

IN THE MATTER OF The inherent jurisdiction of the Supreme Court

BETWEEN **FA’ATUATUA I LE ATUA UA TASI (FAST)
INCORPORATED**

First Applicant

AND **FIAME NAOMI MATAAFA,**

Second Applicant

AND **TUILAEPA SAILELE MALIELEGAOI**

First Respondent

AND **LEAUPEPE TOLEAFOA FAAFISI,**

Second Respondent

AND **TIATLA LIMA GRAEME TUALAULELE**

Third Respondent

AND **SAVALENOA MAREVA BETHAM-ANNANDALE**

Fourth Respondent

AND **LEALAILEPULE RIMONI AIAFI**

Fifth Respondent

AND **MAIAVA VISEKOTA PETERU**

Sixth Respondent

AND **LAUOFO FONOTOE NUAFESILI PIERRE LAUOFO**

Seventh Respondent

AND **TAULEALEAUSUMAI SIOELI ALOFAIFO**

Eighth Respondent

AND **ATTORNEY GENERAL**

Intervener

Court Honourable Justice Fisher
Honourable Justice Asher

Counsel B Heather-Latu, G Latu and B Keith for applicants
D. Gilbertson QC and TS Wulf for first respondent

R. Drake for second respondent (prior leave to withdraw)
S. Chan Chui for third respondent
R. Harrison QC for fourth respondent (prior leave to withdraw)
P.W. Lithgow and M.C Leung Wai for fifth to eighth respondents
R Lithgow QC and FT Sofo-Tuala for Attorney General

Hearing 28 February 2022

Judgment 23 March 2022

JUDGMENT OF THE COURT

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Introduction

[1] This case is about the rule of law in Samoa. The rule of law means that all are subject to the law; that no-one is above the law; and that interpretation and application of the law is left to the Courts. Contempt of court is an important aspect of the rule of law. A person is guilty of contempt of court if they act in a way that is calculated to undermine public confidence in the Courts. To undermine confidence in the Courts is to undermine the rule of law.

[2] The Samoan general election of 9 April 2021 was followed by a period of political turmoil. The Courts gave a series of decisions clarifying the legal position. The legal position was that the current Prime Minister and the FAST party had won the election.

[3] The former Prime Minister and HRRP could not accept that. They publicly denigrated the Judges and declined to follow their decisions. By rejecting the Judges, they invited legal anarchy. Many others accepted the invitation. It was a troubling time for Samoa. The root of the problem was rejection of judicial decisions. The rejection of judicial decisions was the basis for these contempt proceedings against the eight respondents thought to be responsible.

[4] We have found that some of the respondents were guilty of the gravest possible examples of contempt of court. The contempts were committed repeatedly over a sustained period. They damaged the fabric of Samoa. This judgment is intended to help in overcoming the damage. We also think it important to set a precedent. The precedent is intended to clarify aspects of the law of contempt that may not have been obvious to those involved.

[5] Appropriate statements to this Court have now been made by all the respondents. Those respondents who committed contempts have largely retracted their damaging remarks, admitted their wrongdoing, and apologised. We were urged to discontinue these proceedings to allow Samoa to move on. Although we did not think it right to accept the discontinuance, we have listened to the wishes of the parties and imposed no penalties.

[6] In this decision we refer to contempt by abusive and false allegations against judges and courts as “scandalising the Court”. We recognise that this is a phrase from a past era which is falling into disuse elsewhere; it remains in use in Samoa, and is a useful label for this aspect of contempt in this country.

Factual Background

[7] On 3 March 2021 the Head of State, Tuimaleali’ifano Va’aletoa Sualauvi II, dissolved the sixteenth Parliament of Samoa in accordance with Article 63(3) of the Constitution of the Independent State of Samoa (“the Constitution”). He issued a Writ of Election on 12 March 2021 in accordance with

section 52 of the Electoral Act 2019. The events that followed were the subject of extensive litigation. The judgments produced were helpfully listed in the applicants' statement of claim as follows:

- a. *FAST Party v Electoral Commissioner* [2021] WSSC 23 (17 May 2021) (*EC (No 1)*); [2021] WSCA 1 (21 May 2021) (*EC (No 2)*); [2021] WSCA 2 (2 June 2021) (*EC (No 3)*); [2021] WSCA 3 (2 June 2021) (*EC (No 4)*); [2021] WSCA 4 (2 June 2021) (*EC (No 5)*); and [2021] WSCA 5 (25 June 2021) (*EC (No 6)*);
- b. *FAST Party v Attorney General* [2021] WSSC 24 (17 May 2021) (*FAST (No 1)*); [2021] WSSC 25 (23 May 2021) (*FAST (No 2)*); and
- c. *Attorney General v Latu* [2021] WSSC 31 (28 June 2021) (*Latu (SC)*); [2021] WSCA 6 (23 July 2021) (*Latu (CA)*).

[8] The factual background to the judgments was conveniently summarised by the Court of Appeal in the last of those judgments as follows:¹

A General Election of the 51 constituency members of the Samoa Legislative Assembly was held on the 9th April 2021. The election was contested in large part by two main political rivals. First there was the Human Rights Protection Party (HRPP), which had been in government for some forty years. Its longevity and dominance was such that during the last session of Parliament, the HRPP held over two thirds of the seats. The second main political party was a relatively new party – FAST, which was established less than a year before the election by a former speaker of a HRPP government.

On election night both HRPP and FAST gained 25 seats apiece. An independent member, after a short period of consultation with the people of his constituency, decided to endorse and support FAST. This important step meant that FAST had or could call on the support of 26 seats, a working majority, in a Legislative Assembly.

Around the time of the independent member's decision to side with the FAST party, the Office of the Electoral Commissioner (OEC) recommended the appointment of an HRPP woman candidate as an additional member of Parliament to satisfy the constitutional guarantee of a minimum number of women members in Art 44(1A).

The consequence of the OEC's determination to recommend the appointment of the 6th woman member left the parties deadlocked at 26 seats apiece.

This Court, on appeal, ruled on 2 June 2021 that the OEC could only recommend the appointment of the sixth woman as an additional member after all the electoral petitions and by elections, if any, had been completed, because it was not inevitable that recourse to the constitutional guarantee of 6 seats was needed. More women candidates might successfully win a by election of a seat vacated following a successful electoral petition against a winning candidate.

On 20th of May 2021, the Head of State issued [a] proclamation [declaring the official opening of Parliament on 24 May 2021].

This Proclamation dated 20 May 2021 was then, without notice, suspended, late on Saturday night 22nd May 2021 [by a further proclamation].

Lawyers for FAST in response made an urgent application [to the Supreme Court].

The SC made 3 orders:

1. A permanent order that the Proclamation made by the Head of State on Thursday 20 May 2021 for the first sitting of the 17th Parliament of Samoa on Monday 24 May 2021 was made in accordance with the requirements of Art 52 of the Constitution and the declaration of the SC contained in paragraph [94](4) of the judgment of the court dated 21 May 2021, is lawful.

¹ *Attorney General v Latu & Ors* [2021] WSCA 6.

2. An interim order that any purported revocation of the 20 May Proclamation, including the 22 May Proclamation is inconsistent with the declaration in paragraph [94](4) of the 21 May judgment and Art 52 of the Constitution and is thereby unlawful and of no effect, until further order of the court.
3. A permanent order that the Clerk of the Legislative Assembly be served immediately with a copy of the orders as well as the AG and the Head of State.

It appears that following the making of the SC orders on the afternoon of 23rd May 2021, the Clerk of the Legislative Assembly, Tiatia Graeme Tualualelei (“Mr Tualualelei”), attended a FAST party caucus to discuss arrangements for the 24th May 2021 swearing in. The meeting was held at about 5pm in the afternoon.

Plans for the swearing in began to unravel later that evening ... The material inferences we draw from Ms Heather Latu’s evidence are as follows:

- (a) that the Head of State’s office the day before the swearing in had signalled to the Clerk that he would “definitely not be attending” the opening of Parliament on the following day Monday.
- (b) That the Deputy Head of State had also refused to attend to perform the functions of the Head of State if the Head of State did not attend.
- (c) Steps were being taken to give effect to the swearing in, having the Clerk of the House administer oaths in the Head of State and Deputy of Head of State’s absence.
- (d) The engagement by the FAST lawyers with Mr Tualualelei was cooperative and respectful rather than coercive.

A further and unexpected turn of events happened some time later that Sunday evening when the Office of the Speaker of the Legislative Assembly became involved and issued the following public notice “... The official swearing in of Parliament scheduled for tomorrow, Monday 24th May 2021 is now postponed until a further proclamation has been made by the Head of State ...”. The notice is signed by Leaupepe Taimaiono Toleafoa Faafisi as “Speaker”.

Mr Faafisi advised that he did not want to engage in the appeal. We are therefore unable to reconcile Mr Faafisi’s assertions though his lawyer of a minimalist or administrative role with the terms of his public announcement postponing the calling of Parliament, or the evidence of Mr Tualualelei, who deposed on oath that Mr Faafisi directed that Parliament be locked and the key delivered to him, see below.

On the morning of the 24th May 2021, the share of constituency seats between the parties were FAST 26 and HRPP 25. The share of seats between the parties had been that way since 17th May 2021. As at 24th May 2021 the operative interpretation of Art.44(1A) as determined by the SC was that only 5 women members were guaranteed under the Constitution.

Neither the Head of State’s purported suspension of the proclamation to convene Parliament until further notice, nor the Speaker’s postponement of the official swearing in, appeared to have any effect on many hundreds of Samoans who turned up to the historic Tiafau malae at Mulinuu. A large marquee was set up beside Parliament House, in which FAST members and supporters sat to await the convening of Parliament in Parliament House.

All the members of the Judiciary, from the Supreme and District Courts, and Judges of the Land and Titles Court, entered Parliament grounds under Police escort at about 9.30am (the time nominated in the Proclamation of 20 May 2021). The Judiciary was unaware that the Head of State had already advised the Clerk, the day before, on Sunday, that he refused to attend the opening. The door to Parliament House was closed, and as the Chief Justice discovered, could not be opened.

[At the Marquee ceremony] all 26 Members were duly sworn in by the Speaker ... The Hon Fiamē Mata'afa then took the Oath of the Prime Minister and the Speaker announced that the Hon Fiamē Mata'afa had been duly appointed as Prime Minister

On 25 May 2021, the AG made an Ex-Parte Notice of Motion for Interim Orders to stay and/or suspend any legal effect of the unconstitutional and unlawful FAST purported swearing in ceremony. The Respondents, in response, relied on the legal doctrine of necessity.

The SC determined the issues in dispute as follows ... The convening of Parliament by the respondents (FAST) on 24 May 2021 was unlawful and unconstitutional ... the Legislative Assembly had not validly met ... Parliament must meet pursuant to the original Proclamation issued by the Head of State on 20th May 2021.

The Head of State issued a Proclamation on 4th July 2021 (a Sunday) which called for the convening of Parliament on 2 August 2021 at 9.30am. The Head of State also said in the same proclamation:

... I FURTHER STATE that the Supreme Court has no jurisdiction to order the convening of Parliament, as only I, the HEAD OF STATE of the Independent State of Samoa, have the POWERS to appoint a time and place for the meeting of the Legislative Assembly. I also add that the Court, through their decision of Monday 28th June 2021,³ have shown flagrant disregard, and disrespect, of the powers of the position of the Head of State.

[9] The Attorney General, acting on behalf of the HRRP caretaker Government, appealed against the Supreme Court judgment of 28 June 2021. The FAST interests cross-appealed.

[10] In its judgment of 23 July 2021 the Court of Appeal dismissed the Attorney's appeal and upheld FAST's cross-appeal. The Court held that:

- (a) The Head of State's proclamation of 20 May 2021 convening Parliament was valid.
- (b) The attempt to revoke it two days later by further proclamation was invalid.
- (c) The swearing in of Parliament and associated appointments on 24 May 2021 were valid.
- (d) Although the FAST government had been entitled to take power on the 24th May 2021, they were to take power from the date of the judgment (23 July 2021).

[11] From a legal point of view the judgment of 23 July 2021 brought matters to an end. The Judges had found that FAST was the legitimate Government. The former Prime Minister and HRRP had lost the election.

[12] The former Prime Minister and HRRP refused to accept the Court's decision. One solution they saw was to undermine the Judges responsible. Over a period of several months, the key respondents spoke out against the Judges in video clips posted on the Government website; Radio 2AP; the Government Facebook page; TV One; the first respondent's press conferences; the Samoan Observer; other media; and at open air gatherings and marches.

[13] HRRP supporters were told they had lost only because the Judges were in collusion with FAST. That was the nub of the attack. Other accusations included incompetence; corruption; dishonesty; bias; corrupt and ulterior motives by the judges; favouritism; conflict of interest; prejudice; partiality; discrimination; political influence; and unfairness by the judges in the determination of every election issue where HRPP had lost.

[14] Intense discord followed throughout the country. There were arguments within families and villages. There were marches and banners attacking Judges. Typical was a protest rally outside the Supreme Court building on 2 August 2021 organised by HRRP. The first and fifth respondents gave inflammatory speeches at the rally. A sample of placards displayed included the following:

- "CJ You destroyed the Constitution";
- "CJ, Mata + Leilani in the divine eyes of god you are all guilty";
- "No judges' coup government"; and
- "CJ believes he is above the Constitution"

[15] The respondents' public statements during that period are the subject of "contempt by scandalising" allegations. Acts in defiance of the Courts' decisions are the subject of the "contempt by obstruction" allegations. These two forms of contempt will be explained shortly. Both are addressed in this judgment.

Procedure followed

[16] The applicants began these contempt proceedings on 26 May 2021. Proceedings of this kind are normally brought by the Attorney General. The Attorney's responsibilities include the taking of steps to maintain confidence in the courts. In fulfilling that role the Attorney normally begins proceedings of this kind. That was not possible in this case given the extraordinary circumstances at the time. Among other things the Attorney then in office was one of the proposed respondents. Accordingly the current proceedings for contempt were commenced by the FAST party and the second applicant, Hon Fiame Naomi Mataafa. But it is important to note that the proceedings do not represent a dispute between two political parties or between a former and a current Prime Minister. For contempts of this kind the person who begins the proceedings is immaterial. The sole object of the proceedings is to restore public confidence in the courts. The current Attorney has since been added as an intervener to assist in achieving that goal.

[17] The applicants filed extensive evidence alleging various forms of contempt. Further affidavits were filed by the fourth to eighth respondents. The first, second and third respondents did not file evidence. All eight respondents have made statements to the Court. The statements are annexed to this judgment as Appendices B to I.

[18] On 15 February 2022 the applicants and first, third and fifth to eighth respondents filed joint memoranda seeking discontinuance of the proceedings on the ground that they had come to an agreement. The main agreement, which we will refer to as the “Harmony Agreement”, is set out in Appendix A to this judgment. In essence the parties agreed that to achieve harmony in Samoa they should discontinue these proceedings.

[19] We declined to accept the discontinuance. The interests of Samoa certainly included putting public disputes behind it. The parties were uniquely well-qualified to make that assessment. However the interests of Samoa also included restoration of the rule of law. As the current Attorney General commented in her memorandum, if the evidence in the applicants’ affidavits were accepted it would support findings of contempt. It would not be possible to commit contempts of the kind alleged without causing serious damage to the rule of law in Samoa.

[20] If contempts that seriously threatened the rule of law were left unmarked by the Courts, it would send a very unfortunate message to those tempted to act in the same way in the future. The message would be that whenever there is political upheaval, those involved should feel free to disregard the Courts’ decisions because conduct of that kind would have no legal consequence. It would be an incitement to legal anarchy. In our respectful view, failing to publicly condemn conduct of that kind would have been equally harmful to Samoa.

[21] While we applaud the efforts of the parties to bring the dispute to an end, it was not within their power to terminate proceedings for contempt of court. The proceedings were not about a dispute between FAST and HRRP or the people they represented. The proceedings were about the place of the Courts in upholding the rule of law. The uncertainty and disruption that had troubled Samoa certainly needed to be brought to an end as quickly as possible. But by the time the parties entered into their Harmony Agreement, the trial was less than two weeks away.

[22] Over the period since the proceedings began in May 2021 there have been 10 procedural conferences with counsel for the parties. We have issued 17 minutes and rulings. Working through the issues in that way made it possible to shorten the trial itself to half a day. At the trial the respondents did not wish to give evidence and abandoned their earlier requirement that the applicants’ witnesses be cross-examined.

Origin and purpose of the law of contempt

[23] As with all laws in Samoa, the Constitution is the starting point. Article 65 of the Constitution creates the Supreme Court and declares it to be a superior Court of record. A superior Court of record

has always had the power to commit for contempt.² It follows that the foundation of the Supreme Court's power to commit for contempt is the Constitution.³

[24] The effect of the Constitution is that contempt of Court requirements override the right to freedom of expression. In their statements or affidavits the first, fifth, sixth and seventh respondents claimed that in making the public remarks now under challenge, they thought they were exercising their constitutional right to freedom of expression. That was wrong. The very Article that creates freedom of expression specifies that it is subject to contempt of Court.⁴ Contempt of Court overrides freedom of expression. Criticism of courts is healthy and expected; personal attacks on judges are not.

[25] The purpose of the law of contempt is to preserve public confidence in an efficient and impartial system of justice and to publicly reject challenges to the fundamental supremacy of the law.⁵ Any act done, or writing published, which is calculated to bring a Court or a Judge into contempt, or to lower a Judge's authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court.⁶ As the New Zealand Law Commission said in 2017:⁷

Contempt is not concerned with preventing legitimate criticism of judges or their decisions or with protecting the feelings of individual judges Courts need the authority or power to punish for contempt to preserve an effective, efficient and expeditious court system and to maintain the rule of law in our constitutional democracy.

[26] In short the goal is to promote the public interest by protecting the administration of justice in Samoa.

The law of contempt by scandalising the Court

[27] Contempt by scandalising the Court involves the making of statements which unjustifiably attack the integrity and impartiality of judges and the Courts. The Court of Appeal observed in *Petaia v Supreme Court of Western Samoa*⁸ that statements that are critical of the Courts may amount to contempt by scandalising the Court if they "... may tend to interfere with the administration of justice by diminishing public confidence in the courts.". It was stated further (at 394) that:

"Whether the Judicial process is brought into disrepute must of necessity be considered in relation to the rights of free speech as contained in the Constitution of ... Samoa."

² *Ellis v. Earl Grey* (1833) 6 Sim. 214; *Reg. v. Powell* (1841) 1 Q.B. 352; *Feather v. The Queen* (1865) 6 B. & S. 257.

³ *Re Tapu Leota* WSLR [1960-69] 106; *Petaia v Supreme Court of Western Samoa* [1990] WSLawRp 1; [1980-1993] WSLR 382, 392; *Attorney-General v Va ai* [2009] WSSC 47.

⁴ Article 13(1)(a) and (2).

⁵ *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 229 and 232. See also *Attorney-General v Taylor* [1975] 2 NZLR 138 at 147.

⁶ *Attorney-General v Blundell* [1942] NZLR 287

⁷ *Reforming the Law of Contempt of Court: A Modern Statute / Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* NZLC R140, 2017, 3.

⁸ [1990] WSLawRp , [1980-1993] WSLR 382 at 392.

The Court went on to distinguish contempt from “lively debate; reasoned criticism; and constructive recommendations” (at 394). More recently it was stated in *Attorney-General v Va’at*⁹

“... it must be observed that great care must be taken before a finding of the existence of a contempt by scandalising the court is made. Indeed, and although as I have said already, I am satisfied that this form of contempt is known to the law in Samoa, New Zealand, Australia and the UK, it is nevertheless a “rarely encountered species of contempt ”

[28] The New Zealand Law Commission stated in its 2017 report on reforming the Law of Contempt¹⁰:

[C]ourts may invoke contempt of court in the public interest to punish those whose actions constitute false and egregious attacks on the integrity and impartiality of members of the judiciary, thereby impugning the integrity of the judiciary and adversely affecting the rule of law.

[29] As we have indicated, the contempt jurisdiction is not intended to restrict criticism of Court decisions and the Courts and their work. In a case where it was found that there had been contempt it was stated that:¹¹

No wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, public acts done in the seat of justice.

[30] Recognising this, contempt is an exception to this right to criticise. It is the function of the Courts to uphold the rule of law. Courts can only discharge that function if they command the authority and respect of the public.¹² The sanctioning of conduct which undermines that authority and respect can be seen as a necessary limitation on freedom of speech, and indeed it is only if the Courts can function with the support and respect of the public that they can protect freedom of speech.

[31] We set out certain key features of scandalising the Court:

- (a) It must be proven that an allegation has been made against a judge or Court.
- (b) It must be proven that the respondent made the statement.
- (c) The statement must contain words that can be seen objectively as creating a real risk of undermining the public confidence in the independence, integrity or impartiality of the judiciary or Court.¹³
- (d) Proof of intention to lower the authority of the judge or Court is not required.¹⁴

⁹ [2009] WSSC 47: ???

¹⁰ *Reforming the Law of Contempt of Court: A modern statute.*

¹¹ *Re Wiseman* [1969] NZLR 55 (CA) AT 58.

¹² *Solicitor-General v Smith* [2004] 2 NZLR 540 at [133].

¹³ *Solicitor General v Radio Avon* [1978] 1 NZLR 225 (CA) at p 232 – 233, *R v Kopyto* (1987) 47 DLR 213 at p 214.

¹⁴ *Solicitor General v Radio Avon* [1978] 1 NZLR 225 (CA) at p 232.

- (e) It does not need to be proven that the statements scandalising the Court are false. However truth if proven could provide a defence.¹⁵
- (f) The process of considering such contempt is summary by application, with the evidence being provided by affidavits with the ability to cross-examine.¹⁶ There is a degree of urgency in ensuring that damage to the administration of justice is cured.¹⁷
- (g) The jurisdiction is to be exercised sparingly.¹⁸

The law of contempt by obstruction

[32] It is a contempt of Court to fail to carry out an act required by a Court order within the time specified or to fail to comply with an order requiring a person to abstain from carrying out a specified act.¹⁹ As between the defaulting party and the state there is a penal or disciplinary jurisdiction to be exercised by the Court in the public interest.²⁰

[33] It is also a contempt to knowingly help or encourage some other party to disobey a coercive order directed to that other party.²¹ That is sometimes referred to as “intentionally interfering with the administration of justice” or more usefully “aiding or abetting a contempt”.²² To be guilty of aiding or abetting a contempt, a respondent must know that a coercive order has been made against some other person and must help or encourage that other person to disobey it.

[34] Six principles have particular application to the present case. First, refusal to comply with a declaratory order does not amount to contempt; there must be a coercive order.²³ A coercive order is one which orders an identified individual or entity to carry out, or abstain from carrying out, a specified act. Contempt by obstruction can occur only where a person has disobeyed a coercive order.

¹⁵ See the discussion in the NZ Law Commission report *Reforming the Law of Contempt of Court: A modern statute* at p 6.36 and 6.37.

¹⁶ *Solicitor General v Radio Avon* [1978] 1 NZLR 225 (CA) at p 229.

¹⁷ *Solicitor General v Radio Avon* [1978] 1 NZLR 225 (CA) at p 229

¹⁸ *Attorney General v Blomfield* (1913) 33 NZLR 545, at 576, *Solicitor General v Radio Avon* [1978] 1 NZLR 225 (CA) at pp 229, 238

¹⁹ For this and the principles that follow in this section see *Laws of New Zealand CONTEMPT OF COURT* paras 54 and 61; 9(1) *Halsbury's Laws of England* (4th ed, 1998 Reissue) para 458.

²⁰ *Malvarez v Knox* [1977] 1 NZLR 463; *Seaward v Paterson* [1897] 1 Ch 545 (CA) at 555, 556; *Scott v Scott* [1913] AC 417 at 440.

²¹ *Malvarez v Knox*, above; *Attorney-General v. Times Newspapers Ltd.* [1992] I A.C. 191, 210-211, 217F-218B; *M v Home Office* [1994] 1 AC 377 (HL).

²² As in *Malvarez v Knox*, above.

²³ *IRSS Nominees (30) v CIR* [2014] WSSC 59, [10]-[12]; *M v Home Office* at 405; *Webster v Southwark London Borough Council* [1983] QB 698.

[35] Secondly, a coercive order can only be made against a party to the proceedings in which the order is made. Natural justice demands that a person be joined as a party so they can be heard in opposition to any coercive order proposed, although the joinder for that purpose might be made late in the proceedings. For example in this case if the former Attorney General had been a party to relevant proceedings but the first respondent had not, a coercive order could be made against her but not against him.

[36] Thirdly, a person cannot be guilty of aiding and abetting a contempt if no coercive order had been made against some party to the proceedings in question. For example in the present case if the proceedings had resulted in nothing more than declarations, the absence of any coercive order would mean that another person, such as the first respondent, could not be guilty of aiding and abetting a breach of the Court's decision.

[37] Fourthly, the requirement that there be a coercive order has important consequences where the Government is a party to litigation. As in other countries, the Courts of Samoa can make declarations which the Government must follow but cannot make coercive orders against the Government itself.²⁴ The Courts can, however, make coercive orders against identified individuals acting in their capacity, or purported capacity, as public office-holders so long as they are parties to the proceedings.²⁵ Contempt orders can be made against the public office which the individual holds or, in certain circumstances, against the office-holder personally. A finding of contempt against an office-holder personally requires proof of not only knowledge of the order and failure to comply, but also an intention to interfere with or impede the administration of justice.²⁶

[38] Fifthly, the power to punish for civil contempt is a power to be exercised with great care.²⁷ The Court will punish disobedience to a Court order only if satisfied that the terms of the order or undertaking were clear and unambiguous,²⁸ that the defendant had proper notice of its terms,²⁹ and that a breach of the order has been proved beyond reasonable doubt.³⁰

[39] Finally, where the order said to have been breached was a mandatory one which required an act to be done, a time must have been specified within which the act was to be done. Only when the time limit has expired can it be said that a contempt has been committed.³¹

²⁴ Government Proceedings Act 1974, s 12(1).

²⁵ *M v Home Office* [1994] 1 AC 377 (HL), 424 – 426.

²⁶ *M v Home Office*, above, at 426.

²⁷ *Attorney-General v Blomfield* (1913) 33 NZLR 545; *Marshall v Marshall* (1966) 110 Sol J 112 (CA).

²⁸ *Malavez v Knox* [1977] 1 NZLR 463; *PA Thomas & Co Ltd v Mould* [1968] 2 QB 913; [1968] 1 All ER 963.

²⁹ *Savill v Roberts* (NZ High Court, Christchurch, CP 9/86, 10 December 1986, Holland J).

³⁰ *Parker v Dodson* (1914) 33 NZLR 1313 (CA); *Re Bramblevale Ltd* [1970] Ch 128; [1969] 3 All ER 1062 (CA).

³¹ *Townend v Townend* (1905) 93 LT 680; 22 TLR 50 (CA); *Re Wilde* [1910] WN 128 (CA).

[40] It follows that in the present case a respondent could be guilty of contempt by obstruction only if the following elements were satisfied:

- (a) The order alleged to have been disobeyed was coercive and not merely declaratory.
- (b) There was either an order against the respondent as a party to the proceedings or the respondent must have helped or encouraged disobedience by some other party against whom the coercive order had been made.
- (c) The order must have been clear, unambiguous and, if requiring positive action, time limited.
- (d) The respondent must have had proper notice of the terms of the order.
- (e) The respondent can be found guilty in their personal capacity, as distinct from contempt by the holder for the time being of the relevant public office, only if it is proved that the respondent knew of the order and intended to impede the administration of justice by aiding or abetting its disobedience.
- (f) The respondent's breach of the order is proved beyond reasonable doubt.

The role of the Head of State

[41] Those principles are subject to special modification in the case of the Head of State. In this case the Courts clearly expected that once their declarations were drawn to the attention of the Head of State, he and the Government would act in accordance with them. The expectation was understandable. In the United Kingdom the House of Lords considered that where public officers were involved, coercive orders would normally be unnecessary. That was because the Government, Ministers, Departments and officers of the Crown could be relied upon to act in accordance with the Courts' declarations. As the House of Lords said in *M v Home Office*:³²

The fact that these issues have only now arisen for decision by the courts is confirmation that in ordinary circumstances ministers of the Crown and government departments invariably scrupulously observe decisions of the courts. Because of this, it is normally unnecessary for the courts to make an executory order against a minister or a government department since they will comply with any declaratory judgment made by the courts ...

... a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations.

[42] Compliance was equally to be expected in Samoa. It was almost unthinkable that having received notice of the declarations, the Head of State would defy them. No doubt for that reason, most

³² *M v Home Office*, above, at 397 and 422.

of the orders made in this case amounted to declaratory descriptions of the legal position, not orders requiring the Head of State - or indeed any other identified person - to do or refrain from doing a specified act. As the Court of Appeal commented at one point:³³

It is plain to us that the Supreme Court's decision relied on the good faith of the relevant actors whom all owe obligations under the Constitution to give effect to the order to convene. Regrettably, such reliance was misplaced.

[43] Regardless of the wording of the Court's order, it could not have operated as a coercive order against the Head of State himself. The holder of that office has immunity from legal proceedings while in office.³⁴

[44] With that background we turn to the particular judgments said to have been disobeyed in this case.

Judgments said to have been disobeyed

FAST v Attorney-General (No 1)

[45] The first judgment relied on was *FAST v Attorney-General (No 1)* [2021] WSSC 23 (17 May 2021). In that case the Court held that the published result of the April 2021 General Election was valid and that there was no lawful basis for the Head of State to call for a new election. The orders the Court made were appropriately described by the Court itself as declarations. The closest the declarations came to targeting individuals was the statement:

The Head of State's attention is directed to the requirements of the Art 52 and the Head of State's obligation under the Constitution to call a meeting of the Legislative Assembly within 45 days of the holding of a General Election.

[46] The judgment was purely declaratory. It did not demand that any person act or refrain from acting. It could not have done so in the case of the Head of State. The Court acted on the wholly reasonable assumption that the Head of State would act in accordance with its declarations.

FAST v A-G (No 2)

[47] The second judgment relied on was *FAST v A-G (No 2)* [2021] WSSC 25 (23 May 2021). In that decision the Court upheld the validity of the Head of State's 20 May 2021 Proclamation for the first sitting of Parliament. It held that any purported revocation of that Proclamation, and substitution of a new one, was invalid. Three individuals were referred to in the concluding direction:

A permanent Order that the Clerk of the Legislative Assembly be served immediately with a copy of this Order. The Registrar was also directed to bring the Orders to the immediate attention of the Head of State and Attorney General.

³³ *Attorney General v Latu & Ors* [2021] WSCA 6 at para 107.

³⁴ Head of State Act 1965, s 5(1); and exclusion from definition of "officer" and "servant" in s 2(1) of the Government Proceedings Act 1974.

[48] Once again the Court reasonably expected that when the declarations were drawn to the attention of the Clerk of the Legislative Assembly, the Prime Minister, the Head of State, and the Attorney General, they would act in accordance with the declarations. However the direction did not go beyond drawing the declarations to their attention; there is no suggestion that the Court was taking the further step of ordering that they carry out, or refrain from carrying out, a specific act.

Electoral Commissioner judgments

[49] Thirdly the applicants relied on a bracket of three judgments - *FAST v Electoral Commissioner* [2021] WSSC 23; *Electoral Commissioner v FAST* [2021] WSCA 1 and *Electoral Commissioner v FAST Party* [2021] WSCA 2. In those decisions the Court set aside the appointment of a 52nd member of Parliament, refused a stay of that decision and upheld the invalidation of that candidate's appointment pending conclusion of electoral petitions. But there is no suggestion that the Courts made coercive orders requiring action or inaction.

A-G v Latu (SC)

[50] The final judgment relied upon was *A-G v Latu* [2021] WSSC 31 (28 June 2021). In that decision the Court again upheld the Head of State's Proclamation of 20 May 2021 and then went on to say:

(iv) We therefore in terms of the Application brought by the Applicant make the following declaratory orders which we deem to be 'Orders necessary in the circumstances':

(1) The Proclamation of the Head of State dated 20 May 2021 is to forthwith be given full force and effect by the Applicant without further delay or procrastination;

(2) The Applicant to advise the Clerk of the Legislative Assembly and all other relevant parties or "relevant actors" as the case may be to comply with the said Proclamation and convene the Parliament of Samoa within 7 days hereof so that Parliament may discharge its constitutional and other functions in accordance with Part V of the Constitution and the Standing Orders of Parliament;

(3) The Applicant to further advise all concerned that any attempts to undermine or subvert this process is tantamount to a contempt of the Head of State, the Supreme Court and of Parliament within the terms of Rule 85 of the Standing Orders for which appropriate sanctions will lie.

[51] Although the Court described its own orders as "declaratory," the orders that followed were expressed in coercive terms. The Court did not stop at a passive statement as to the law and its application to current circumstances. It went on to order that specified steps be taken. There was also an oblique warning in order (iv)(3) that failure to comply would amount to contempt of court. The individuals specifically targeted were the Attorney General (described there as "the Applicant") and the Clerk of the Legislative Assembly.

[52] We accept that in substance these were coercive orders against the Attorney General (the fourth respondent). We will return to the question whether she breached the orders later.

[53] The other named individual was the Clerk of the Legislative Assembly (the third respondent). The literal wording of order (iv)(2) required the Attorney to advise the third respondent to do something as distinct from a direct requirement that he do it. Despite that we accept that it was intended as a coercive order against him. But the third respondent had not been joined as a party to those proceedings. Consequently he could not have been the subject of a coercive order.

[54] The same order refers more generally to “all other relevant parties” and “relevant actors”. We do not consider that this identified individuals in a way that could be converted into a coercive order against them. They would need to have been joined as parties in those proceedings. And as the Court pointed out in the same judgment:

[The applicants] could have sought the further urgent intervention of the Court in directing the Clerk and other “relevant actors” to proceed with implementation of the 20 May Proclamation of the Head of State and/or in respect of unlocking of the Parliamentary Chamber and premises.

That no such application was made was doubtless due to the applicants’ reasonable expectation that as the responsible holders of public office, the “relevant actors” would comply with the Court’s declarations.

[55] For completeness, the applicants did not allege that there was non-compliance with the final judgment in the sequence, *Attorney-General v Latu* [2021] WSCA 6 (23.7.21). It is not suggested that the respondents disobeyed court orders found in that judgment.

[56] The upshot is that the only coercive Court orders capable of supporting contempt proceedings were orders (iv)(2) and (iv)(3) of the judgment in *A-G v Latu* [2021] WSSC 31. Those orders required the fourth respondent to give certain advice.

Scandalising by the first respondent

[57] The first respondent, Tuilaepa Sailele Malelegaoi, was the former Prime Minister of Samoa and is the leader of the Human Rights Protection Party and an elected member of the Legislative Assembly. The amended statement of claim set out certain remarks made by him “that sought to bring the Court into contempt and undermine its authority”. He filed a statement of defence but offered no evidence challenging the facts asserted by the applicants. In the statement to the Court annexed as Appendix B he admitted making the public statements alleged.

[58] Statements particularised in the amended statement of claim were public statements made between 28 July and 27 August 2021. In general terms, they were highly critical of the Court decisions, and critical of the Judges involved in those decisions, to the point of abuse and insult.

[59] We do not propose setting out his public statements in full. In general terms, most of the pleaded statements ranged from accusing the courts of error, to making insulting and denigratory statements about the judges involved in the decisions and the courts. On occasions they accuse the courts of acting complicitly with the FAST Party.

[60] We set out some of the most egregiously denigrating and insulting extracts from these statements:

(a) Public statement made on 28 July by First Respondent:

“But the power of FAST and the Judiciary have been combined. So we only come in and go under... come in and go under as the decisions favour that side.”

(b) Statement of First Respondent in panel discussion on ‘Good Morning Samoa’ on 30 July 2021:

“Is this what Fiame and La’auli want? The Chief Justice comes and becomes King of Samoa? These are very shameful.”

(c) Statements in panel interview broadcast on TV1 and other media on 30 July 2021:

“Major things have occurred. Act of treason against the Head of State. I can also say acts of treason against Parliament.”

...

“It can be said that the leadership of FAST and the Judiciary are colluding. So where is justice? Justice is achieved through your being independent. You don’t favour any side. And if you know you are closely related to someone, you resign.”

(d) Public statements in a live-streamed broadcast from Petesa on 1 August 2021:

“What has happened is that our government is facing an act of treason from the judiciary.”

...

“What’s happening now? The Judiciary has shown pride. It has gone reckless. It has jumped up.”

...

“It must be clear that is treason.”

...

“Where they used a swearing in already ruled unlawful and unconstitutional and of no effect by the Supreme Court. That is what is known as a ‘coup d’etat’. But this coup is usually carried out by the military, countries with armies such as Fiji. But this coup is carried out by the judiciary.”

(e) Public statements in a live-streamed programme on 5 August 2021:

“I advised the Judiciary, this guy who is the Chief Justice, and especially these two. You can’t escape to another planet.”

...

“Any Judge who does something like that, is a Judge who is tricky and does bad tricks.”

(f) Public statement on 27 August on a large billboard:

“... there is no more independence in the Judiciary ...”

[61] These statements, which are the most extreme of those pleaded, plainly express contempt for the Court. By accusing the Court of being in collusion with the FAST Party, and by using insulting words such as “treason” and “tricks” to describe judges, the first respondent undermined public confidence in the independence, integrity, and impartiality of the judiciary. In undermining the authority of the Judges he undermined the rule of law.

[62] Accordingly, we find the first respondent to be in contempt of court in making the statements referred to.

[63] In these proceedings the first respondent does not seek in any way to defend these statements or suggest there was any truth in them. He unreservedly withdraws them and apologises to this Court and its Judges for making the statements, and for any loss of confidence in the courts of Samoa caused by his statements. The statement is welcome and appreciated.

Obstruction by the first respondent

[64] The first respondent also faces allegations that he committed contempt of court by obstructing the implementation of Court orders. The allegations fall into three categories.

[65] The first is that the first respondent was responsible for the Head of State’s defiance towards the Courts’ decisions. There is no doubt that the Head of State did reject important Court decisions. And on all the evidence before us it is reasonable to conclude that in doing so the Head of State was acting on the first respondent’s advice. In other circumstances that might have made the first respondent guilty of aiding and abetting a contempt. However no coercive order was made against the Head of State nor could it have been. The first respondent cannot be party to the breach of a coercive order if there was no such order to begin with.

[66] The second allegation is that the first respondent encouraged the third respondent to breach order (iv)(2) from the judgment in *A-G v Latu* [2021] WSSC 31. In essence order (iv)(2) required the third respondent to take such steps as lay within his power to ensure that Parliament was convened within 7 days. We accept that the first respondent directly or indirectly encouraged the third respondent to obstruct the convening of Parliament in the way he did. But we have held that the fact that the third respondent was never joined as a party to those proceedings prevented the making of a coercive order

against him. Once again the first respondent cannot be guilty of encouraging someone else to breach a coercive order if there was no such order to begin with.

[67] Thirdly the first respondent is alleged to have breached certain Court orders that had declared that the status of a certain candidate from the first respondent's party was suspended until completion of all current election petitions, consequent by-elections, and subsequent appointments. The allegation is that in defiance of those orders, the first respondent:

- (a) refused to allow Parliament to meet unless the second applicant agreed that the suspended candidate could sit as an additional Member of Parliament; and
- (b) (failing such agreement) insisted on continuing in office as a "custodian" Prime Minister until all current election petitions, any consequent by-elections, and any subsequent appointments, were completed.

[68] The evidence shows that the first respondent did act in that way. But the decisions in question were declarations, not coercive orders. The first respondent has a defence.

[69] Our conclusion is that for technical reasons the first respondent is not guilty of contempt by obstruction of Court orders. The first respondent must have known perfectly well that his actions were contrary to the Courts' decisions. However the decisions in question were declarations, not coercive orders. For technical reasons they cannot give rise to contempt by obstruction.

[70] Technicalities aside, it is proper to record that the first respondent defied Court decisions and successfully persuaded many others to join him in doing so. The first respondent entered into the agreement which is at appendix A to this judgment, and his personal statement at appendix B, stating his respect, and support for all Samoa to respect, the Courts and judiciary of Samoa. The statement is welcome and appreciated

The second respondent

[71] The second respondent, Leaupepe Toleafoa Faafisi, was the Speaker of Parliament. In essence the case against him was that in defiance of Court declarations he issued a notice purporting to postpone the swearing in of Parliament, instructed the third respondent to cancel preparations for convening the Legislative Assembly, and instructed the third respondent to secure the Assembly building.

[72] There is ample evidence that the second respondent acted in that way. It does not reflect well on him. But for the technical reasons outlined earlier, the declarations in question, not being coercive, could not give rise to proceedings against the second respondent for contempt. Nor could he be guilty

of encouraging the third respondent to breach an order if there was no coercive order to begin with. We find therefore that has not committed contempt.

[73] The second respondent has made a statement to this Court the relevant portion of which is annexed as Appendix C to this judgment. It acknowledges that his actions which prevented the swearing in of the new Government in Parliament were wrong. The statement is welcome and appreciated.

The third respondent

[74] The third respondent, Tiatla Lima Graeme Tualaulele, was the Clerk of the Legislative Assembly. The evidence shows that on 24 May 2022 he cancelled preparations for convening the Assembly, locked the Assembly building, withheld the keys and stayed away from the building so that the elected Members could not gain access to it. His conduct was inconsistent with declarations in force at the time.

[75] However for reasons explained earlier, no effective coercive order was ever made against him. Even the order that could have been coercive if he had been a party to the proceedings was not made until 28 June 2021, well after his conduct on 24 May 2022. There is no sworn evidence as to what the third respondent did or did not do after 24 May 2021. It has not been proven that the third respondent committed contempt.

[76] The third respondent was party to an agreement with the applicants similar to the one entered into with the first respondent and others. This included the statement annexed as Appendix C to this judgment. He says he acted in accordance with instructions that he believed he was required to follow. He accepts that his instructions were contrary to the Court of Appeal decision in *Attorney General v Latu*, and emphasises his respect for the judiciary of Samoa, and the discharge of its functions under the Constitution. The statement is welcome and appreciated.

The fourth respondent

[77] The fourth respondent, Savalenoa Mareva Betham-Annandale, was Attorney General at the material time. The statement of claim alleges that on 23 and 27 May 2021 she issued press releases relating to the Courts' decisions.

[78] We do not think the first release was contemptuous. The second, which was insultingly critical of the Judges concerned, was contemptuous. We set out some of the most egregiously denigrating extracts from this statement:

“There is now substantive evidence before our office that is questioning the appearance of impartiality and integrity of the Judiciary presiding over this matter.”

...

“The actions of the Chief Justice indicate that he may be in contempt of Parliament.”

...
“[i]t is also apparent that the leader for FAST, Fiame Mata’afa is a close relative of the Chief Justice of Samoa.”

[79] Whoever was responsible for that press release committed a serious contempt of court. However we accept the fourth respondent’s sworn evidence that she did not authorise the release and had no knowledge of it until after the event. We find her not guilty of contempt by scandalising the court.

[80] The fourth respondent also faced allegations of contempt by obstruction. The allegations stem from the Supreme Court’s orders of 28 June 2021:

(iv) We therefore in terms of the Application brought by the Applicant make the following declaratory orders which we deem to be ‘Orders necessary in the circumstances’:

(1) The Proclamation of the Head of State dated 20 May 2021 is to forthwith be given full force and effect by the Applicant without further delay or procrastination;

(2) The Applicant to advise the Clerk of the Legislative Assembly and all other relevant parties or “relevant actors” as the case may be to comply with the said Proclamation and convene the Parliament of Samoa within 7 days hereof so that Parliament may discharge its constitutional and other functions in accordance with Part V of the Constitution and the Standing Orders of Parliament;

(3) The Applicant to further advise all concerned that any attempts to undermine or subvert this process is tantamount to a contempt of the Head of State, the Supreme Court and of Parliament within the terms of Rule 85 of the Standing Orders for which appropriate sanctions will lie.

[81] It was not within the fourth respondent’s power to carry out order (iv)(1) herself. She could advise others to do so but she did not have the legal status to give effect to the Proclamation.

[82] Orders (iv)(2) and (3) required the fourth respondent to give the stated advice. There is no evidence that she failed to give it – indeed there would have been privilege complications if any attempt were made to prove that she had not. We are not prepared to infer that she failed to give the requisite advice.

[83] We accept the apology in the fourth respondent’s affidavit for what occurred. These points are repeated in the joint statement of the applicants and the fourth respondent annexed as Appendix E. In the statement the fourth respondent goes on to affirm her support and respect for the Courts in the discharge of their functions under the Constitution. The applicants were appropriately prepared to discontinue the proceedings against her.

[84] We find the fourth respondent not guilty of contempt of Court.

The fifth respondent

[85] The fifth respondent, Lealailepule Rimoni Aiafi, is the Secretary of the Vaialele branch of the HRPP, and a former member of the Legislative Assembly. In an affidavit of 19 January 2022 he did not deny making the public statements alleged but set out to justify them, expressed no regret for having made them, and showed no recognition of the need to abide by Court decisions. In a statement to the Court annexed as Appendix F he expressly admitted making the statements.

[86] We set out some of the most egregiously denigrating and insulting extracts from these statements:

- (a) Statements in a live streamed broadcast on 25 July 2021 by the Fifth Respondent:

“... the truth is, it is a coup that they staged. It’s a coup. Judiciary coup. What they did was a coup.”

- (b) Statements in a live streamed panel by the Fifth Respondent shown on TV1 and other platforms on 1 August 2021:

“[The] CJ and these [other two Judges in *Latu (CA)*] are cursed.”

...

“The Constitution was not loosely written. What’s happening now is that this Chief Justice has come; he is a son and he has usurped his father.”

...

“The Chief Justice and these two: They move around but they are already cursed. The Chief Justice and these two. They move around but they are already cursed. If they do not apologize, lower themselves and leave the chair, we will not forgo of these as well”.

...

“The truth is it was a coup by the Judiciary that brought in an Unconstitutional government.”

...

“The Chief Justice is afraid, he should be afraid because he is doing crooked things.”

- (c) Statement made by the fifth respondent on a march organised by the HRPP on 2 August 2021:

“Chief Justice something is going to happen to you. You are cursed for not respecting the Constitution.”

- (d) Statement made by the fifth respondent on a livestream panel interview shown on TV1 and other platforms on 15 August:

“Had it not been for the crooked decision by the Chief Justice, the couple would have been imprisoned...”

(e) Statements made by the fifth respondent on a livestream panel interview shown on TV1 and other platforms on 18 August:

“... all these people should be jailed. So what decision the Chief Justice will come up with? Because if he confirms the Supreme Court decision, all these people will be jailed. For what? Treason.”

...

“But if not, it means he is coming to kill us.”

...

“It is here that we know and believe that these were crookedly done. These were not done honestly.”

...

“No one... only HRPP. These people [the judiciary and FAST] have come together to defeat HRPP. Defeat Tuilaepa. Yes.”

[87] In his subsequent statement annexed as Appendix F the fifth respondent does not seek to defend these statements or suggest there was any truth in them. He unreservedly withdraws them.

[88] These statements of the fifth respondent, which are the most extreme of those pleaded, plainly express contempt for the Court. As we have said in relation to the First Respondent, by accusing the Court of being in collusion with the FAST Party, and by using insulting words such as “coup”, “cursed” and “crooked” to describe the judges, the fifth respondent inevitably undermined public confidence in the independence, integrity, and impartiality of the judiciary. He even stated that the Chief Justice “...was coming to kill us”. In so undermining the authority of the Court, he undermined the rule of law.

[89] Accordingly, we find the fifth respondent to have been in contempt of court in making the statements alleged.

[90] The fifth respondent was party to an agreement with the applicants similar to the one entered into with the first respondent and others. This included the statement annexed as Appendix F to this judgment. He explains that the contemptuous statements were made in a time of turmoil and high emotions. He completely withdraws any suggestion that could be taken from his statements that the Court its judicial offices or decisions were biased or corrupt, or that in any way there was any unlawful or inappropriate link between the FAST party and judicial offices or decisions of the Court. He states that public confidence in the Court and Judges underpins Samoa's existence as a democratic country under the Rule of Law. The statement is welcome and appreciated.

The sixth respondent

[91] The sixth respondent, Maiava Visekota Peteru, is a Solicitor of the Supreme Court. Her affidavit does not challenge the evidence provided by the applicants. In the statement to the Court annexed as Appendix G she expressly admits that she made the public statements alleged.

[92] We set out the most egregiously denigrating and insulting extract from these statements:

Statements made by the Sixth Respondent on a livestream panel interview shown on TV1 and other platforms on 15 August: “We are doing all of this as the opposition including criticisms of wrong and dishonest decisions currently happening” and that the second applicant “is bold because ... she has the judiciary”.

[93] These statements express contempt for the Court. By unjustifiably using the word “dishonest” to describe a Court decision, and implying a collusive connection between the second applicant and the Courts, the sixth respondent must have undermined public confidence in the independence, integrity, and impartiality of the judiciary. In so undermining the authority of the judiciary, they undermine the rule of law.

[94] Accordingly, we find the sixth respondent to have been in contempt of court in making those statements. The sixth respondent also has submitted a statement which is at appendix G to this judgment. It does not ameliorate the contempt. We comment on it in the penalties section of this judgment.

The seventh respondent

[95] The seventh respondent, Lauofo Fonotoe Nuafesili Pierre Lauofo, is Deputy Leader of the Vaoala branch of the HRPP and a former member of the Legislative Assembly. He has not offered any evidence challenging the evidence provided by the applicants. In a statement to the Court annexed as Appendix H he expressly admits that he made the public statements alleged.

[96] Unlike those we have previously dealt with, the seventh respondent’s statements do not accuse the Judiciary of cooperating with the FAST Party, and do not contain extreme insulting descriptions of Judges. The strongest statement appears to be “... it seems like the Judiciary has been placed above Parliament”. In our view, this falls close to the edge of what is legitimate criticism, but does not cross over into contempt.

[97] We find the Seventh Respondent not guilty of contempt of Court.

[98] In the statement annexed to this judgment as Appendix H the seventh respondent said:

“I accept the maintenance of public confidence in the Courts and Judiciary and the Rule of Law is fundamental to the functioning of a democratic society. To the extent that these statements

could undermine public confidence in the Courts or Judiciary, I regret making such statements and unreservedly withdraw them.” ... To the fullest extent I apologise for any and all statement or suggestion that in any way could diminish public respect or confidence in the Courts or Judges of Samoa.”

[99] The statement is welcome and appreciated.

The eighth respondent

[100] The eighth respondent, Taulealeausumai Sioeli Alofaifo, is a television presenter employed by the Samoa Broadcasting Company. He conducted a livestream panel interview with the first, fifth and eighth respondents broadcast on TV1, SBC Radio, and elsewhere. During the interview he said to the first respondent:

“Now you’re sitting in the opposition seat as you were in the Prime Minister’s seat, I have been asking you that the country has no more confidence in the judiciary, but you keep on protecting the Judiciary. So it seems all well now you are outside now and you can criticize the Judiciary?”

Because the truth is, the people no longer have confidence in the Judiciary.

[101] The eighth respondent does not deny that he said this. Unlike those statements we have previously considered, but like the statements of the seventh respondent, these remarks or questions do not accuse the Judiciary of cooperating with the FAST Party, and do not contain extreme insulting descriptions of the Judges. The strongest statement appears to be “... the people no longer have confidence in the judiciary”. In our view, this falls close to the edge of the legitimate criticism, but does not cross over into contempt.

[102] We do not hold the Eighth Respondent to be in contempt of Court.

[103] In his affidavit he explained that these were merely questions. In his statement to the Court annexed as Appendix I he explains:

“It should not be taken nor was it meant that these questions are statements reflecting upon the integrity of the Court or Judiciary of Samoa. Further, these questions should not be taken as suggesting corruption or bias by the Courts or Judiciary.”

...

“If in any way these questions scandalise the Court or undermine public confidence in the Courts or Judiciary I regret such questions and unreservedly withdraw any suggestion of corruption or bias.”

...

“To the fullest extent I apologise for any and all suggestion contained in my questions that could in any way diminish public respect or confidence on the Courts or Judges of Samoa.”

[104] The statement is welcome and appreciated.

Penalties

[105] We have found the first, fifth and sixth respondents guilty of contempt of court.

The first respondent

[106] Until these events the first respondent had been regarded by many as a respected and long-standing father of the nation. When Samoa entered a period of political turmoil it was reasonable for its people to look to him as a role model. The Constitution gave the Supreme Court the job of interpreting and applying the laws of Samoa.³⁵ The Courts decided that FAST had won the election. That was the moment for the first respondent to show true leadership.

[107] Instead of accepting and following the Courts' decisions, the first respondent embarked on a sustained campaign to vilify its Judges. For a time the campaign appeared to be successful. For several anxious months Samoa's proud history of stability was under threat. Even now the conflicts linger. We accept the evidence before us that there has been a lasting decline in respect for the law and the Courts in some quarters. That is the sorry legacy left by a formerly great leader.

[108] In other circumstances the first respondent's actions might have called for imprisonment. Fortunately three considerations allow us to avoid that result. First, no-one could question the first respondent's long and distinguished service to Samoa. He is entitled to credit for that. It was only for a short period that he fell from grace. Secondly, he has expressed regret for his conduct, unreservedly withdrawn the shameful things he said, apologised, and accepted that maintenance of public confidence in the judiciary and the Courts of Samoa is fundamental. Thirdly there is the Harmony Agreement, to which we will come shortly.

The fifth respondent

[109] The fifth respondent is the Secretary of HRPP and a Member of Parliament. Although lacking the authority of the first respondent, his public statements were even more inflammatory. Over a sustained period he described the Courts' decisions as a "judiciary coup", made personal and insulting allegations about the Chief Justice, said that the Chief Justice should be afraid because he had done crooked things, said that three of the Judges were "cursed", implied that the Judges were guilty of treason and said that the Chief Justice was "coming to kill us". He organised a march at which banners to similar effect were displayed. These were repeated and serious contempts designed to persuade others to defy the Courts.

[110] Aggravating the fifth respondent's contempts was the affidavit he swore as recently as 19 January 2022. In his affidavit he sought to justify the statements he had made denigrating Judges. He expressed no regret for having made them. Intentionally or otherwise, the affidavit demonstrates that he still lacked understanding of the harm he had done to the social fabric of Samoa. He still failed to appreciate the anarchy that would have followed if others had continued to do what he urged.

³⁵ Articles 4, 65 and 73.

[111] Fortunately the fifth respondent's attitude towards the Courts was dramatically reversed eight days before the trial was due to begin. He filed the statement at Appendix F to this judgment. In the statement he completely withdrew any suggestion that the judges were biased or corrupt, withdrew any suggestion that there had been any inappropriate link between the FAST party and a Judge, unreservedly apologised to the Court, accepted that the statements he had made could have harmed public confidence in the judiciary and the Courts, and acknowledged that public confidence underpinned Samoa's existence as a democratic country under the rule of law. Only that statement, his distinguished service to Samoa, and the Harmony Agreement we will come to in a moment, save the fifth respondent from a major penalty.

The sixth respondent

[112] The sixth respondent is a solicitor. In an interview broadcast on television and radio she described the Courts' decisions as "dishonest" and said that current Prime Minister "is bold because ... she has the judiciary". The scale of her contempts is not comparable to that of the first and fifth respondents. On the other hand her views carried the extra weight expected of a lawyer. As an officer of the Supreme Court she ought to have known better.

[113] In her statement to this Court annexed as Appendix G the sixth respondent said "Should any of my ... comments ... have the effect of diminishing public confidence in the Judiciary and judicial decisions I unambiguously accept that a retraction is in order" and "Should any statements made by me ... including an inferred link with the FAST party, have diminished the public perception of the standing, the integrity and impartiality of the Court, I unambiguously apologise." We are not impressed by conditional retractions and apologies of that kind. They imply that the speaker remains unconvinced. The very purpose of the sixth respondent's public remarks must have been to persuade the public that at least in that instance they could have no confidence in the integrity of the Judges. There is nothing doubtful or contingent about the effect public remarks of that kind would have had.

[114] We have found the sixth respondent guilty of contempt of court. She has brought dishonour on her profession. A penalty would have been appropriate but for the Harmony Agreement to which we now turn.

The Harmony Agreement

[115] Overshadowing all other penalty considerations is the document we have referred to as the Harmony Agreement (Appendix A). The agreement was in fact no more than a proposal which was never adopted by the Court. However we have attached great significance to the views expressed in it by the current Prime Minister and the FAST party. They feel strongly that it is time for Samoa to put these election arguments behind them. That would allow Samoa to unite in addressing greater challenges that lie ahead such as Covid and climate change. To that end they were prepared to

discontinue the contempt proceedings altogether. If we had accepted the discontinuance it would have left the respondents without penalty.

[116] Given that the respondents were the ones at risk in the proceedings, they were hardly about to disagree. But the Prime Minister and her party had nothing personal or political to gain by discontinuing. We accept that as the Government elected by the people of Samoa, they know what is best for the country.

[117] Although it is important to publicly record and condemn these contempts of court, we see no need to go further. The precedent now stands. It should now be plain how the Court would deal with repetitions. On this occasion penalties would simply inflame disruptions and conflicts that have done enough harm already. The current Prime Minister and FAST party are anxious to put them to bed. It is not our place to disagree.

Result

[118] We find the first, fifth and sixth respondents guilty of contempt of court. In the very special circumstances we impose no penalty. We find the other respondents not guilty of contempt of court.

[119] There will be no order as to costs.



Justice Fisher



Justice Asher

APPENDIX A: AGREEMENT BETWEEN APPLICANTS, FIRST RESPONDENT AND HRRP PARTY.

15 February 2022

The Hon Fiame Mataafa MP, in her own capacity and as leader of Fa'atuatua I Le Atua Samoa Ua Tasi and the Hon Tuilaepa Sailele Malielegaoi MP, in his own capacity and as leader of the Human Rights Protection Party have agreed, with the permission of the Supreme Court, to discontinue the contempt proceedings between them.

The two Hon Leaders have engaged in thorough discussion following the aftermath of the April 2021 General Election and the consequent court proceedings and the wider challenges that Samoa now faces. They have formed the common view that it is now necessary:

- to ensure and secure political and social stability for the benefit of all people and residents of Samoa;
- to promote peace and harmony for the public of Samoa, which is the prevailing public interest in light of the months of uncertainty and disruption to the conduct of governance after the general elections in April 2021;
- to face the current challenges to Samoa in terms of the global pandemic brought upon by Covid-19 and the effect on the environment caused by climate change, as a nation united under God; and
- to recognise that Samoa is a small country with limited resources and therefore particularly vulnerable during times of economic, political and social instability and, further, that Samoa has a unique culture where everyone is connected one way or another either through family ties or matai titles;
- to restore public confidence in all the democratic institutions upon which our government and society are founded;
- to restore and acknowledge the traditional honor and dignity belonging to all those who lead the country, from the heart of each family, to the villages, districts and islands; and
- in doing so seek to respect to the overarching spiritual leadership of the various denominations of our Christian churches for the glory of God.

They have, therefore, agreed that, rather than cause further disagreement and disharmony, they discontinue the contempt proceedings and, further: to emphasise and uphold their shared respect, and their support for all Samoa to respect, for the Supreme Court, the Court of Appeal and the judiciary of Samoa; and

to record their agreement to move forward under the Constitution, with which Samoa is blessed and under which the courts of Samoa were able to resolve the unprecedented disagreements of the past year.

APPENDIX B: STATEMENT BY FIRST RESPONDENT

STATEMENT OF TUILAEPA SAILELE MALIELEGAOI

1. I am the Leader of the HRPP and the former Prime Minister of the Independent State of Samoa. I make this statement in relation to proceeding MISC 142/21 in the Supreme Court of Samoa.
2. As a Christian Nation, we privilege peace, harmony, forgiveness, compassion and unity as part of Samoa's paramount axes of value.
3. Through my many years of leadership of this country, I have always remained true to my Samoan cultural values and Christian principles, and they have never failed to stand me and this country in good stead.
4. I still hold true to those Samoan values and principles and commensurate with the spirit of forgiveness and reconciliation that in the best interest of Samoa, it is time for Samoa to move forward from its recent past of political turmoil and uncertainty.
5. I recognize the importance to unite and work together in building our nation to face the difficult challenges ahead brought about by the Covid pandemic, climate change and slowing economies.
6. I acknowledge that I made the statements alleged against me in paragraphs 11.1 to 11.14 of the Statement of Claim Incorporating Additional Particulars dated 21 September 2021, including statements concerning the motives or independence of individual judges of this Court.
7. I made the statements at a time of political instability and high emotions where I thought I was exercising my rights to fair comment and freedom of expression as guaranteed under our Constitution.
8. I accept that the maintenance of public confidence in the judiciary and the Courts of this country is a fundamental principle.
9. I regret making the statements, unreservedly withdraw them, and I apologise to this Court and its Judges for making the statements and for any loss of confidence in the courts of Samoa caused by my statements.

SIGNED this 24th day of February 2022

Tuilaepa Sailele Malielegaoi

**APPENDIX C: STATEMENT BY SECOND RESPONDENT, LEAUPEPE TOLEAFOA
FAAFISI**

The Second Respondent says that he now appreciates and deeply regrets that his actions at the time thus preventing the new Government and their Members from being sworn in Parliament following the General Election were wrong. At the relevant time his uppermost thought was to obey the Proclamation by the Head of State published on Saturday, 22 May 2021 to postpone the convening of Parliament. A literal translation of the first paragraph of the Second Respondent's letter on 23 May 2021 to the Clerk of the House would be as follows "In **obedience** to the Proclamation by His Highness the Head of State of Samoa on Saturday, 22 May 2021, I hereby give Notice of the postponement of the Swearing of the Legislative Assembly that has been scheduled for Monday 24th May 2021" (Exhibit B to Affidavit of Leaupepe Toleafoa Faafisi To Oppose And For An Order To Dismiss Motion for Contempt Orders by the Applicants).

The Second Respondent says he now realises and deeply regrets that the actions which he took at the time, thus preventing the swearing in of the new Government in Parliament were wrong.

In addition the Second Respondent respectfully would like to clarify that he was totally unaware of the Court hearing that was taking place that same Sunday in the Supreme Court. Furthermore he did not immediately know of the decision in particular he was not one of the three parties the Supreme Court had directed to be served with a copy of its ruling.

**APPENDIX D: STATEMENT ON BEHALF OF THIRD RESPONDENT, TIATIA LIMA
GRAEME TUALAULELEI**

In the contempt proceedings, Tiatia Lima Graeme Tualaualelei has explained that his actions on 23 and 24 May 2021 concerning the opening of Parliament were in accordance with instructions that he believed he was required to follow.

He now accepts, however, that those instructions were in fact contrary, in particular in light of the decision of the Court of Appeal in *Attorney General v Latu* [2021] WSCA 6. He more widely wishes to emphasise his respect for the judiciary of Samoa and its discharge of its functions under the Constitution.

APPENDIX E: STATEMENT BY FOURTH RESPONDENT

Agreed Joint Statement by the Applicants and the Fourth Respondent

JOINT STATEMENT BY FA'ATUATUA I LE ATUA SAMOA UA TASI, THE HON FIAME NAOMI MATAAFA AND SAVALENOA MAREVA BETHAM-ANNANDALE CONCERNING CONTEMPT OF COURT PROCEEDINGS

FAST and its leader, the Hon Fiame Naomi Mataafa, and Savalenoa Mareva Betham-Annandale make the following joint statement concerning the current contempt of court proceedings to which they are party, as applicants and fourth respondent respectively.

Ms Betham-Annandale has denied the contempt of Court allegations against her.

She has stated in evidence that:

- The first of the two May 2021 press releases the subject of the proceedings was made by her without knowledge of the relevant pronouncements of the Supreme Court and in direct response to earlier media criticism. The second press release was not authorised by Ms Betham-Annandale and, further, is the subject of apologies by her to the Court;
- As regards compliance with relief granted by the Supreme Court in two election-related judgments in May and June 2021, she cannot disclose advice given by her as Attorney General to the then government, but has confirmed that she gave no advice inconsistent with the June judgment and also sought and relied upon advice of external counsel; and
- She accepts that the July 2021 decision of the Court of Appeal in *A-G v Latu* brought these difficult matters to an end.

FAST and the Hon Fiame Naomi Mataafa consider that these explanations sufficiently uphold the public interest that they had sought to protect in this part of the contempt proceeding. They and Ms Betham-Annandale wish to express their shared support and respect for the Courts in the discharge of their functions under the Constitution. Subject to the Court's ultimate ruling, they and Ms Betham-Annandale have therefore agreed that it is not necessary to pursue it further.

APPENDIX F: STATEMENT BY FIFTH RESPONDENT

STATEMENT OF LEALAILEPULE RIMONI AIAFI

1. I am the Fifth Respondent in this Proceeding.
2. I am a member of Parliament for the Constituency of Faleata. No 3. and the secretary of the Human Rights Protection Party ("HRRP").
3. I acknowledge that I made the statements alleged against me in-paragraphs 17 .1 to 17.6 of the Amended Statement of Claim incorporating Additional Particulars dated 21 September 2021.
4. I made the statements at a time of political turmoil and high emotions where I thought I was exercising my rights to fair comment and freedom of expression as guaranteed under our Constitution.
5. However, I now unambiguously accept that the statements I made could have harmed public confidence in the Judiciary and the Courts.
6. I acknowledge the maintenance of public confidence in the Judiciary and Courts of Samoa is fundamental. Public confidence in the Court and Judges underpins **Samoa's** existence as a democratic country under the Rule of Law.
6. I completely withdraw any suggestion taken from my statements that the Court, its judicial offices or decisions were biased or corrupt or that in any way there was any unlawful or inappropriate link between the FAST party and judicial offices or decisions of the Court.
7. I unreservedly apologise to the Court and its Judges and regret that my statements and words could suggest that the Court, the Judges or Judicial decisions were biased or corrupt.

SIGNED 22 February 2022

Lealailepule Rimoni Aiafi

APPENDIX G: STATEMENT BY SIXTH RESPONDENT

STATEMENT OF MAIAVA VISEKOTA PETERU

1. I am the Sixth Respondent and I am a Barrister and Solicitor of the Supreme Court of Samoa.
2. I am a matai in four (4) villages, a human rights advocate and a Christian. I have also served as Member of Parliament.
3. I affirm the key role of the Courts in interpreting and upholding the Constitution and the rule of law in Samoa.
4. I hold the Court in high esteem and as an officer of the Court I am acutely aware of my personal duty and responsibility to uphold the dignity of the Court.
5. After the April 2021 General Elections, I participated in at least 100 live streamed broadcasts for the Human Rights Protection Party (HRPP) which were updates on the developments during Samoa's political crisis.
6. On August 15th and 18th 2021, I made statements in two (2) live streamed programs and I carried a banner during a march on 2 August 2021 relating to the protection of the Constitution which read : "If our Constitution is tarnished the future of Samoa will be in danger"
7. Should any of my other comments in paragraph 18.2 or panel interview in paragraph 18.1 of the Amended Statement of Claim or the banner (in paragraph 18.3) have the effect of diminishing public confidence in the Judiciary and judicial decisions, I unambiguously accept that a retraction is in order.
8. I have long been an advocate of the freedoms of all Samoan citizens under the Constitution and I am not oblivious to the fact that there are limits to the same.
9. Should any statements made by me in reference to the Judiciary or the Courts of Samoa including an inferred link with the FAST party, have diminished the public perception of the standing, the integrity and impartiality of the Court, I unambiguously apologise.
10. I acknowledge the maintenance of public confidence in the Judiciary and Courts of Samoa is fundamental. Public confidence in the Court and Judges underpins Samoa's existence as a democratic country under the Rule of Law.
11. Samoa is a peaceful country and I acknowledge the key role of our culture and the leadership of matai of this country. Despite heated exchanges and debates no incidents of violence arose and this blessing is one I do not take for granted being a matai myself.

SIGNED 23rd February 2022

Maiava Visekota Peteru

APPENDIX H: STATEMENT BY SEVENTH RESPONDENT

STATEMENT OF LAUOFO FONOTOE NUAFESFLI PIERRE LAUOFO

1. I am the Seventh Respondent and a Member of Parliament for the Electoral Constituency of Anaomaa. No 2 and Deputy Leader of the Human Rights Protection Party ("HRPP").
2. I acknowledge that I made the statements alleged against me in paragraph 19.1 and 19.2 of the Statement of Claim Incorporating Additional Particulars dated 21 September 2021.
3. I made the statements against the backdrop of recent court decisions which at the time were of great public interest because they attracted much public opinion in the media and discussions in all sectors of the community.
4. The statement in paragraph 19.2 also relates to an incident that occurred at Salelologa in Savaii Island where the HRPP car rally was prevented by the villagers by a barricade of rocks and stones across the road from proceeding and also a shot gun discharged was heard. And I cautioned that this kind of behaviour must stop from happening in our country.
5. I believe that these statements were a reflection of the concerns and sentiments that were expressed by the public and members of the HRPP at the time of much political turbulence and uncertainty which I thought at the time was an exercise of the right to a free expression of a political view under the constitution.
6. I accept the maintenance of public confidence in the Courts and the Judiciary and the Rule of Law is fundamental to the functioning of a democratic society. To the extent that these statements could undermine public confidence in the Courts or Judiciary, I regret making such statements and unreservedly withdraw them.
7. To the fullest extent I apologise for all and any statement or suggestion that in any way could diminish public respect or confidence in the Courts or Judges of Samoa.

SIGNED 23rd February 2022

Lauofo Fonotoe Nuafesfli Pierre Lauofo

APPENDIX I: STATEMENT BY EIGHTH RESPONDENT

STATEMENT OF TOLOGATAUA SIOELI ALOFAIFO

1. I am the Eight Respondent to this proceeding.
2. I am a TV and radio presenter for Samoa Broadcasting Corporation.
- 3.1 I acknowledge that as part of a question and answer process in a live television interview on 30 July 2021 with the former Prime Minister and other HR.RP members. I posed the following question "when you read the decision brought by the Court, the words of the decision are serious because the decision says the Head of State does not understand his duties, the words of the decision are very serious, so that the Leader is correct, and the Chief Justice seems to have questioned the Head of State?"
- 3.2 I also acknowledge that as part of the question and answer process in a live television interview on 30 July 2021 with the former Prime Minister and other HRRP members I posed a question as follows "now you're sitting in the opposition seat as you were in the Prime Minister's seat, I have been asking you that the country has no more confidence in the Judiciary, but you keep on protecting the Judiciary. So, it seems all well now that you're outside now and you can criticise the Judiciary? (Is it) because the truth is that, people no longer have confidence in the Judiciary?"
- 3.3 I believe these questions were a reflection of sentiments that had been expressed in public by members of the HRRP and others during the course of events subsequent to the election in April 2021.
4. It should not be taken nor was it meant that these questions are statements reflecting upon the integrity of the Court or Judiciary of Samoa. Further, these questions should not be taken as suggesting corruption or bias by the Courts or judiciary.
5. If in any way these questions scandalise the court or undermine public confidence in the Courts or Judiciary I regret such questions and unreservedly withdraw any suggestion of corruption or bias.
6. To the fullest extent I apologise for all and any suggestion contained in my questions that could in any way diminish public respect or confidence on the Courts or Judges or Samoa.

23 February 2022

Tologataua Sioeli Alofaifo