Schafer-Macdonald v Health Practitioners Registration Council & Kingdom of Tonga

Supreme Court, Nuku'alofa
Hampton CJ
C 387/95

8, 9, 15, 16, 17, 18 July, 2, 16 August, 4, 7 October 1996, 5 March 1997

Medical practitioner - registration - delay - damages - statutory duties
Constitution - retrospective legislation - new Act
Statutory interpretation - rules at common law
Damages - exemplary - failure of statutory duty

The plaintiff sued the defendants for damages (general and exemplary) for breach of their statutory duties relating to the registration of the plaintiff as a medical practitioner. She had qualified in medicine in Germany in 1980 and had been duly licensed to practice. She did a post-graduate degree graduating in 1983. In 1986 she bought a medical practice in Tonga, having earlier in 1986 been registered as a medical practitioner in the United Kingdom. She was granted "temporary" registration in Tonga and in 1990 "full" registration "limited" to a term of 3 years. In 1991 the Kingdom passed into law the Health Practitioners Registration Act 1991, inter alia creating the first defendant and a new regime for registration of health practitioners including medical practitioners. The Act came into force on 1 July 1993. The plaintiff applied for registration under it, in April 1994 at the first time the first defendant had prepared forms and procedures and sought registration. Her application was not dealt with however until June 1995 when it was granted by the first defendant but only after issue of proceedings by the plaintiff in the Supreme Court after threats to her by the first defendant to, inter alia, close down her practice and to prosecute her for practising medicine whilst unregistered.

Held:

1. The plaintiff was duly registered in the Kingdom from 1 May 1987. Such registration could not be, as a matter of law, subject to any conditions (whether "temporary" or in terms of a period of years). The Director of Health, under the then in force Medical Registration Act, had a duty to keep and maintain the register of practitioners. The plaintiff's name was entered in the register.
2. For 6 1/2 years up until the coming into force of the 1991 Act the plaintiff had practised medicine in Tonga as an approved and registered duly qualified medical practitioner. The Tonga Government Gazette of July 1992 in publishing the list of persons registered under the old Act which included the plaintiff in the list of persons registered to practise as medical practitioners and made mention of her as being "MD (Germany)" was official confirmation of

her registration and qualifications.

3. In February 1993 the then acting Director of Health issued the plaintiff a certificate advising inter alia, of her registration and that she was a medical practitioner of good standing. That certificate under s.5 of the old Act was presumptive proof of both her registration and her qualification as a medical practitioner.
4. Under the new Act the first defendant can and should conduct a hearing or enquiry in exercise of its duties under the new Act (such as consideration of applications for registration).
5. Reservations were expressed (obiter) as to whether the membership of the first defendant complied with the Act.
6. If, as argued for the defendants, the new Act effected a complete repeal of the old Act then there would have been an unfortunate and lengthy interregnum when there would be no registered health practitioners of any sort able to lawfully practise in Tonga. A matter patently absurd and potentially harmful.
7. If the position was as argued for the defendants, there was no discretion in the first defendant to allow people to continue to practice until procedures could be put in place.
8. The plaintiff's application (for registration under the new Act) was met with extraordinary actions, shifting reasons, procrastination and delays on the past of the first defendant; these actions (or sometimes lack of action) being difficult if not impossible to understand.
9. The application of the plaintiff objectively, contained an amplitude of evidence as to her qualifications, prior registrations and professional experience,as well as her good character and professional competence.
10. The first defendant dealt with the application for registration of government staff differently to those of non-government practitioners (such as the plaintiff) yet the Act did not allow such a distinction.
11. The members of the first defendant had a duty to look at, and decide on, the merits of each individual's application.
12. The first defendant deferred making a decision on the plaintiff's application but without telling her of that or of the reasons for it, and during that deferral period the plaintiff's cheque for her registration fee and her annual practising certificate (which could only be issued if she were registered) was banked by the Ministry of Health (part of the second defendant).
13. At no stage did the first defendant suggest that the plaintiff should come and give evidence before it to attempt to clear up any unresolved questions or ambiguities. Given the duties and powers of the first defendant a hearing before it was required at some stages. Nor did the first defendant make a decision to refuse to admit the plaintiff to the register, from which she could appeal.
14. The first defendant omitted the plaintiff's name from a list of qualified doctors published, in the Government Gazette and in the Tonga Chronicle, in July 1994; and republished in 2 newspapers in December 1994.
15. The plaintiff, having tried for some 9 months to obtain registration, decided to try and obtain registration in Canada, her husband's country of nationality.

16. Many of the exhibits in the control of the first defendant, were only lamely and falteringly produced at trial. They showed that there had been much delay, procrastination and dissemblance by the first defendant and, even when it announced it "no longer doubts the authenicity of the document submitted so far" after some 11 months - still registration did not proceed; but instead decisions made to refuse to accept the plaintiff's prescriptions and to refer the matter to the Police.

17. Proceedings were issued in May 1995 seeking, inter alia, prerogative orders confirming her registration, directing the issue of a practising certificate and prohibiting prosecution. In June 1995 the first defendant approved her registration and issued a current practising certificate.

18. The first defendant was and is not a separate legal entity. Financial and other responsibility for it rests with the Ministry of Health and, through the Minister, the second defendant.

19. The plaintiff, having given medical advice previously for a member of the judge's family, the judge enunciated the test of bias-would a reasonable, an objective, observer think it likely or probable the judge would favour the plaintiff unfairly at the expense of other parties? A suspicion of bias reasonably and not fancifully entertained by reasonable minds. The test of bias is whether there is reasonable suspicion of bias looked at from the objective stand point of a responsible person and not from the subjective standpoint of an aggrieved party. Those tests were not met here and a court should not desist from hearing a case because a party or somebody wrongly and irrationally suspects bias.

20. Even if the plaintiff had to re-apply for registration under the new Act, the treatment of her application and of her was not only quite extraordinary and unreasonable but was in many respects disgraceful.

21. The actions of the first defendant were reviewable and were wrong in fact and in law. The first defendant had not only stepped outside the limits of its statutory authority from time to time but also at other times acted without authority. It acted unfairly and unreasonably towards the plaintiff; it failed to perform its statutory duties; having functions requiring it to act judicially (both in the Act and in accordance with the rules of natural justice) it failed to do so; it acted capriciously and in bad faith, without regard to relevant consideration as well as bringing into consideration irrelevant considerations.

22. In addition given the results which would otherwise occur s.15 (a) and (b) Interpretation Act had effect i.e the new Act did not affect the plaintiff's existing registration nor the entry of her name in the register and so she was and remained a duly registered medical practitioner; and she retained her right to practice acquired under the old Act.

23. As to cl 20 of the Constitution (as to retrospative laws) if that provision was put alongside and used in conjunction with the common law rules of statutory interpretation which operate in Tonga and in particular the rule that statutes should be interpreted, if possible, so as to respect vested rights, that supported the plaintiff's case. She had a right acquired (to practise medicine) by her as an individual, and which some had and some had not.

24. The plaintiff was entitled to general damages of $30,000 and exemplary damages of $5000 given the conduct of the first defendant.

[NOTE - The defendants appealed. The report of the Court of Appeal judgment follows].

Cases considered:

exp. Angliss Group (1969) 122 CLR 546
Whitford v Manukau City [1974] 2 NZLR 344
R v Simpson (1983) 154 CLR 101
Starey v Graham [1899] 1 QB 406
In re Tonga Ma'a Tonga Kautaha (1910) 1 Tongan LR 5
Fulivai v Kaianuanu (1961) 2 Tongan LR 178
Bennett v Bennett [1989] Tonga LR 45

Statutes considered:

Medical Registration Act
Health Practitioners Registration Act
Constitution cl.20
Interpretation Act s.15, s2, s23
Evidence Act s50

Counsel for plaintiff : Mr Niu
Counsel for defendants : Mrs Taumoepeau

Judgment

In the matters set out below when I refer to facts then, from the evidence (oral testimony and documentary exhibits), I find those facts proved:-

The Plaintiff was born in Heidelberg, Germany, on 14 February 1949 (Exhs 74, 73).

She studied medicine at the Ludwig-Maximillian University, Munich, Bavaria, Germany (then West Germany or the FDR - the Federal Republic of Germany) from 1974 to 1980 (Exh 80/81) completing and passing her final examination (oral and written) in March, April and May 1980 (Exhs 81, 4/5) and thereupon being approved to practise medicine in Germany by the Bavarian Ministry of the Interior (Exh 6/7).

I give a little more detail of these events. On passing her final examinations she received a "certificate of final medical examination" (Exh 4/5) of 13 June 1980 - her "Zeugnis uber die Arztliche Prufung" which certificate, in the World Health Organisation book "World Directory of Medical Schools" 6th Ed (1988) (Exh.99) at p.101, is referred to as the "Title of degree awarded". That book (Exh.99) at p.101 refers to the "duration of medical degree course: 6 years" and at p.105 listed amongst the medical schools is the following "Fachbereich Medizin,Ludwig-Maximillians Universitat Munchen ..... year instruction started 1826 ....."

On receipt of that "Zeugnis uber die Arztliche Prufung" the Plaintiff was then approved to practise medicine by the issue to her of her "Approbation als Artz" - her approval as a medical doctor-contained in the "Certificate of State Approval" ("Approbationsurkunde") (Exh. 6/7) issued by the Bavarian Ministry of Interior on 13 June 1980.

Again I refer to Exh. 99 at p.101 where it is said that "The licence to practise medicine is granted by the Medical Examination Board of the health authorities of the respective "Lander" " which includes "Bayern-Bayerische Staatsministerium des Junern". That Bavarian Ministry is of course, the very Ministry which issued the Plaintiff's "Certificate of State Approval" (Exh 6/7).

I note some matters of interest, if not significance, now. The book Exh. 99 was at all relevant times available, through Dr Welch (a witness in this trial and who is on appointment to the Kingdom for the World Health Organisation) at Vaiola Hospital. It was never sought - or indeed any like equivalent - at any time by the First Defendant.

Both Certificates (i.e. Exhs 5 and 7) were translated into English in October 1986 (Exhs 4 and 6) respectively, at a time when, as I will come to it in this chronology, the Plaintiff was not only contemplating coming, but taking active steps to come, to Tonga.

To resume the chronology, I find that after qualifying and being registered the Plaintiff practised medicine in various places including

(a) in the German Heart Centre, Munich (1980 - Exhs 9-12)

(b) on a leprosy island (Culion Sanatorium) in the Philipines (1981 - Exh 8)

(c) in Brunsbuttel Regional Hospital, Schleswig-Holstein, Germany for 4 years (2 years internal medicine; 2 years surgery) (1981 - 85 - Exhs 16-26).

During the Brunsbuttel employment the Plaintiff wrote a dissertation or thesis on "Yersinia arthritis" through the Ludwig-Maximillian University and on 24 February 1983 graduated as a Doctor of Medicine "cum laude" (Exh. 13/14).

Also during this same time at Brunsbuttel the Plaintiff qualified as a specialist doctor in rescue and lifeguard services (January 1984 - Exh. 27/28) and in mid 1984 she completed a course in the English Language (Exh.15).

In 1985 the Plaintiff transferred to the Regional Hospital in Engen, Baden - Wurttenburg Germany and worked in surgical medicine there for about 6 months and later in 1985 and into 1986, still in Baden-Wurttenburg she worked in anaesthesiology and surgical medicine at Breisach Regional Hospital (October 1985 - December 1986 - Exh.31/34).

It was during this period at Baden-Wurttenburg that the Plaintiff and her then fiance became interested in a medical practice ("the German Clinic" - still known by that name) in the Kingdom of Tonga, then owned (and advertised for sale in Germany) by a Dr Icks.

The Plaintiff and her then fiance (Dr Bruno Blersch) came to Tonga in August 1986 to inspect the practice and decided to buy the same - and indeed entered into an agreement to do that on 18 December 1986 (Exh 36/37).

That jumps ahead a little in the chronology of events because, to enable the Plaintiff to practise in Tonga, she decide to seek full registration as a medical practitioner with the General Medical Council, London, England. That step was necessary because of the provisions inthe (then in force) Medical Registration Act (cap.75) and in particular Section 3 which enacted, inter alia, that a person entitled to practise in the United Kingdom as a medical practitioner (holding a diploma or certificate to that effect) "shall, upon satisfying the Director of Health of his identity ..... be entitled to be registered as a duly qualified" (medical) "practitioner ....."

Accordingly in October and November 1986 the Plaintiff took steps towards that United Kingdom registration. She obtained her necessary certificates of qualification and registration (Exhs 5 & 7), had them translated into English (17 October 1986 - Exhs 4, 6); various references and other documents showing her qualifications and experience were available to her (eg. Exhs. 8,9-12, 13/14, 15. 16-26, 27/28); she also obtained a Certificate from the German Federal Ministry for Youth, Family Affairs, Women and Health of 6 October 1986 (Exh 29 - translation 17 October 1986) certifying as follows:-

> "This is to certify that Mrs. Dr. Helga Theresia Schafer-Durst, born on 14th February 1949 in Heidelberg, has undertaken and completed her medical education in the Federal Republic of Germany satisfying all requirements according to article 1 of the guideline 75/363/EWG.
>
> Mrs Schafer-Durst was issued with a Certificate of State Approval as a Doctor of Medicine on 13th June 1980 valid from that date by the Bavarian Ministry of the Interior having passed the Final Medical Examination on 29th May, 1980. The Certificate of State Approval as a Doctor of Medicine entitles holder to practise the medical profession extensively within the Federal Republic of Germany.
>
> Furthermore we certify that Mrs. Dr. Schafer-Durst is still entitled to practise the medical profession in the Federal Republic of Germany and that neither professional nor disciplinary legal proceedings have ever been initiated against her."

On 28 November 1986 the General Medical Council in London, England, advised the Plaintiff in writing (Exh.30) that "you were granted Full Registration on 25th November 1986 and I enclose your certificate of Full Registration. A fully registered

medical practitioner is entitled to practise medicine in the United Kingdom".

A certified copy of the entry in the (United Kingdom) Register of Medical Practitioners (overseas list) is Exh.89. It bears the "registration no.3184972" which number is also found on Exh.30. The certified copy Exh..89 also bears on it "State Exam. Med. 1980 Munich".

The Plaintiff and Dr Blersch came to Tonga at the end of 1986 and the agreement to buy the German Clinic (Exh.36/37) was signed on 18 December of that year (and all signatures witnessed, interestingly enough, by the German Consul here, Mr Ralf Sanft - who is to appear later in this narrative (if not already) as a translator of various documents (German to English).

In keeping with that agreement the Plaintiff and Dr Blersch commenced the practice of medicine in the Kingdom on 1 January 1987. This was apparently done on the basis that the practise was to continue to be conducted under Dr. Ick's licence. One wonders as to the regularity of that, but it is not an issue before me. Suffice to say that the Plaintiff did apply for registration in Tonga under the Medical Registration Act (cap 75) and on 1 May 1987 she "was granted temporary registration as medical practitioner" ("to 30 April 1990") - refer Exh.51.

Three things about this stage of events require further scrutiny. First the provisions of the Medical Registration Act itself; second the steps taken by the Plaintiff to obtain registration; and third the registration obtained.

The Act then in force, the Medical Registration Act, had been in existence since 1918 and had remained virtually unchanged for almost 70 years. It had been preceded by some legislation in the field of medical services in 1909 (about circumcision) and 1916 (Medical Services Act) but this Act was apparently the first dealing with Registration and was "an Act to Regulate the Registration of Medical Practitioners, Dentists, Apothecaries and Mid-wives" (long title).

In Section 2 it was provided that the Director of Health "shall keep a register ..... of all persons qualified to practise medicine or surgery or dentistry or to practise as pharmaceutists or apothecaries or midwives in the Kingdom and it shall not be lawful for any person unless so registered ..... to practise for fees .....". Section 3 provided (inter alia) that "Any person holding a ..... certificate entitling him to practise in" (inter alia medicine or surgery) "in the United Kingdom ..... shall upon satisfying the Director of Health of his identity with the person named in such certificate ..... be entitled to be registered as a duly qualified practitioner .....". Section 5 provided for the Director to issue to such a registered practitioner a certificate of registration which "shall be admitted in any court or proceeding as evidence of the facts therein stated and of the person's qualification .....". Section 11 provided that a list of persons registered "shall be published annually in the Gazette .....". Section 12 and Section 13 allowed the removal or striking off of names from "the register" in certain circumstances (not applicable here) and Section 14 for erasure of names from "the register" on death. (Any underlinings are mine).

The Plaintiff supplied to the Director of Health certified true copies of her Certificate of Final Examination (Exh 4/5); her Certificate of State Approval (Exh 6/7); and her Certificate of Full Registration (United Kingdom - as referred to in Exh 30). Other materials and/or documents also may have been supplied. Whatever, her credentials and identification were obviously accepted and acted upon. I find that the three certificates

mentioned (or at the very least copies thereof) were retained by the Ministry of Health, a matter to which I will return.

As I have said the Plaintiff was granted "temporary registration as Medical Practitioner..... from 1 May 1987 to 30 April 1990" (Exh 51). Quite what authority there was to create and grant such a status of "temporary registration" for a term of years, and the effect or effects of such is not important here, but is somewhat puzzling. The Act does not create such a category of registration nor does it enable a conditional registration for a term of years. Practitioners such as medical practitioners are either entitled to be registered as qualified to practise medicine (and entered into the register) or they are not. The Act is clear. They are not like "unqualified practitioners" upon whom conditions and limitations could be imposed - refer eg. to Ss 7, 8 and 11 of the 1918 Act.

On the evidence before me I find that the Plaintiff was duly registered in the Kingdom, as a medical practitioner, from 1 May 1987 on. Such registration could not be and was not at law, subject to any conditions (wether the claimed "temporary" or in terms of a period of years). The Director of Health had a duty to keep and maintain the register of practitioners; the fact that the Defendants have looked, it is said, and now cannot produce, physically, to this Court such a book, does not lead me to find (as argued on behalf of the Defendants) that the register never existed. Given the provisions of the Act (eg. Sections 2, 3, 12, 13 and 14) this Court can, and does, presume that the Director of Health (or successive Directors of Health previously styled "Chief Medical Officers" over almost 70 years) did keep and maintain such a register as was required by law. (I refer in passing to Section 17 of the Interpretation Act (cap 1) which says that "whenever by any Act ..... a duty (is) imposed then unless the contrary appears to be intended ..... the duty shall be performed from time to time as occasion requries"). It is footling, in my view, for the Defendants to claim (as was done in their final submission) that "there was no evidence of any register established by the Director of Health under the Medical Registration Act". One notes the statutory presence of the Director of Health (ex officio and as chairman) on the First Defendant Health Practitioners Registration Council (Section 4 Health Practitioners Registration Act 1991) and, inter alia, maintaining continuity relating to registration between the 1918 Act and the 1991 Act.

Not only do I find that the Plaintiff was registered; I find that, in keeping with the clear and important statutory obligations, her name was entered in the register under the 1918 Act.

The registration was confirmed by Cabinet (3 June 1987, C.D. No.88), it would seem. Quite what the matter had to do with Cabinet is, again, somewhat puzzling. Under the 1918 Act Cabinet did have a say in which other countries' qualifications should be recognised (Section 3-by adding the country to the Schedule to the Act), in registering unqualified practitoners (Section 6 to 10) and in directing the removal of a name from the register (Section 12). But Cabinet had, and could have, no say in registration of qualified practitioners. I will comment on this aspect again later; but Cabinet involvement did not (and could not) affect the Plaintiff's registration.

The Plaintiff continued the practise of medicine here in Tonga. Dr Blersch did not. He left Tonga after about 6 months and I find that from about September 1987 on until the present trial the Plaintiff has operated the German Clinic, as a sole medical practitioner. I will come to the size and substance of that practise later.

About one year further on (on 5 November 1988 - Exh..39) the Plaintiff married

Peter Douglas Macdonald, a lawyer then practising here, originally of Canada. Mr Macdonald gave evidence at the trial and I will return, later, to that evidence. Thereafter (in March 1989) the Plaintiff registered a change of surname with the German authorities - see the Certificate of change of surname to Schafer - Macdonald (from Schafer-Durst - born Schafer) at Exh.40/41. I note the continuity of changing names - "Schafer - Durst", or "Schafer -Durst born Schafer" or Schafer - Durst nee Schafer" had been the surnames used in various Exhibits earlier referred to (eg. Exhs 4/5, 6/7, 8,9-12,13/14, 15-16, 27/28, 29, 30, 31-35, 36/37-38, and even the then Acting Director of Healths letter of 4 February 1993 - Exh.51 - which refers to "Dr Helga Schafer - Durst later known as Dr Helga Schafer - Macdonald").

As the initial registration of the Plaintiff, in Tonga, purported to be "temporary" and limited to a term of 3 years (until 30 April 1990) the Plaintiff on 9 March 1990 wrote to the then Director of Health (Dr S. Foliaki) seeking full registration.

There seems to have been a four month (and to me quite inexplicable) delay in responding but on 6 July 1990 (Exh.42) the Director of Health, by letter to the Plaintiff of that date, advised that His Majesty's Cabinet in its decision No.877 of 25th June 1990 approved the grant of full registration as Medical practitioner under section 3 of the Medical Registration Act for Dr Helga Schafer-Macdonald ..... You are therefore accordingly registered". On that phraseology I add to what I said earlier - if she was "accordingly registered" her name, perforce, must have been entered in the register. How else could she be registered?

Again I cannot see what this had to do with Cabinet. But that does not affect the validity of the registration, by the Director of Health, nor the recording of her name in the register, which he had to maintain.

The letter (Exh.42) of 6 July 1990 to the Plaintiff refers to a request by the Plaintiff, for "registration as a medical practitioner in Tonga for a further three years .....". On behalf of the Defendant it is argued that, when I come to them, that puts an immediate end to any and all arguments of the Plaintiff as to the effect of various provisions in Section 15 of the Interpretation Act (Cap.1) and Clause 20 of the Constitution (as to retrospective laws) because as at the time of the repeal of the 1918 Act and the coming into force of the 1991 Act (on 1 July 1993) the Plaintiff's registration under the 1918 Act had already expired and as she had not had it renewed none of the above statutory or constitutional provisions (whatever their effect or meaning) could affect her position.

I reject that argument (on several bases) and therefore the Interpretation Act and Constitution issues must be decided on their merits.

First I reject the argument on the basis set out above - there was no power to impose conditions and/or limitations on "qualified practitioners". Secondly the Plaintiff was already registered (as from 1 May 1987). Thirdly no additonal validity could be given by dint of the fact it was said that the Plaintiff only applied for 3 years - she cannot amend statutory authority and power. Fourthly when was the three years to run from? - i.e. for example only from 9 March 1990 (her apparent application); from 1 May 1990 (the "temporary" registration having "expired" 30 April 1990); from 25 June 1990 (the Cabinet decision); from 6 July 1990 (the notification to the Plaintiff); or some other date being the date when she was "accordingly registered". In the latter 3 instances what of the interregnum (eg. between 30 April 1990 and 25 June 1990)? Had she been practising medicine without registration and therefore unlawfully? Uncertainty heaped on uncertainty.

Fifthly the letter of 6 July 1990 conveying the Cabinet Decision did not refer to that decision and "grant of full registration" as being restricted to a term of years and nor did the notification that the Plaintiff was "accordingly registered". Why would it be called "full registration" if it was to be a limited grant. If it were to be limited in any way (and if it could be so limited, and in my view, as already expressed, it could not) it would have to be clearly spelt out.

What is of significance, and is worthy of comment at this stage, and as affecting some subsequent events and my findings thereon, is this - twice in a period of just over 3 years the Cabinet, and (given my view of the 1918 Act) - more importantly the Director of Health had considered the Plaintiff, her qualifications, her identification and, had approved her registration as a medical practitioner. For some 6 & 1/2 years (up until the crucial date of 1 July 1993 - the coming into force of the 1991 Act) the Plaintiff had practised medicine in the Kingdom as an approved and registered "duly qualified" medical practitioner. There was additional recognition of that status of the Plaintiff in the allowance by her as a private practitioner to utilize Ministry of Health facilities, including the main base Hospital, Vaiola (refer eg. Exh..43).

The Health Practitioners Registration Act 1991 was passed through the House on 15 August 1991 and gained Royal Assent on 25 October, 1991. It was not to come into force until a date appointed by the King in Council (S.1(2)). A new regime for registration of various health workers (and more categories of health workers than under the 1918 Act) was to be imposed and the 1918 Act (Cap. 75) was to be repealed. As I have said the 1991 Act did not, in fact, come into force until 1 July 1993 and I will deal with that delay and reasons for it, and effects of it, later in this judgment.

But that 1991 Act having been passed and assented to, the Plaintiff points to a curious event which occurred in 1992 - and which, I find understandably, has led her to view the post - July 1993 events, involving her registration and the new Act, with considerable suspicion.

The Plaintiff had become and remained a member of the Tonga Medical Association from her first commencing practise here. Yet in the 1992 50th Anniversary Commemorative Publication of that Association (Exh 44-46) at page 16 her name is notably ommitted from the list of "Tonga Medical Association members who graduated from other medical schools", yet she is in the group photograph at page iii.

When the Tonga Government Gazette No.22 of 31 July 1992 (Exh. 47-49) published the annual "list of the persons registered under this Act" (S.11, 1918 Act) as was required to be done as a matter of law, the Plaintiff's name was included as it had been in the past, in the list of "persons ..... registered under section 3 of the (Medical Registration) Act to practise as Medical Practitioners ....." - refer Exh. 49 - Gazette p.22/781.

That publication is of some significance in that it lists the Plaintiff as "Dr Helga Schafer - Macdonald - M.D. (Germany)" - i.e. apparent recognition of her Doctorate in medicine. The Gazette is defined in S.2 of the Interpretation Act (cap 1) as meaning (inter alia) "the Tonga Government Gazette" and by s.50 of the Evidence Act (cap. 15), "The Court shall presume until the contrary is shown the genuineness (a) of every notice purporting to be a Government notice in ..... the official Gazette of the Kingdom". Those provisions apply here; nothing to the contrary has been shown (or proved - or indeed adduced in evidence at all-) here. Again official confirmation of both the Plaintiff's qualifications and registration.

In 1992 the Plaintiff became a member of the Medical Women's International Association (Exh.50) and has continued to be a member since then.

In 1993 the Plaintiff decided, responsibly, to undergo certain further medical education in Bavaria Germany involving a specialist course in general practice. She satisfied the requirements of that course - refer to the Certificate of the Bavarian Medical Association of 17 February 1993 (Exh. 52/53). At about the same time she became a member of the Medical Practitioner's Association of Bavaria and has remained a member since then

480 Importantly, I find, and obtained so that the Plaintiff could enroll for the Bavarian further education studies (para.42 above), the Plaintiff was given a letter of 4 February 1993 from, and signed by the (then) Acting (shortly to be permanent - and permanent as at 1 July 1993) Director of Health, Dr S.T. Puloka which reads as follows (Exh 51):-

> "To Whom It May Concern
> This is to certify that Dr Helga Schafer-Durst later known as Dr Helga Schafer-Macdonald was granted temporary registration as Medical Practitioner in the Government of Tonga for 1 May 1987 to 30 April 1990. Her registration
> 490 status was changed to full registration as Medical Practitioner on 25 June 1990.
> Dr. Helga Schafer-Macdonald during her entire time in Tonga was a full time private general medical practitioner. She is a medical practitioner of good standing."

Significantly there was no mention in that certificate of the "full registration" being for just a three year term (see paras. 33 and 34 above).

And again, significantly, this was a certificate confirming not only the Plaintiff's qualification and registration, but also her professional good standing in Tonga.

500 That certificate, it seems to me, is a certificate within the terms of S.5 of the 1918 Act. Section 5 provides: "There shall be issued to any person registered under this Act a certificate under the hand of the Director of Health stating the date of such person's being registered and the capacity in which he is registered and upon proof of the signature of the Director of Health to any such certificate the same shall be admitted in any Court or proceeding as evidence of the facts therein stated and of the person's qualification whose name appears therein". So before me (and as it transpires, before the First Defendant, at the relevant time, when I come to that) here was presumptive proof not only of the Plaintiff's registration as a medical practitioner but also (and more importantly from the point of view of these proceedings) of her qualification as a medical practitioner.

510 Within 5 months of that Certificate (Exh.51) the 1991 Act came into force. By section 24 the Medical Registration Act (cap 75) - the 1918 Act - was repealed: (I will consider in due course the effects of that repeal alongside provisions such as ss.15 and 23 of the Interpretation Act (cap 1)). There is no saving provision (a curious feature given what I will come to).

A new registration regime thereby was brought into being and force on 1 July 1993. A Health Practitioners Registration Council (hereinafter the Council or the First Defendant) was established (s3(1)); its composition spelt out (s4(1) - as I read it, and the s2 definition of "health practitioner", some at least 9 and up to 12 members with 3 other persons of the
520 like health profession being co-opted for certain purposes including here, materially,

registration s.3(3)); a chairman appointed (S4(1) - the Director of Health i.e. as at 1 July 1993 the same Dr Puloka who had signed the certificate Exh. 51 - paras 43-46 above); quorum, and minimum representation of the particular health profession under scrutiny, at a meeting of the Council established (s4(2)); with the Council to have the duty, inter alia, to "(a) consider applications for and if approved admit persons to the relevant part of the register" (sic) (s3(2)).

The register (as defined in s2) "means the Register of Health Practitioners maintained under this Act", and by s5 the Registrar of the Council (appointed by the Minister of Health under s3(5)) "shall maintain the register .....". s9 provides that "Save as provided in this Act, no person shall practise as a health practitioner ..... unless (a) his name is on the register; (b) he has in force a valid health practitioners certificate". (Those certificates are annual certificates (s.11); and there is no question before me in relation to annual certificates). The Register is to be sub-divided into various sections (s15) including "Medical".

It is clear that something in the nature of a hearing or enquiry can, and should, be conducted by the Council in its exercise of its duties (such as consideration of applications for registration). I refer to e.g.

(a) s3(2)(a) "..... consider applications for and if approved admit ..... to ..... the register"

(b) s3(3) - power to co-opt "to assist the Council in reaching its decision".

(c) s3(4) - power to have this Court "issue subpoenas requiring witnesses to appear before the Council"

(d) s4(2) - "Decisions of the Council shall be by a majority, the chairman having a casting vote ....."

(e) s19 - "All decisions of the Council shall be recorded in writing and copies made available to the health practitioners concerned".

(f) s8 - on refusal of admission to the register an applicant "may appeal against the Council's decision to the Minister (of Health) whose decision shall be final"; and he may affirm, reverse, amend or remit for reconsideration that decision of the Council.

For completeness, and before I move back to the factual account, I add that an applicant for registration has to give consideration to sections 6 and 7 when applying for registration.

(a) s6: "An applicant for admission ..... shall make available to the Registrar such authenticated evidence of his professional qualifications as the Council may require. The Council shall have the right to approach such individuals and bodies as may be necessary to confirm the fitness of the applicant to be admitted ..... Applicants must be proficient in either the Tongan or the English language."

(b) s7: "As well as evidence of approved qualifications the applicant will be required to produce evidence of his good character and professional competence. Such evidence shall be that as may be required by the Council".

Leaving aside any co-opted members, the membership of the Council from July 1993 on is as shown on Exh. 102, i.e. only the 8 members as specifically nominated in

s4(1) and not "a senior representative of any other group of health practitioners required to be registered" (and arguments were made that meant only 1 additional member for those 4 diverse groups - but a more likely interpretation would mean another 4 members i.e. 1 for each group) and therefore no representative or representatives of health officers, midwives, traditional birth attendants and village health workers (see the definition of "health practitioner" in s2). The present Director confirmed that during cross examination, which leads me to have considerable reservations as to the validity of the constitution (and composition) of the First Defendant Council (which both Defendants must give some urgent thought to, in my view) but in view of my findings on the issues which were fully argued before me (and this constitution issue was not - nor was it pleaded but was raised by me with counsel and made the subject of written submissions) - I have determined that I will not take that matter further in this judgment. I enlarge on that a little as follows: On 16 August 1996, I saw Counsel, advised them of my concerns and sought further argument on the questions of composition, validity of constitution and possible effects on both legality of the Council and its actions (including registration of all practitioners) and these proceedings. Written arguments were supplied on 4 & 7 October 1996. (There was a difficulty, after those written submissions were filed, in locating the file and this has resulted in delay in relation to the issue of this judgment).

Despite the considerable time available for preparation for the new 1991 Act (i.e. from August 1991 or October 1991 - see above - until the coming into force on 1 July 1993), it seems that no preparatory steps had been taken by the Minister of Health, the Director of Health or the Ministry of Health who were responsible for the implementation and administration of the Act. If, as is argued on behalf of the Defendants before me, the 1991 Act effected a complete repeal of the 1918 Act and, inter alia, for example all medical practitioners registered under the 1918 Act had to apply to be, and be, registered under the new Act then, unless there was going to be an unfortunate (and, as it turned out, quite lengthy) interregnum when there would be no registered health practitioners of any sort able to lawfully practise anywhere in Tonga, those responsible had to take all necessary steps to establish a Council and that Council had, inter alia, to lay down forms and procedures, and then call for and consider and decide on applications. S.23 Interpretation Act (cap 1) would have allowed such steps to be taken but those steps would not "have any effect until the Act comes into operation".

Yet even if all steps which could have been taken under s23 were taken before the 1991 Act came into force it is hard, if not impossible, to imagine that there would not have been some gap or hiatus between the 1991 Act coming into force and the proper registration of all health practitioners in all 8 categories (see S.2 definition) who would have been in practise under the 1918 Act and who also would have shown their eligibity for registration under the 1991 Act (if that was indeed required, as will be come to in due course).

Which would mean health practitioners practising unlawfully - the effect of ss.11 and 12 of the 1991 Act - if the people of the Kingdom were to have any medical services of any sort immediately post - 1 July 1993, and if all the arguments of the Defendants (already mentioned and yet to be come to) are correct. Can that be so as a matter of law? As a matter of fact it is patently absurd and potentially harmful. It is, however, a matter to be borne in mind when it comes to a consideration of the matters of statutory (and constitutional) construction shortly to be undertaken.

In addition, and as it turned out, despite the apparent ability to take steps in advance of the 1991 Act coming into force, under s.23 Interpretation Act, nothing was done and on the evidence it was not until about March 1994 that the Council was appointed (there is no certainty of dates in the evidence before me) and steps taken over forms, procedure, applications for registration and so on (and advertisement seeking applications in all 8 health practitioner catergories was placed in March 1994 (Exh 54) presumably after the first Council meeting - although no dates, agenda, or minutes of such were produced to me - and the second 1994 Council meeting was held on 14 April 1994 - to be found by referring to minutes of the third 1994 meeting of 11 May 1994 (Exh D1 AA). It was suggested that very first meeting may have been in October or November 1993, and therefore the second Council meeting (1/94) must have been in early 1994.

So in fact there was an interregnum of some 8-9 months or so between the 1991 Act coming into force and, apparently, the start of registration procedures - for all health practitioners in all 8 categories. It is all very well for the now Director of Health to speak of the Council in effect allowing an "amnesty" period (my word) when people could continue practising until procedures could be put in place. That ignores the Act itself (and the illegality effect - ss 11 and 12, and it is noteworthy that very illegality is referred to in the Council's advertisement (Exh 54). The Council did not have any such discretion as claimed for it in evidence by the Director. What of (lawful) health services for the people of the Kingdom through that period?

After the advertising (Exh 54), or about the same time, the Plaintiff was spoken to by the then Registrar of the Council, who advised her that she needed to be registered under the 1991 Act. I accept that the Plaintiff was told that this was more or less a formality as her qualifications were already on the file (kept under the 1918 Act). Such a comment accords not only with the history as outlined above and also with the effect of the previous issued certificate of registration (eg. Exh 51 signed by the Director about a year before), but also with how Government Doctors were treated and certain of my conclusions of law (para.148 below).

The form of application is Exh. 54A and a copy of the actual application, signed by the Plaintiff, was found and produced as Exh. D9. This form was completed on 22 April 1994, and taken by the Plaintiff to the Registrar at the Ministry of Health, Vaiola Hospital together with her cheque for $88.00 being for the registration fee ($50 - Exhs. 54 & 55) and the Annual Practicing Certificate fee ($38 - Exhs 54 & 55). The cheque was made payable to the Ministry of Health (s23 provides the "Council shall be financially supported by the Ministry" and that "all sums received as fees ..... shall be paid to the general revenue ....."). That cheque was apparently banked on 26 May 1994 (Exh 56) and I will come back to that.

Having lodged her application the Plaintiff then heard nothing from the Council for some 2 or nearly 2 and 1/2 months. Meanwhile, as before, she continued to practice - unlawfully in the strict terms of the Defendants' submissions. The now Director claimed a discretion in the Council, as I have said - wrongly claimed in my view of the Act. In cross examination the Director agreed that when the 1991 Act came into force the Plaintiff's practice was not closed down because it was known that she was properly qualified under the old (1918) Act and that she was not a risk to the public. That is, in my view, an important and significant factual concession and one that an objective person conducting a rational consideration of the facts set out above would also reach. It only counter points

the extraordinary (in my judgment) actions, shifting reasons, procrastination and delays which followed that 22 April 1994 application by the Plaintiff. Objectively viewed those actions (or sometimes as will be come to, lack of action) are not only difficult to understand in some cases, but in others impossible to understand.

I should note, also, that the Plaintiff's application was fully filled out and contained reference to her original (1980) qualification in medicine and her post graduate studies, degrees and registration (1983 in Germany ; 1993 in Germany . It was accompanied by a quite comprehensive resume of her professional life (both qualifications and experience); her specialist general practice certificate (Exh 53) and her Doctorate of 1983 (Exh 14); and the certificate of 4 February 1993 from the Director of Health (Exh 51). Given the history already outlined and, by then, her registration and work in Tonga as a medical practitioner for some, (over 7) years, objectively one would have thought that an amplitude.

So far as the Plaintiff was concerned nothing further happened for some time. However, and unbeknownst to her, the First Defendant held a Council meeting (3/94) on 11 May 1994 - see minutes (Exh D1 AA). In those minutes at paras 2.1 and 2.2 it is clear that Ministry of Health staff were being dealt with in a different way to private practitioners. That was confirmed by subsequent evidence from the now Director of Health, Dr Malolo. I will return to that evidence in due course - Ministry of Health employees in effect had to do nothing to be registered; private practitioners had to apply and supply various other documents. The Act did not allow such a distinction. If the First Defendant was a body independent of the Kingdom as claimed why did it act in such an uneven-handed way outside the prescription of its own legislation?

In para 2.2 of the minutes of 11 May it was noted that applicants were asked to "provide histories of their employments before a full review of their applications could be made." Dr Malolo, in cross-examination was asked whether the "Experience" section of the Plaintiff's resume, attached to her 22 April 1994 application (Exh D9) was a history of the Plaintiff's employment as mentioned in para 2.2 of the minutes of 11 May. He replied that it was.

Then Dr Malolo was referred to para 2.3 of the same minutes where it was stated: "The Registrar reported and noted by the Council that he had not yet received the employment histories of Drs. ..... and Helga Macdonald." He was asked, in cross-examination, how could that be correct given his reply (and the matters) set out above. Initially he said that was how it was reported to the Council by the Registrar but then in effect conceded that the resume admittedly attached to the Plaintiff's application must have been overlooked by the Registrar. And I add, by the Council - all members apparently - as well. Surely they had a duty to look at, and then decide on the merits of, each individual's application. I so find.

When asked why he overlooked this resume himself, as well, he said that he did "not recall about it." Dr Malolo in re-examination made a claim that not all the references required from the Plaintiff were available at that 11 May 1994 meeting. It is noted, however, that there is no reference to such in the minutes exhibited.

Nor was there any reference in the minutes exhibited to another claim made by Dr Malolo in relation to this 11 May meeting namely that the Council was not prepared to grant the Plaintiff's application because her supporting (attached) degrees (Exhs 52 & 14) were in German, and needed to be translated (and he claimed the Council then directed

the Registrar to have them translated - this is to be compared with evidence I will come to shortly .

This stance flew in the face of all that had gone before as set out above, and in particular in the face of the certificate of 4 February 1993 (Exh 51).

This meeting of 11 May 1994 was not concluded on that day but was adjourned to resume on 16 May (the minutes Exh D 1A A from page 5 refer). The Plaintiff's application was further considered on 16 May and there is noted, inter alia:

"Qualification: MD Luding Maximillians University,
Germany 1980 .....
History of Employment: Medical Practitioner,
Germany 1980 - 1986: Medical Practitioner,
Nuku'alofa Tonga, 1987 to date."

By and large that was an accurate summary and on its face would satisfy aspects of both qualification and experience one would have thought.

The minutes go on to record this: "The transcripts attached" (i.e. presumably the transcripts of qualification(s) - see the application form Exh D9) "to this application were all in German. The consideration of the application was deferred until the Registrar gets these transcripts translated into English".

It is clear that no decision had been made on the Plaintiff's application at that stage so there could be no question of her being able to appeal under s.8 of the 1991 Act - there was no refusal of admission to the register to appeal to the Minister against. Furthermore she was not told of the decision to defer, nor of any need to provide translations of her qualifications, nor of the steps taken to obtain translations. She was left in ignorance of what was occurring.

I now return to the Plaintiff's cheque for $88.00 (registration fee $50, annual practising certificate $38) as mentioned above, forwarded with the application of 22 April 1994 (Exh D9). That cheque was banked on 26 May 1994 i.e. while her application was apparently deferred. Why that should have been done, at such a stage, is quite unexplained by the Defendants or anyone on their behalf. It can be seen as yet another recognition by the Council that indeed the Plaintiff's application was both in order and acceptable; and was to be acted upon - and an annual certificate issued.

Unbeknownst to the Plaintiff the Council met again on 7 July 1994 - the minutes are Exh. D 1A, and in evidence Dr Malolo confirmed those minutes. At p.3 of those minutes this is stated about the Plaiantiff's application:-

"The documents (qualifications etc.) submitted with this application were again reviewed by the Council and having noted that these papers did not include any reference to her primary qualifiifcation and that the authenticity of them all were not verified, the Council did not accept the application. Furthermore the Registrar was directed to write and advise her that she needs to produce the original of her primary medical qualification within two months from the date of receipt of the advise".

This marked a shift of position by the Council. Whether the documents in question (Exhs 53 and 14 attached to the application Exh D9) were in German or not the dates on them were clear and they clearly referred to the post graduate studies mentioned by the Plaintiff on the second page of her application. For something over 7 years of practice in Tonga here primary qualification had been accepted and acted upon without question.

Dr Malolo was asked about the reference in the minutes Exh D 1A to "the

authenticity ..... not verified". He said that referred to the 1983 post graduate degree (Ex 14) which was "unsigned". It is worthy of note, however, that that apparent problem of lack of signature on Exh 14 was not raised or mentioned in the minutes until the meeting of 2 June 1995 (Exh D 5).

Dr Malolo was cross-examined about why the primary degree was required when the post-graduate degree was available and when, as he accepted, no such post graduate degree could be obtained or awarded unless the recipient (the Plaintiff here) held a primary degree. No satisfactory response was given to that.

On 8 July 1994 the Registrar wrote to the Plaintiff (Exh 57). I note that, importantly in my view, the letter was on Ministry of Health letterhead. The first paragraph, I accept, remains a mystery to the Plaintiff. It reads as follows:

> "Thank you for the translation of your transcripts. Their availability had enabled the Council to reconsider your application in its meeting of yesterday 7 July 1994".

The Plaintiff had no contact from the Council. She had supplied no transcripts. Nothing, until then, had been asked of her. The transcripts had been obtained by the Registrar himself at the direction of the Council (see above). She did not know her application had been considered, let alone re-considered. It is pertinent to note here that at no stage, whether at this time or later, did the Council suggest that the Plaintiff should come along in front of its members and give evidence and clear up (or attempt to) any ambiguities or unresolved questions. Given the duties and power of the Council (see above) one would have thought that such a hearing, given the claims of the Council as to its concerns, was required at some stage.

The letter (Exh 57) went on then to seek "two of the basic documents that must be forwarded before an application is processed further" and which had not been included with the original application viz "authenticated evidence of your primary medical degree and a birth certificate". This is the first mention of a birth certificate. If these documents were so essential in the Plaintiff's case (and they were surely not, given the history I have already recorded), but if they were, why was it some 2 1/2 months on before they were even mentioned. An additional shifting of position.

The letter (Exh 57) does not mention any defects in the application as to employment history (yet see the earlier claimed concerns in that regard mentioned above - which were to resurface much much later in June 1995 - see minutes of meeting of 2 June 1995 (Exh D5 and D5 A) which will be come to in due course. Again illustrative of changing ground - ducks and drakes - with this Plaintiff's application).

Nor does the letter (Exh 57) mention any of the problems about the lack of authentication of and/or signature to the post-graduate degrees - see above. Why was that not raised if a conern?

As with the May 1994 Council meeting, so with this July one. There was no decision to refuse admission of the Plaintiff to the register from which she could appeal.

On receipt of that letter (Exh 57) the Plaintiff had her birth certificate translated by Mr Sanft (see Exhs 73/74) and made available to the Council. The Plaintiff knew that an authenticated copy of her primary degree had been made available to and kept by the Ministry of Health back in 1986/1987 when she first applied for registration. Notwithstanding that however the Plaintiff contacted her sister in Germany to have a copy sent from there and, as well, she told the Registrar that he had her consent to communicate direct with the appropriate German authorities.

In the Government Gazette of 18 July 1994 (Exh 58/59) there was published "for general information" a list of "persons holding Health Practitioners Certificates for the period ending 31st December 1994". The Plaintiff's name did not appear in the list of 42 "Qualified Doctor". Such was done "pursuant to section 11(4) of the Health Practitioners Registration Act 1991", although I note s.11(4) requires such a list to be published in the Gazette in March of every year. A similar list to that in the Gazette was published in the newspaper the Tonga Chronicle. The omission of her name caused comment to be made to the Plaintiff and marked, I find, the commencement of the difficulties, embarrassment and consequent losses as pleaded variously in paras such as 10, 22 & 23 of the Amended Statement of Claim. To have both patients and fellow practitioners questioning your qualifications and your right to be in practice was, and would obviously be, very damaging (both financially and personally).

On 1 August 1994 the Registrar apparently wrote to the Bavarian Ministry of Health (full title: Ministry for works and Social Order, Families, Women & Health). Like many documents which should be in the Ministry's records or the Council's records this letter (or a copy of) has not been found and produced. But such a letter would be in keeping with the authority the Plaintiff had given the Registrar and the date can be found in the Bavarian Ministry's reply of 10 August 1994 (Exh 60/61). Again, importantly, this letter of 1 August would seem to have been written on Ministry letterhead - see the reply of 10 August addressed to the Ministry.

The reply of 10 August 1994 one would have thought, reasonably, would have resolved this matter for once and for all. It clearly and unreservedly confirmed the Plaintiff's original qualification of 13 June 1980 (see Exh 6/7). This letter (or certificate) seems to have been received in, at least, September 1994 because on Exh 60 (the English translation) can be seen Mr Sanft's name (signature) and a date of (possibly) 13 September 1994.

Dr Malolo in cross-examination as to Exh 60/61 agreed that letter (of 10 August 1994) was in front of the Council at its meeting of 6 October 1994 and that the letter "confirmed she (plaintiff) was properly qualified".

Unfortunately the date of birth of the Plaintiff, in that letter of 10 August, was said to be 16 February 1949 - her actual birth date as already noted (and as e.g. recorded in Exh 73/74) was 14 February 1949. No other detail was incorrect. But a discrepancy seemingly to be seized on by the Council in due course, as will be seen shortly. Why the Council did not e.g. check (by facsimile or telephone) with the Bavarian Ministry to see if an understandable mistake possibly had been made was never explained. An easy solution one would have thought.

But I have got slightly ahead of myself in this chronological account. Between the Registrar's letter of 1 August 1994 and the translation of the reply of 10 August a further Council meeting (No.5/94) was held on 8 September 1994 - the minutes are Exh D1. The letter of 10 August, I infer, had been received by then the minutes noting that "the Registrar requested and approved by the Council that this matter (re the Plaintiff) be deferred for the next Council meeting as the translation into English of documents relating to the professional qualifications of the applicant was still being made. The documents were sent by the German Ministry of Interior from Munich and they were in German ...". There was reference then to the translation not being available from Mr Sanft until the next week.

Following the translation of the 10 August 1994 letter the Council met again

(without notice to the Plaintiff) on 6 October 1994 - the minutes are Exh D2. The translation was tabled, and the minutes note that the letter was the response to the Registrar's request. The minutes record that the Council (surprisingly to say the least given the past history and the unequivocal terms of Exh 60/61) "noted the letter but would not accept it as it was prepared on the basis of the Bavarian Ministry ..... records and not on the records of the training institution where Dr Schafer - Macdonald had her trainings. It was therefore decided that, firstly, the application ..... for registration .... be not accepted and secondly the Registrar wrote, and inform her of the above decision and
880 that the Council would reconsider her case when she is able to provide the information the Council requires".

Curiously enough - and giving weight to the Plaintiff's complaints of the damage done to her, and in her practice, by the Council's actions - the Council whilst still considering the Plaintiff and her application, and not apparently being satisfied with the lists of registered Health Practitioners published in July 1994 (refer above) resolved to inform the public (i) of an "updated listing ... for 1994" and (ii) "that the Council would take legal actions ... on those who continue to practice without valid certificates". A heavy handed approach directed at least in some (considerable) measure towards the Plaintiff and something of a pointing out or underlining in the public mind of her position
890 (as "unregistered") by her continued omission from the updated list. I add that at the next Council meeting of 19 December 1994 - the minutes are Exh D3 - it was noted that the list was published in 2 local newspapers in the third week of November 1994.

Again the question must be asked - why did not the Council employ the simple expedient of getting the Plaintiff along in front of it - give her an audience - an opportunity to explain if she could the qualification system and any discrepancies.

On 10 October 1994 (Exh 62) the Registrar (still on Ministry of Health letterhead) wrote to the Plaintiff noting (i) "what the Council really needs from you is the original or an accept certified true copy of your first degree from the institution of your training"
900 and (ii) the discrepancy of 2 days between the birth certificate the plaintiff had forwarded to the Council and her application on the one hand, and the Bavarian Ministry of Health letter on the other. The letter goes on "The Council therefore decided that your application be not accepted" (whatever that means - not presumably a refusal - able to be appealed - under s.8 of the Act). "It would be happy to consider again your case when you are able to provide the information it requires".

The Plaintiff wrote to her sister, in Germany, as a consequence of Exh 62 asking again for her original qualifications and she received from there and forwarded on to the Council by letter of 10 November 1994 (for date see Exh 64 - again the Plaintiff's letter
1900 to the Council was not produced) her "Approbation als Artz" in the Certificate of State Approval (i.e. Exh 6/7).

On 19 December 1994 the Council met again. The minutes (Exh D3) record that the Registrar reported and the Council noted that the Plaintiff was "making contact with the University in which she had her medical training to provide the required evidence". That minute does not accord with the Plaintiff's evidence or with the Council's letter (still on Ministry letterhead) of 20 December 1994, Exh 64. The Plaintiff's account does conform with the letter Exh 64. That letter claims that the Approbation als Artz was tabled at the Council meeting of 19 December and "that the initial decision of the Council on
1910 your application still stands" - whatever that means. The letter went on to say: "This is

really what the Council needs - a transcript of your degree offered to you by (Ludwig-Maximillian) University at the end of your medical training there. Please obtain ... and forward ... for the Council will not consider your case again unless it is available". Not an appealable refusal under s.8; no mention of difficulties over date of birth.

This letter, received by the Plaintiff just before Christmas 1994, resulted in her ringing the Bavarian University and she spoke to a Mr Huth there on 22 December and faxed to him on 23 December asking for whatever documentation he could supply to be sent to her urgently.

That correspondence from the Plaintiff was followed up by two letters (on his firm's letterhead) of 29 December 1994 by the Plaintiff's husband (and he gave evidence at trial) the first (Exh 65) to the Council setting out a fair and objective summary of the position and trying to ascertain what the real difficulty (if there was one) was; and the second (Exh 67) to Mr Huth at the Ludwig-Maximillian University containing a fair, objective and detailed account of the Plaintiff's studies and qualifications, her apparent problems with the Council, drawing comparisons with recognition in other countries and asking for either the "transcript" required by the Council or a full explanation of the German system of medical qualification and copies of whatever documents about the Plaintiff which they held. This letter was copied to the Council. The two letters (Exhs 65 & 67) sensibly and acceptably summarise the position I find; and were written after the Plaintiff's husband had spoken, in person, to Dr Puloka.

The Plaintiff, by now quite concerned as to her future practice in Tonga (and with some justification for that concern, I find) decided to take steps to become registered as a medical practitioner in Canada, her husband's country of nationality. She had been trying to be registered in Tonga for almost 9 months, without success; others had been registered in very short time.

To enable registration in Canada (or the U.S.A. for that matter) the Plaintiff had to pass certain evaluating examinations for graduates of international medical schools. The certificate as to her attendance at a required course in Los Angeles in January/February 1995 is Exh 70 (after the course she was examined and returned to Tonga in March 1995 - and received her (successful) results by letter of 4 May 1995 - Exh 90 - which I will refer to later). I accept that that cost her a sum of some $10,000 for fees, travel, food and accommodation; as well as for her absence from her Tongan practice - there was no locum tenens available.

On 23 February 1995 meeting 1/95 of the Council took place. The reference in the minutes (Exh D 3A) to the Plaintiff is brief. The letter (of 29 December 1994) from the Plaintiff's husband was discussed - "The Registrar was directed to reply to this letter".

The letter referred to in those minutes was not written until 23 March 1995 (Exh 75) and I will come to that shortly. The 1 month delay in writing is unexplained, and inexcusable, in my view.

By referring to other later correspondence, it seems that Mr Huth at the University in Bavaria replied direct to the Council by letter of 7 March 1995 (refer to Exh 80 to see that reference). The Defendants (interestingly) did not produce that letter; nor the Council's own (apparent) letter of same date (7 March) in reply - again for reference to that see the Registrar's own letter of 23 March 1995 - Exh 75 and Exh 80 which is a letter from Mr Huth of 12 April 1995 amd quotes the Council reference and date ("07.03.1995").

The absence of such correspondence and other documents was (at trial), and is, of concern

to me. Much of the exhibits finally received (minutes, agenda, correspondence etc), which were in the control of the Council, was only lamely and falteringly produced as the trial progressed.

Of concern to the Plaintiff throughout this whole period (in 1994 and 1995) of being unable to be registered was the ease with which others were registered - see e.g. the minutes Exh D 3A at page 3 to the two doctors there; and a savingram of 7 March 1995 (Exh 101) showing a government employed doctor being allowed to enter into (part) private practice as well - and I have already commented on the discriminatory ease (and unwarranted discriminatory ease in terms of the Act) with which government doctors were registered.

On 18 March 1995, whilst the Plaintiff was still in the US, her husband wrote to the Bavarian Ministry of ..... Health (the letter is Exh 71) referring back to their letter of 10 August 1994 (Exh 60/61) and seeking correction of the birth date (from 16 to 14 February 1949 - see above). The Bavarian Ministry did not reply until 23 May 1995 (Exh 90A) when they not only apologised but they sent the corrected certificate (in English and in German i.e. the identical certificate as Exh 60/61 but with the date of birth correctly recorded) to both the Plaintiff's husband and the Tongan Ministry of Health.

I now come to the letter (on Ministry letterhead) by the Registrar to the Plaintiff's husband on 23 March 1995, Exh 75, (referred to earlier). At long last the reply to Mr Macdonald's letters of 29 December 1994 (Exhs 65 & 67). Again a piece of real dissemblance in my view. It refers to the unacceptability of the explanation of the German system by the Plaintiff - her explanation however (and her husband's, as well) completely accorded with, and was confirmed by, the World Health Organization book (Exh 99) which was at all times available at the Ministry's Hospital (I refer to what I have said above). It secondly referred to registration in England not necessarily resulting in automatic acceptance for registration in Tonga - but the Plaintiff was pointing to that English registration not for automatic acceptance but as part of the proof of her qualifications. It thirdly referred to the fact that "the first lot of documents submitted .... were photocopies. In addition, dates of birth differ in some of the documents" (something of an overstatement, I interpolate) "Being so their authenticity were questioned". The first time, I comment, that the first documents the plaintiff had submitted many months before were now said to be doubted because they were photocopies. Why was not that told the Plaintiff much earlier? It fourthly referred to the submission then of the original Approbation als Artz - and complained it came from the State and not the University "as expected".

Then the letter went on "The Council no longer doubts the authenticity of the documents submitted so far". Objectively given all the Council had as set out in detail above, surely there was enough then to proceed with registration. But no: "What is really (is) after now is a missing piece of information i.e. a transcript of her first medical degree .. or an explanation from an official source of why this is not available to us. Once this is made available to us, we can proceed with the consideration of the application". (Again I note - no appealable refusal under s.8).

The Council met again (No.2/95) on 29 March 1995. The agenda papers of 28 March (on Government letterhead I note) were before me as well as the minutes (as Exh D4). This was less than a week after the letter, Exh 75, of the 23 March but a very different tone was struck at this meeting; - and a very different tone as well to the assurances which

the Plaintiff said she was receiving from the Registrar that she could carry on working.

In the minutes the sending of the letter of 23 March was noted but "it was pointed out that (plaintiff) has continued to practice and that her clinic was still being opened for service". I pause there - there is nothing in what I have seen or heard which indicates that the Plaintiff thus far had been told or warned in any way that she should not practice. The minutes also go on "The Council realises that it cannot claim that (the plaintiff) does not respect the law. Nor does it has the power to close the clinic for this has to be from the Ministry of Justice. It therefore resolved that the Chairman, as Director of Health, could firstly inform dispensaries not to accept prescriptions from her and secondly, refer the matter to the Ministry of Police to handle". Decisions (and significant and dramatic ones) taken about her by the Council without any notice of any sort to her or any opportunity for her to make submissions. The agenda for that meeting has a handwritten note on it "Complaint to Police Department - through Director of Health but not through the Council".

Not only no advice in advance to the Plaintiff but also a curious delay in advising her of the resolutions of 29 March - it was not until 11 April 1995 (Exh 79) that the Director of Health (on Ministry letterhead and writing it would seem as Director and not as Chairman of the Council) wrote to the Plaintiff advising her to discontinue her medical practice immediately "as we have no authority to do otherwise but to refer your case to the police". Why such a delay? Why no mention of refusal by pharmacies of her prescriptions? Why the "watering down" of the Council's 29 March resolution that the Director refer the matter to the Police? All unsatisfactory and quite wrong-headed in my view. I will return to that letter of 11 April.

Why a "watering down". The explanation I believe lies in Exh 77 a memorandum of 5 April 1995 made by the plaintiff's husband, for the Plaintiff and following a conversation he had with the Director of Health on 4 April. Mr Macdonald confirmed the contents in evidence and said (as is shown in the memorandum) that the Director was "in favour of registration" and that in the conversation there had been no reference to closing down the practice or complaining to the police. In the conversation there was reference to an anaethetist (Dr Bernardi Tu'inukuafe) whose qualifications were German and who could explain the German system to the Council when they next met (at long last, I add!).

The Plaintiff's state of unease and concern was not aided by what she now seems reluctantly to accept (i.e. in evidence accepted) was an unrelated, coincidental event in late March/early April 1995 involving a patient of hers and that patient's treatment at Vaiola Hospital in conjunction with the refusal to allow the Plaintiff access to either patient or records in Vaiola. Despite the Plaintiff's acceptance I remain somewhat sceptical about the events bearing as they do a marked correlation in time - the resolutions of the Council of 29 March fall right in the middle of the period of 6 or so days when the Plaintiff was having these difficulties of access. Such barriers well accord with the resolution to e.g. cut off prescriptions, and fly in the face of the previously existing arrangements for the Plaintiff's use of Vaiola (-see above and Exh 43 - her authority to use, and the terms on which she could use, Vaiola Hospital and other facilities of the Ministry of Health for her private patients since 31 August 1990).

I now go back to Exh 79 - the Director's letter to the Plaintiff of 11 April 1995 asking her to discontinue her practice or else the matter would be referred to the Police. That letter sought the Bavarian University qualifications; but no mention of e.g. problems with

photocopies or dates of birth. It is an important document.

No witness called before me for the defendants, was able to explain the differences between the Council's resolutions of 29 March and the letter of 11 April. Nor were the differences between that letter and the memorandum of 5 April (Exh 77) explained.

In my view it was not coincidence that, at about this time, rumours about the possible imprisonment of the Plaintiff started to be aired. They got back to the Plaintiff and her secretary. More concern. And more still when in and through this middle part of 1995 another medical practitioner established a private practice right next door to the Plaintiff and indeed on the same 'api. All this at a time when the plaintiff was struggling (and known to be struggling) to obtain registration and maintain patients and a practice. Small wonder, as I find, that the Plaintiff was starting to feel some what paranoiac (and I use that term in a lay sense I hasten to add, in case someone thinks I am holding myself out in some other field).

By letter of 12 April 1994 (Exh 80) Mr Huth of the Unversity in Munich supplied to the Council Certificates showing the Plaintiff's record of studies at the University (Exh 81). This letter and the certificates were faxed to the Council. They confirmed her studies from 1974 to 1980 and her passing of her final state examination of 29 May 1980. They also stated clearly her date of birth - 14 February 1949. In the letter Exh 80 Mr Huth referred to his earlier letter of 7 March 1995 which, I suspect, was of importance but was not produced by the defendants (nor the Councils own letter to Mr Huth of the same date, 7 March).

On 13 April 1995 the Plaintiff received the Director's letter of 11 April 1995 (Exh 79). She was shocked, frightened and felt severely threatened. Well she might. She felt she had done no wrong. She immediately sought legal advice (not from her husband).

The letter (Exh 82) of 13 April from her lawyer to the Director followed. It contained a number of factual and legal assertions and summarised (in effect) the Plaintiff's present case and claimed that, as a matter of law, the Plaintiff was still registered as she had been so registered under the previous Act. Discussions were sought.

Discussions immediately followed - between her lawyer and the Registrar the same day and the resultant summary of discussions was recorded by the lawyer, faxed to both Plaintiff and Registrar, and produced to me as Exh 86 (of 13 April 1995).

The particularly relevant piece of Exh 86, confirmed on oath before me by the lawyer and not challenged by the defendants *is* this:

> "3. He (i.e. the Registrar) has been instructed however to inform me that they have received communication from the University in Germany which has now satisfied the Director of Health, and himself, the Registrar .... as to the matter required by the Council, and subject to any other view of the Council when it will meet, they see no reason to refuse to approve your registration under the new Act; and that they therefore do not see any necessity for you to close your clinic down in the meantime, as advised in the letter from the Director on 11 April 1995".

The Plaintiff was much relieved, and relied on the assurance. The communication from Germany referred to in Exh 86 was, of course, the letter (Exh 80) from Mr Huth and the accompanying certificates (Exh 81). All would now at last seem to be plain sailing.

As I noted above, in March a government doctor had been allowed to take up private practice as well, the same permission was given another government doctor on 12 April

1995 - see Exh 100.

Plain sailing it was not to be. I come now to a crucial Council meeting of 27 April 1995. (Again the Plaintiff had no notice of and was not asked to attend before the Council). This meeting was and is quite vital. Yet there are no minutes. In the end I was provided with (as part of Exh D4) an agenda of 24 April 1995 (on Government letterhead) for the meeting (and including an item: "Application of Dr H. Schafer - Macdonald") and, reluctantly, 3 pages of handwritten notes taken in the meeting (Exh D4A) by (it is believed) the Registrar.

1220 It would seem to have discussed several issues as to the Plaintiff. Doubt was cast on the Plaintiff's character because she had continued to practice and to "flout the law". It was resolved it seems, still not to register the Plaintiff, to translate the documents (Exhs 80, 81), and for the Director to forward the matter to the Police. This, in my view, was clearly wrongheaded.

Two letters of 28 April 1995 were written (both on Ministry letterhead) - 1 from the Registrar to the Plaintiff (Exh 87) and the other from the acting Director to the Plaintiff's lawyer (Exh 88). Significantly neither mentions lack of professional references, or problems about date of birth, or translation of Exhs 80, 81. Exh 87 says the Council "needs to work on it (Plaintiff's application) further ..." (still no appealable refusal though); but 1230 it contained no reference to the decision to go to the Police. The second (to the lawyer) was solely about that aspect. There was no reply to any of the lawyer's arguments (his long letter of 13 April - Exh 82) - just that the matter was "being forwarded to the Police for their appropriate action". Devastation, an intense upset and angry reaction in the Plaintiff followed. So much for the earlier assurances to husband and to lawyer. Insecurity was understandably felt - and not helped by the sort of rumour already mentioned.

About this a further certificate (dated 3 May 1995 - Exh 89) became available to the Council confirming the Plaintiff's U.K. registration back in 1986. Quite why the Council 1240 members were still looking back to the UK registration (as they were - see the meeting notes of 27 April Exh D 4A at p.2) remains a mystery. Much time wasting was taking place, it seems to me.

All news for the Plaintiff was not bad. At about the same time she received news of her pass in the Canadian medical evaluation examination (Exh 90). But that could not allay the Plaintiff's fears and concerns.

On 5 May 1995 these proceedings were commenced by the Plaintiff; seeking certain declarations confirming or requiring her registration; an order directing the issue of a current certificate; an order of prohibition preventing any criminal prosecution; and for 1250 $10,000 general damages. An application was also made for interim orders (a) of prohibition of prosecution and (b) allowing the Plaintiff to continue to practice.

The result was that, on 11 May 1995, the Solicitor General on behalf of the defendants gave undertakings to the Plaintiff (copied to the Court) not to proceed with any prosecution and allowing the plaintiff to continue practice. This was some relief to her.

On 23 May 1995 the Bavarian Ministry sent (to plaintiff and to the Council) the corrected certificate (as referred to above) i.e. with the correct date of birth in it, and apologising. See Exh 90A.

The Council next met on 2 June 1995 - the original minutes are Exh D5. Dr Bernardi 1260 Tu'inukuafe was present "for assistance in the translation and to advise the Council on

matters relating to the medical education system of Germany". By now the birth date issue was cleared up; the University papers were available; the U.K. registration confirmed. But, unbelievably, still hurdles were to be found. Even if I ignore the original minutes (Exh D5) entirely the eventually re-written and confirmed minutes (Exh D5A) still show the Council had "some concerns about the lack of professional references". Exhs 42 & 51 and the Cabinet decision of 25 June 1990 approving the Plaintiff's full registration were "only letters of good standing rather than that of professional competence ... furthermore the Council was still not satisfied with the information provided as evidence of her professional competence". This is extraordinary in my view. Letters of professional competence were not sought with the application for registration (see Exh D9) nor had they been since (of the Plaintiff by the Council). She had been in practice in a very small medical community in Tonga for over 8 years. Dr Malolo, in evidence, agreed that it had not been claimed she was incompetent. In any event does not a certificate (such as Dr Puloka's Exh 51) that "she is a medical practitioner of good standing" speak as to, inter alia, competence? I believe so.

At this meeting reference was made to the fact that the Plaintiff's post graduate degree (Exh 13/14) was unsigned. A year on. One cannot but think any impediment was being looked for (c.f. the attitude in the letter of 23 March 1995 - Exh 75 - when with the post graduate degree before it, the Council said then that it no longer doubted the authenticity of the documents submitted).

Ultimately, on 2 June, no decision as to registration was made but the matter was deferred to 5 June "so that the members could study the papers" and the reference of the case to the Police was deferred until "the civil case ..... has been dealt with by the Court".

Still, no suggestion (let alone invitation) for the Plaintiff to attend before the Council to clarify matters. On 6 June 1995 the Council met again - this time with yet further (German) references, the desire for such having been told to the Plaintiff. The references which she had - and always had available (but never requested before by the Council) - such as Exhs 9 - 12, 16 - 26, 31 - 34 - were given to the Council. Then, at long last and some 13 1/2 months after application was first made (and almost 2 years since the Act came into force) the Council approved by majority vote (and I stress majority, only) the Plaintiff's application for registration.

This decision was communicated to the Plaintiff by letter of 8 June 1995 (Exh 90 B) hand delivered by the then Director (- still on Ministry letterhead I note - and all these references to that use of letterhead, have siginificance when I come to the issue of responsibility liability, if any, of the second defendant). Registration of the Plaintiff had "effect from 6/6/99" - no post-dating I note. Her 1995 Certificate (under s.11) was also given to her (Exh 90 C) - presumably the annual fee of $38 the Plaintiff had paid back on 22 April 1994 (Exh 55 and banked on 26 May 1994 - Exh 56) had been used for the 1995 annual practicing fee.

That same date (8 June 1995) the Plaintiff filed an application to file an amended statement of claim. In the proposed amendments there was an amount of re-pleading and some variations to the prayers; of significance is the increase of general damages claimed to $50,000 and a further (new) claim for $50,000 exemplary or punitive damages.

I intend finishing the chronological account of all events before turning to certain conclusions of fact and of law.

The Council next met on 13 July 1995 (Exh D6). There was some reference to the

Plaintiff and her present case including the fact that the case had been before a judge (Lewis J) in chambers that very day and been deferred to 6 October 1995 until the arrival of the new Chief Justice. On that day Lewis J (on his own motion) disqualified himself from further hearings of the case because of his knowledge of and contact with the Plaintiff and her husband. Ironically, given the history I have detailed, the Council on 13 July discussed the "shortage of medical doctors as a crisis in Tonga .... almost 50% of trained doctors has either left Tonga, resigned, dismissed, retired or died". Why such a performance with the Plaintiff therefore? I will return to this shortage of doctors shortly.

On 6 October 1995 I granted leave to file an amended Statement of Claim; and adjourned inter alia an application to strike out the second defendant from this action.

On 20 October 1995 the actual amended Statement of Claim - i.e. the claim before me - was lodged seeking in its prayers damages only (general: $50,000; exemplary or punitive: $50,000) the Plaintiff having pleaded her registration and the grant of her annual practising certificate. The amended Statement of Claim was in front of the Council on 29 November 1995 (Exh D7). At that same meeting approval of temporary registration was granted to a locum tenens from Germany to cover for the Plaintiff whilst she was in the U.S.A. doing the next (U.S./Canada) qualification or eligibility courses and evaluating examinations. There were no problems in achieving this temporary registration - it was granted immediately - an interesting contrast with the Plaintiff's situation. The Plaintiff had determined to continue the process of getting registered in Canada - given her treatment by the Council a wise precaution - and, jumping ahead she did the further course and took the next examinations in January - March 1996 in the US - refers Exhs 91, 92 and 93.

On 19 January 1996 the application to strike the second defendant out of the proceedings was heard. Although a final decision on the argument was to be deferred until the substantive trial I expressed a tentative view that the second defendant was properly a party. That ruling is appended to this judgment. What I expressed tentatively I now confirm. The Council is not a separate legal entity; overall responsibility (including financial responsibility - see s.23) for it rests with the Ministry of Health and, through the Minister, to the Kingdom. The Ministry kept demonstrating its responsibility in various ways as shown in the account above - e.g. the Plaintiff's cheque for fees ; letters for the Council on Ministry letterhead and Government savingrams (e.g., and not exhaustive).

The trial of this action was set for two days commencing 8 July 1996. Those days were used in trial and a further six days of trial (and considerable written submissions) were needed. On 17 July 1996 (the start of the fifth day of trial) having just discovered this I disclosed to counsel that on the previous two days, by telephone only, my wife had sought advice from the Plaintiff as to whether medical treatment should be being obtained for our youngest son (my wife earlier in the year, in circumstances of some urgency, having been attended by the Plaintiff for treatment herself. Fees had been rendered and paid for that). No treatment for our son resulted. No fees were rendered or paid. Other medical advice was to be sought for our son if that became necessary; although almost inevitably any other Doctor consulted might be involved as well in some way in these proceedings (e.g. a Doctor with, whom we had become acquainted previously, had been a coopted member of the Council at some of the relevant times). I fully disclosed the situation. I allowed time for counsel to fully inform their clients, take instructions, and argue the matter. The defendants took objection and asked me to disqualify myself.

I ruled on the matter on 17 July, after hearing argument. The matter and the ruling are set out in detail in my bench book No.5 at pp.52-53. In summary I concluded that the decision was mine; I was disinterested and without bias or preconceived opinions about the case; from the position which I had outlined no bias in me, objectively, should or could be perceived or assumed, applying the tests I enunciated. It was not as if the issue was whether the Court should order the Plaintiff's registration - that had been decided by the first Defendant in June 1995 before I was even in the Kingdom. Did a real likelihood of bias exist? Would a reasonable, an objective, observer, think it likely or probable I would favour the Plaintiff unfairly at the expense of the other parties? (A suspicion of bias reasonably and not fancifully entertained by reasonable minds - Exp. Angliss Group (1969) 122 C.L.R. 546, at 553 (H.C.A.); the test of bias is whether there is a reasonable suspicion of bias looked at from the objective standpoint of a responsible person and not from the subjective standpoint of an aggrieved party - Whitford v Manukau City [1974] 2 NZLR 344 at 346). Applying those tests I answered no.

The matter could not be viewed in isolation from the circumstances in Tonga - a small community - limited medical practitioners (see above - "a crisis") - the necessity to be able to seek medical advice - the only other judge already disqualified. Normally given the challenge or objection made a Court would lean in favour of disqualification. But although when there is a suggestion made of bias, a Court should not proceed if in fact there is actual bias or a reasonable suspicion of that (neither here on the tests), that is not to say that the Court must desist from hearing a case because a party or "somebody wrongly and irrationally suspects bias" - R v Simpson (1983) 154 CLR 101 at 104 (H.C.A.).

The matter proceeded on, to its conclusion. I now express mine.

CONCLUSIONS

Even if the Plaintiff had to reapply for registration under the 1991 Act (and I will comment on that very soon) the treatment of her application and of her, in the way detailed above by the First Defendant is in my view, not only quite extraordinary and unreasonable, but in many respects (as I have indicated in comments on the way through) disgraceful.

First it is evident from all the matters set out, comprehensively, above that: (i) in my view the actions of the First Defendant were not only reviewable in this Court; but (ii) were and are (variously) plainly wrong both in fact and most importantly in law; (iii)that the First Defendant has not only stepped outside the limits of it's statutory authority from time to time but also, at others, acted without authority; (iv) that the First Defendant has acted (by anyone's standards) both unfairly and unreasonably towards the Plaintiff; (look for just one example, at the position of the First Defendant failing unreasonably to make a decision on the Plaintiff's application for registration on the hand and at the same time saying you will be prosecuted for failing to be registered on the other); (v) that the First Defendant has failed (entirely, in some instances and, partly in others) to perform its statutory duties; (vi) that the First Defendant having functions requiring it to act judicially (both in the Act, and also in accordance with the rules of natural justice) has failed to do so (particularly the freedom from interest and the right to a fair hearing); (vii) that the First Defendant, in exercising its statutory powers and discretions acted capriciously and (I realise the seriousness of this finding, but all the evidence drives me to such a conclusion, inevitably)in bad faith, and, without regard to relevant considerations as well as bringing into consideration irrelevant matters; (vii) that there was not, at any time, a refusal by the

First Defendant which the Plaintiff could appeal against under the Act (and in any event, even if it could be claimed that in these circumstances she had not exhausted her statutory rights of appeal, that would not prevent or circumscribe, in any way, her right to apply (and successfully) for review in the circumstances shown here). The Plaintiff must succeed on this basis alone, if no other.

In any event I find there is force and validity to the submissions made by Mr Niu as to the provisions of the Interpretation Act (Cap 1). Given the absurd position which would otherwise result from the delay in administratively giving effect to the provisions of the new Act (s.15(a) and (b) of the Interpretation Act have effect. The new Act purported to repeal the old in whole; there was no express provision in the 1991 Act to the contrary so the repeal did not affect "anything duly done" under the repealed Act; i.e. here both the registration of the Plaintiff under the 1918 Act as a medical practitioner; and the entry of her name in the register - s.15(a). So she remained a duly registered medical practitioner. The 1991 Act did not disturb that. Her name was on the register at all relevant times from 1987 on - and continued to be on the Register for the purposes of s.9(a) of the 1991 Act. And there was, as well, the Certificate, Exh 51 (see paras. 43 and 46 above) issued under the 1918 Act and before the First Defendant from the start (under the 1991 Act procedures (para. 61 above) confirming those things and proving those things. The Certificate a thing "duly done", and unaffected.

As to s.15(b) it provides, in the circumstances here, that the repeal of the 1918 Act did not affect "any right ... acquired ... under the repealed Act"- i.e. here the right, of the Plaintiff, on registration as a medical practitioner, to practice medicine in the Kingdom - subject to the taking out of annual practising certificates. So she retained her right to practise. The 1991 Act did not take that away - and I will comment on that further, in conjunction with cl.20 of the Constitution,soon.

Given the absence of any steps taken under s.23 Interpretation Act (as I have observed on the way through the narrative) and given the lack of a saving clause as in e.g. s.29(2) Law Practitioners Act 1989 (if registered under old Act and held a valid annual licence "deemed to be enrolled"), the provisions of s.15 have real importance and application here - particularly in covering (as had to be covered, of necessity, for the sake of medical services in the Kingdom) the gap or hiatus I have referred to above between one Act being repealed and the provisions of the new 1991 Act being put into (and being able to be put into)practical effect. The Plaintiff was registered; as a matter of law (by operation of s.15) she continued to be registered. Once the authorities, and in particular the First Defendant, got the 1991 Act up and running she should have been treated as (in effect) automatically registered under the new Act i.e. treated as the Ministry of Health's doctors were). The actions of the First Defendant were not only plainly discriminatory, but wrong.

Much of what could be said in relation to s.15 Interpretation Act has some validity also in relation to cl.20 of the Constitution. Cl.20 provides that "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws".

That provision is to a considerable extent declaratory of, and reflective of, the common law. The common law rules of statutory interpretation still operate in the Kingdom and if that long and well recognised rule that "statutes should be interpreted, if possible, so as to respect vested rights" is put alongside and used in conjunction with cl.20

and s.15 the Plaintiff's position and case is, in my view, supportable under this head as well.

I refer to what is said in Craies on Statute Law (7th Ed) at pp. 398-399: "it is not to be presumed that interference with existing rights is intended by the legislature, and if a statute be ambiguous the court should lean to the interpretation which would support existing rights. But it must be a "vested right" in the strict sense in order to raise the presumption .... . In Starey v Graham [1899] 1 QB 406 at 411 it was held by Channell J. that ... "right acquired" was "some specific right which in one way or another has been
1580 acquired by an individual and which some persons have got and others have not". It is not a "right" in the popular sense. The learned judge added: "Before the passing of the (Patents) Act, everybody had the right to call himself a patent agent, that is to say, the law did not forbid him to do so. A right enjoyed in that way is not within the meaning of this saving clause (i.e. "Nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of the Act") a "right acquired" otherwise it is obvious that such a clause would nullify the operation of any Act in which the clause was inserted"".

I note the similarity in wording between the saving clause in Starey and the provision
1590 in our s.15(b). It seems to me that the Plaintiff had a specific "right acquired" by her as an individual and which some persons had and others did not; and that was the right acquired under the 1918 Act to practise medicine in the Kingdom and that was a "right or privilege existing at the time of the passing" of the 1991 Act.

Not only was her position protected, therefore, by the ordinary common law rules of statutory interpretation, but her position was also protected by s.15 and by cl.20. Cl.20 has been considered from time to time and I find support for the views I have expressed or will express about it and its operation, and its protection afforded to the Plaintiff, in the circumstances here, from such as In re "Tonga Ma'a Tonga Kautaha" (1910)1 Tongan L.R. 5 at pp. 11-12 (Skeen C.J.); Fulivai v Kaianuanu (1961) 2 Tongan LR 178 at pp. 182-
1600 3 (Hammett C.J. in the Privy Council); and Bennett v Bennett [1989] Tonga LR 45 where Webster J held himself bound in the Supreme Court by the Privy Council in Fulivai and repeated Hammett CJ's words (at p 183) "Cl.20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the law are enacted. It is necessary to examine and consider the wording of the amendment to decide whether it is retrospective in effect".

Here given the terms, wording and provisions of the 1991 Act and the context of it, the circumstances surrounding it and its repeal of the 1918 Act and all that could
1610 (potentially) follow from that, I reject the Defendant's argument that "all rights acquired under the (1918) Act were repealed when the .... 1991 Act came into operation on 1 July 1993.". That argument would result, in my view, in all sorts of unintended unwanted, unwarranted and quite extra ordinarily disastrous circumstances (lack of any legitimate medical services - for 8-9 months at least being one of the gravest). That argument, if accepted, would mean that cl.20 might well have to be invoked, by this Court.

But I do not believe it has to be - i.e. the 1991 Act, given the ordinary rules of interpretation and given s.15 Interpretation Act, was and is not restrospective in effect - it did not take away the Plaintiff's existing acquired rights.

1620 But if I am wrong in that, and the Defendant's argument is correct, then I would not

hesitate to find, in this context and in these circumstances, that it would be in breach of cl.20 ("inconsistent with" cl.20 - see cl.82 and "to the extent of that inconsistency, be void" (cl.82). That would mean that the Plaintiffs pre-existing registration (her name on the Register) would continue despite the 1991 Act, as would continue her pre-existing right to practise medicine.

It seems to me that all I have said about these aspects of statutory construction is reinforced by this: The fact that there were no steps taken under s.23 Interpretation Act for 20 months or so (from the passing in 1991 until the bringing into force of the 1991 Act on 1 July 1993) would indicate that the responsible authorities (the Defendants) were satisfied that the 1918 Act would continue to cover the situation during the period between the time the 1991 Act coming into force and effect and the time all necessary steps, forms and procedures to implement it could be laid down . Exactly the position as argued for by the Plaintiff and accepted by me.

RELIEF

The Plaintiff is now registered under the 1991 Act in any event but not without considerable damage to her practise and her reputation and not without considerable anguish and distress (as well as expense). I so find. I have commented on various aspects as to those matters as I have went . A sad, sorry and unnecessary tale.

On the evidence the Plaintiff's patient numbers rising steadily through 1991 to 1993 inclusive, (with continuing rises reasonably expected) dropped markedly in 1994 and further in 1995 (to almost 1/2 the 1993 total - Exh.94). No coincidence, I find, given the troubles and the publication of them - especially those public lists the First Defendant put out as I have referred to . The drop in patient numbers was confirmed in evidence by the Plaintiff's secretary and the Plaintiff's husband.

Exhs 95 and 98 (with attachments) give me the Plaintiff's accounts and tax returns for the years ending June 1992 to 1995 respectively. The gross practice income (from pharmaceuticals and consultations) grew steadily from 1992 ($24,825.38) through 1993 ($25,941.27), 1994 ($29,232.30) principally by increasing consultation fees, but in the year ending 30 June 1995 and, as I find, reflecting the effect of these events and the Defendants' actions, dropped back to $24,487.52.

I accept that the downward trend well may have continued to some extent into the June 1996 year given the events outlined, but I have no figures as to that.

I find as well, as I have mentioned already that the Plaintiff expended moneys ($10,000) in qualifying herself for North America, in view of the Tongan difficulties created by the First Defendant's actions.

I find the First Defendant, and in view of my findings above, the Second Defendant as well, jointly and severally liable to the Plaintiff for general damages given the treatment meted out to the Plaintiff here. The First Defendant had various statutory functions and duties to perform and the First Defendant has failed, lamendtably, to perform such here viz a viz the Plaintiff (and if for no other reason the breaches of the rules of natural justice involved in the extraordinary delays over her application, the failure to properly inform her, the failure to decide on her application, and the failure to allow her an audience or hearing, let alone the erroneous, negligent and unreasonable exercise of its powers duties and discretions, as I have found.

I assess general damages, on the evidence I have, in a total sum of $30,000.00 made up as to some $5,000 for loss of income (a conservative figure I believe) $10,000 for

moneys spent on North American qualifications, $10,000 for damage to reputation and $5,000 for distress and other suffering.

I do see it as a case where an award of exemplary or punitive damages should be made. The circumstances, as I have commented on them, were extraordinary; the conduct of the First Defendant, outrageous so over and above actual losses, and to mark the nature of those events, I award her a further $5000.

Costs will (and must) follow the event in favour of the Plaintiff against both Defendants.

1680 The Plaintiff will have judgment (and I so order) against each of the Defendants, jointly and severally in the total sum of $35,000 - and costs as taxed or agreed.

ADDENDUM - EARLIER RULING: 19 JANUARY 1996 -

I have previously decided that all other aspects of the motion filed on behalf ofthe Defendants on the 12 December 1995 should await argument and decision until the time of the hearing (on 8 July 1996) of the substantive claim. Which left the question of the application to strike the Kingdom of Tonga out of the proceedings, as a Defendant.

I have reached the view now, after argument, that a final decision on that application
1690 to strike out should await, as well, the hearing of the substantive proceedings.

The argument made by Mrs. Taumoepeau is that the First Defendant is a creature of statute, created by the Health Practitioners Registration Act 1991, and for which the Kingdom is not, and cannot be, vicariously liable.

Mr. Niu's response is to point to two things, basically. First other legislation which creates various statutory bodies and which spells out, quite clearly, that those bodies are separate entities at law with the capacity both to sue and to be sued. The legislation in issue here is quite different, Mr. Niu says,and with that observation I agree. Secondly Mr. Niu points to the terms of the legislation itself and in particular provisions some of which I will
1700 mention shortly.

The Act is designed to provide, inter alia, registration procedures for various health professionals. S.3 creates a Health Registration Council with quite restricted powers. It only can make rules with the consent of the Minister of Health (s.3(2)(f). The Minister appoints a Registrar (s.3(5)) who is a member of the Council. The other members (and the Registrar) are prescribed for in s.4(1) (5 persons by reason of their Government offices plus the Registrar, and 3 other persons appointed by the Minister) and in s.3(3) (3 additional persons coopted by the Council).

By s.5 the Registrar must maintain a Register of Health Practitioners available for
1710 public viewing at the Ministry of Health.

By s.8 an unsuccessful applicant for admission (i.e. unsuccessful before the Council) is given a right of appeal to the Minister, whose decision is final.

By s.10 the Council prescribes various fees but it is significant that all such fees "shall be paid to the general revenue of the Kingdom" (s.23(2)); and s.23(1) provides that "The Council shall be financially supported by the Ministry".

S.16 allows the Registrar, with the approval of the Council, to permit temporary registration of visitors to the Kingdom; but s.17 allows the Minister himself to exempt "short-term" visitors from compliance with the Act.

1720 S.21 requires the Council to report annually to the Minister; and s.22 allows the

Minister, with the consent of Cabinet, to make regulations for the carrying out of the provisions of the Act.

All those matters lead me to the view, which is tentative only at this time, that the Council is really just a branch (a convenient administrative branch) of the Ministry of Health under the general aegis of the Minister of Health, set up for the performing of certain restricted tasks; and that the overall responsibility for the Council rests with the Ministry and the Minister. Which leads me, again tentatively, to the view that the Kingdom of Tonga therefore, is properly joined in these proceedings pursuant to the
1730 Crown Proceedings Act (Cap.13).

In the circumstances, and given the other arguments to be made at the substantive hearing (and in particular as to the earlier legislation - i.e. the Medical Registration Act, Cap. 75 - and its effects on this present claim), I leave the Second Defendant in the proceedings. It may be that, not only the arguments yet to be heard, but some of the evidence (e.g. as to the actual composition of the Council at the relevant times involved in these proceedings) may effect this matter and my view of it.

I therefore defer making a final decision on this application until the substantive hearing. Costs are reserved.

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