IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: **TOFILAU ETI ALESANA** of Apia, Prime Minister

Plaintiff

AND: **SAMOA OBSERVER COMPANY LIMITED**, a duly incorporated company having its registered office at Vaitele, Western Samoa

First Defendant

AND: **SAVEA SANO MALIFA**, Publisher of Apia

Second Defendant

Counsel: M.S. Jacobs QC & S. Jacobs for Plaintiff
R.E. Harrison QC & H. Schuster for First and Second Defendants

Date of Ruling: 21 April 1998

RULING OF SIR GORDON BISSON

The Court has been asked to rule on the conduct of the trial that is whether the plaintiff or the defendants should go first in presentation of their respective cases.

A number of authorities have been cited to the Court including Beevis v Dawson (1957) 1 Q B 195 Brown v Murray (1825) Ry & M 254 Jerome v Anderson er al (1964) 44 DLR (2d) 516.

Various ways in which the parties may present their case have been referred to subject however to the discretion of the Court to rule on the matter. For example the plaintiff may wish to call evidence on some essential element of the plaintiff's case, for example, publication, and then reserve all evidence in rebuttal to the affirmative defences of the defendant until after the defendant's case has been heard. Another approach is for the plaintiff to present all its evidence including evidence in rebuttal before the defendant's case is heard. Mr Harrison has submitted that those cases are outdated in the present context in which briefs of evidence have been exchanged so that both sides know what they face in discharging their respective onuses of proof. Nevertheless those cases do state some principles which still apply such as the discretion of the Court to give such a direction as might be just and convenient in the particular circumstances. In Beevis (supra) Singleton L.J. said at page 204:

> " I venture to doubt whether there is a hard and fast rule either way. The authorities seem to me to show that the practice is based on general convenience. It must depend of course, upon the issues which are raised; obviously it must depend upon the pleadings in the case in which the issues are set out. If publication is admitted and justification is set up as a defence, the plaintiff is entitled to say that the onus is upon the defendant; that it is for him to prove his case. Equally if, by the answer to an interrogatory, the plaintiff can prove his case, and does so, the onus on the issue of justification is upon the defendant. In most cases there are other pleas, and the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of parties, and from the point of view of the court."

However in this case the plaintiff has made his position clear as follows:-

> "the plaintiff will not call evidence in chief in support of the plaintiff's case. He relies on admissions in the statement of defence and presumptions and matters for the Court. All his evidence will be in rebuttal to the defendants' case when heard."

That record from my notes was read to counsel and was accepted as correct.

I put it to Mr Jacobs and he accepted that if the defendants called no evidence he was left with the bare bones of his case without evidence to aggravate any award of damages.

I do not agree that the decision of the plaintiff to rest his case removes any discretion in the Court and requires the defendants to present their case first, as submitted by Mr Jacobs. There is a discretion under Rule 209 in the words " unless the Judge otherwise directs at the hearing" and reference should also be made to R.4 which reads -

> "4. **Construction** - These rules shall be so construed as to secure the just speedy and inexpensive determination of any proceeding."

Mr Jacobs in his submissions said,

> "As regards R209, this Rule could never mean that where the plaintiff is content to rest his case on the pleadings and presumptions, that the court in the exercise of its discretion could compel the plaintiff to rebut the defendants' special defences and mitigation points even before the defendant makes them out."

> "To read the Rule in that manner, as defendants' would, would constitute a radical departure from the fundamental principle, that a court cannot dictate under the adversary system, what evidence a plaintiff is required to call, and it really is as simple as that."

Mr Harrison cited Harbour Inn Seafoods Ltd. v Switzerland General Insurance Co. Ltd. 3PRNZ 65. It is helpful in holding that the issue does not turn solely on the incidence of the onus of proof; the real question is what will best serve the ends of justice. In that case the plaintiff was required to go first but it had three questions to address, the defendant only one which involved affirmative defences.

In exercising my discretion I take into account all that both counsel have submitted.

In the particular circumstances of this case in that the plaintiff does not elect to call evidence in chief, I am satisfied that justice and convenience requires the defendants should proceed first. There is a straight forward case to answer with admissions as to the parties and publication of the alleged defamatory words. If defamatory the law presumes it to be published falsely and maliciously. It is for the Judge to rule if the words in question are capable of bearing a defamatory meaning of the plaintiff to decide if in fact they do bear such a meaning. At this stage of the case on the plaintiff's pleading I would indicate that I would so rule subject to hearing the defendants' evidence and argument to the contrary. The law presumes some damage will flow from a defamatory statement and the question of damages is one for the judge.

Mr Jacobs has contended that the key to the defendants' submission that the plaintiff proceed first and should present all of his evidence including that in rebuttal of the pleaded affirmative defences is that the plaintiff himself may elect not to give evidence at all,

> " and they will then be deprived of the opportunity of cross examining him. If this is what they want to do, then it is unfortunate at the very least, as it would mean that they have no confidence in being able to prove the very serious allegations that they make on their own evidence."

I note that Singleton L.J. passed the comment in Beevis (supra) at p.20 :

> "one might have thought that a plaintiff seeking damages for libel would have been only too anxious to answer those charges."

But that is the matter I must put to one side at this stage.

In my view it is logical that the plaintiff should hear the defendants' case in support of the affirmative defences before he is called upon to give evidence in rebuttal. As Mr Jacobs submitted it is not for the plaintiff to anticipate what portions of the defendants' briefs may not be read, or be struck out. If the plaintiff were required to meet every possible point

raised by the defendants' briefs, this would only prolong the hearing. For the defendants to present their case first is a more orderly and convenient way for the case to proceed and I see no injustice to the defendants in that they must now proceed to present their case and I so rule.

Robinson J.