declaring that the First Defendant, Second Defendant and Third Defendant acted wrongfully in selling the property of the Church at 52 Settlement Road, Papakura, New Zealand.

(b) for an order declaring that the First, Second and Third Defendants acted wrongfully in pulling down and demolishing the property of the Church at Fatafehi Road, Kolofo'ou, Nuku'alofa ;

(c) for an order declaring that the First, Second and Third Defendants acted wrongfully in selling and disposing of the truck of the Church ;

(d) for an order declaring that the First, Second and Third Defendants acted wrongfully in using the proceeds of the sale of the New Zealand property and of the truck of the Church for the purchase of building material and for the

construction of the new memorial building of the Church at Fatafehi Road, Kolofo'ou ;

(e) for an order declaring that First, Second and Third Defendants acted wrongfully in purchasing the new truck of the Church ;

(f) for an order requiring the First, Second and Third Defendants to provide detailed and audited accounts of all monies received by them from the sale of the New Zealand property, Fatafehi Road property and sale of the truck, and of the monies expended by them therefrom, to the Plaintiffs and to the Church within 1 month from the date of the order ;

(g) for an order declaring that the First Defendant acted wrongfully in chairing the misinale collection of the village of Kolomotu'a on 15th November 1997 ;

(i) for an order declaring that the First Defendant acted wrongfully in declaring the increase of the salary of the Church building steward, Mafile'o Tongotea from $2,000 to $6,000, and in instructing the payment of that salary on 15th November 1997 ;

(j) for an order that the First Defendant is liable to and shall forthwith pay to the fund of the village trustees of Kolofo'ou and Kolomotu'a the sums of $1,000 and $3,000 respectively ;

(k) for an order declaring that the First Defendant acted wrongfully in instructing the withdrawal from the Bank of Tonga and depositing in the ANZ Bank the sum of $162,445.17 on 17th November 1997 ;

(l) for an order requiring the First, Second and Fourth Defendants to withdraw all funds standing in credit together with interests thereof in the said ANZ Bank account and deposit it into the account of the Tongatapu district at the Bank of Tonga within 7 days from the date of the order ;

(m) for an order requiring the First, Second and Fourth Defendants to provide detailed and audited accounts of all the monies received, deposited into and withdrawn form the account at the ANZ Bank to the Plaintiffs and the Church within 1 month from the date of the order.

(n) for an order declaring that the First Defendant acted wrongfully in allowing his son Kilifi Veikoso and friend, Kali Vailahi, to have truck loads of soil, coral and rubble for free from the demolition of the Fatafehi Road property ;

(o) for an order requiring the First Defendant to pay a sum of $500 to the Church in respect of the said truckloads ;

(p) for an order declaring that the First Defendant is guilty of a breach of the laws governing the conduct of a quest worshipper ;

(q) for an order that the First Defendant forthwith give a formal apology to the First Plaintiff and to the Second Plaintiff for the unkind and defamatory words which he spoke to them ;

(t) for an order declaring that the purported dismissal of the Third Plaintiff from his position of auditor of the Church, preacher and quest worshipper was unlawful and that the Third Plaintiff was and still is the auditor of the Church and is also a preacher and quest worshipper ;

(u) for an order that the First Defendant shall pay forthwith to the Third Plaintiff damages for the salary lost by him during the period in which he was deprived of his position of, and salary as, auditor of the Church ;

(v) for an order declaring that the Fourth Plaintiff was wrongfully dismissed by the First Defendant, and that he be reinstated forthwith to his position as driver of the Church at Tongatapu, and that the First Defendant be liable for and for him to pay tot the Fourth Plaintiff all salaries lost by him during the period in which he was deprived of his position forthwith ;

(w) for an order declaring that the First Defendant has acted wrongfully and improperly during the district meeting of Tongatapu in April 1998, and in the Conference in May 1998 ;

(y) for an order dismissing the First Defendant from his position of President of the Church ;

(aa) for an order declaring that section 29 of the laws of the Church is ultra vires, and that allocation of Ministers be done by the meeting of the Ministers at the Conference ;

(bb) For an order that the First, Second, Third and Fourth Defendants be liable to pay any sum or sums which may be found unaccounted for in any account which has been ordered herein ;

(cc) For an order that the Defendants be jointly and severally liable for the costs of these proceedings ;

(dd) For any other order or relief that may just.

(ee) For an order declaring that the resolution of the Conference referred to in paragraph 48 of the Statement of claim as amended was and is ultra vires.

The basis of declarations (a) to (e) is the same, namely that the defendants had no right to act as they did without specific authority from the Conference.

The defendants rely on the last sentence of clause 8 of the Constitution that it is for the Chief Trustees to keep all properties and to control them. During the trial they also produced an extract from the minutes of the Conference held in Ha'apai in May 1981 which showed a motion was passed that the "Chief Trustees are authorised to use the funds of the Church for the works of the Church".

When it was produced the plaintiffs sought to amend their claim to add a reference to that motion and claim that it is ultra vires clause 9 of the Constitution. Declaration (ee) follows from that.

I have set out the relevant part of clause 9 already.

If the defence is right that the meaning of that motion was to transfer the whole control of Church funds to the Chief Trustees without any further reference to Conference, it is clearly ultra vires that clause.

The Constitution is the principal temporal law of the Church. Clause 9 gives Conference the right to decide the manner in which the church funds are to be employed but it also imposes the duty on conference to ensure the funds are not wasted, are kept safely and are only to be used in the interests of the Church of Tonga. Conference has no right totally to abdicate such power to anyone else and any act purporting to do so must be ultra vires.

However I do not believe the 1981 motion was intended to give the Chief Trustees the unfettered power the defence suggest. The minutes show the Chief Trustees raised it because there were works to be done in Tongatapu. I have no doubt it was passed with the intention only of allowing them to take decisions to spend church funds for that purpose and it was not intended to be a power to act without the control of conference indefinitely. The Trustees are not involved in costs of the day to day running of the Church but only major transactions that may affect the overall assets and properties of the Church. Clearly such transactions must always be subject to the scrutiny and control of the Conference

I make the declarations sought in (a), (b), (c), (d) and (e) with the addition of the words in each case..."without the express prior approval of conference."

I decline to make the declaration in (ee) but do make the following declaration in its place;

> "The motion passed by the Conference on 14 May 1981 giving the Chief Trustees authority to use the funds of the Church for the works of the Church did not extend the power of the Trustees beyond the year for which it was passed or absolve the Conference from the duty imposed upon it by clause 9 of the Constitution."

As I have stated the monies from the sale of the New Zealand property and of the church truck and the expenditure on the rebuilding of the Fatafehi Road property were not properly accounted

for by the first, second and third defendants. Paragraph (f) does not make it clear to whom the accounts should be provided. Clearly the failure to provide them means that Conference was not given proper information about the transaction.

The evidence does not prove that the failure to provide proper accounts was the fault of those defendants named. The person responsible would presumably have been the treasurer who is the fourth defendant. I assume the relevant documents are still in the possession of the Church as it occurred only two years ago but I accept some of the transactions may require the advice of the Chief Trustees.

Instead of (f), I order that the fourth defendant shall supply detailed and audited accounts of all monies received from the sales of the New Zealand property, the materials from the Fatafehi Road site and the truck and all monies expended therefrom and shall provide such accounts within three months to the Head Ministers to hold for submission to the next Conference thereafter.

For the reasons I have stated earlier in this judgment, I do not make the declaration sought in (g).

I do make declaration (i) but I consider any further action must be decided by the village trustees of Kolofo'ou and Kolomotu'a and I decline to make the order sought in (j).

I am satisfied that the instruction to transfer the district misinale funds from the district account into an account in the names of the officials of the church office was wrong. The defendants had no right to control those funds. The only bodies with power to make orders as to the distribution and use of those misinale funds were the district meeting and the conference. Those funds were properly deposited in the account by the first plaintiff and his district treasurer and secretary.

The evidence was that the decision was made by the three Chief Trustees and I therefore make declaration (k) with the addition of the second and third defendants.

I do not consider it is for the court to make the orders in (l) and (m). If any action is needed following declaration (k) it is for the Conference to decide.

As I have stated earlier in this judgment, I do not have sufficient evidence to make declaration (n) or order (o) and decline to do so.

There can be little doubt, on the first defendant's own admissions in the witness box, that he acted more than once in a manner that appears to be inconsistent with the law relating the quest worshippers. The court will never rule on purely spiritual matters and I feel that the interpretation of the laws relating to the conduct of quest worshippers involves such a consideration.

Section 114 of the Laws and Chapter XVI rule 8 provide a procedure for the trial of a quest worshipper and the precise manner in which the laws relating to quest worshippers are interpreted should be a matter for the members of the Church. I do not think it appropriate to make any declaration in relation to that in case there should be a trial under those provisions. I therefore decline to make declaration (p) but I do order that the next Conference shall decide

whether the first defendant should be tried under section 114 for breach of the Laws relating to quest worshippers and that Conference shall be chaired during that discussion by the Head Minister of Tongatapu District in accordance with section 35.

I do not think the order sought in (q) is appropriate for the court.

I have already found that the dismissals of the third plaintiff from his position of auditor and quest worshipper were wrong. He denied the allegation of drunkenness and he was undoubtedly tried in his absence. However, I do not consider the minutes of the quarterly meeting on 24 September 1997 are sufficiently accurate to allow me to declare his name was wrongly struck off the lay preachers list.

I make the declaration sought in (t) in the following terms:

> "The purported dismissal of the third plaintiff from his position of auditor and quest worshipper was unlawful under the laws of the Church of Tonga."

I do not consider it appropriate to make the order in (u). Such a claim should be the subject of a separate claim where the issues can be properly aired. This court has certainly not heard sufficient evidence to make such an order.

For the same reason, I make declaration (v) in the limited terms:

> "The fourth plaintiff was wrongfully dismissed by the first defendant."

For the reasons I have already given, I shall make the declaration (w) in the following terms:

> "The first defendant acted wrongfully in failing to follow the proper procedures of the Church at the district meeting for Tongatapu in April 1998 and during the ministers meeting of the Conference in May 1998 and thereby wrongfully prevented the first plaintiff from presenting his charges to the ministers meeting."

Whilst I accept there is precedent in Tonga for the court to order the dismissal of a church president, I do not consider that is a proper order in this case. If the President acted wrongfully, it must be a matter for the Conference to decide the appropriate remedy. I consider it would only be appropriate for the court to usurp the function of the Conference in the most extreme circumstances. I would only add that any discussion of this by Conference should not be chaired by the first defendant. With that qualification, I decline to make order (y).

The question posed in (aa) refers to the apparent difference between the wording of section 29;

> "It is upon the President to decide and to allocate the Ministers to the department they are each to hold".

and question 23 in clause 5 (l) of the Constitution which is to be asked at the Conference; "What are the allocated positions of the ministers?"

I accept these provisions suggest the allocations are, at the least, open to comment and discussion by conference before they are ratified. That interpretation, in itself, would not be sufficient to make the section ultra vires and I have not heard sufficient argument to decide the matter. I decline to make the declaration (aa).

(bb) is a matter for the Conference to decide and I shall not make the order sought.

I have already dealt with (ee).

Finally, although it was not requested by the plaintiffs, I declare that the purported striking off the membership of the Church of the first plaintiff, second plaintiff, third plaintiff and fourth plaintiff on 5 August 1998 for bringing this action in a Court of Law was not decided in accordance with the provisions of clause 8 (e) of the Constitution and is void.

Whilst the plaintiffs have only achieved a partial success in the declarations they have sought, I have found that the main thrust of their complaints have been made out and they are entitled to their costs. The second plaintiff has not appeared to prosecute his claim and the defendants have had to prepare for such a defence. However, I do not consider it added to a great extent to the preparation they had to do to defend the claims of the other three plaintiffs and I shall reduce the costs they must pay by one tenth. I therefore order that the defendants shall pay nine tenths of the costs of the plaintiffs to be taxed if not agreed.

DATED: 19 April 2000.

G Ward

CHIEF JUSTICE