

Michael Whitten KC

Notable cases in which I appeared prior to being appointed Chief Justice of Tonga

1. Daniel Herridge & ors v Electricity Networks Corporation t/as Western Power & ors [No 4] [2019] WASC 94 – “Parkerville bushfires” multiple group proceedings – acting for the IAG/Allianz insured plaintiffs at trial. Final appeal recently decided in Electricity Networks Corporation v Herridge Parties [2022] HCA 37 where Ms Claire Harris KC with Mr Paul Mendelow acted for those parties.
2. Mercuri v TCM Building Group Pty Ltd [2018] VSC 604
3. Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd [2017] VCC 1769
4. Minesco Pty Ltd v Anderson Sunvast Hong Kong Ltd [2017] VSC 299
5. WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor [2013] VSC 314; (No 2) [2016] VSC 443; (No 3) [2016] VSC 674
6. Enwerd Pty Ltd v Metier 3 Pty Ltd [2016] VSCA 234
7. Construction Engineering (Aust) Pty Ltd v Adams Consulting Engineering Pty Ltd (Ruling No 2) [2016] VSC 209
8. Novawest Contracting v Brimbank City Council [2015] VSC 679
9. Metier3 Pty Ltd v Enwerd Pty Ltd & Anor (No 3) [2015] VSC 587
10. CBL Insurance Ltd v Skordakis [2014] VSC 659
11. Boat Harbour Beach Blue Waters Pty Ltd v Matthews Properties Pty Ltd [2014] TASSC 59
12. Birek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165
13. Owners Corporation No1- PS336302K v Fairfax House Quest Lodging Pty Ltd [2012] VCAT 1837 and Victorian Supreme Court.
14. SMEC Australia Pty Ltd & Anor v McConnell Dowell Constructors (Aust) Pty Ltd & Ors (No 3) [2012] VSC 557; (No 2) [2011] VSC 492
15. FTF Pty Ltd v JM Kelly Pty Ltd – Queensland Supreme Court - 2012
16. Noonan v Renaissance Assets Pty Ltd [2012] VSC 370.
17. Austman Pty Ltd v Mount Gibson Mining Ltd [2012] WASC 202
18. Thiess Degremont v CFMEU, 2011/12 Supreme Court litigation – Melbourne Desalination Project.

19. Wheelahan & Anor v City of Casey & Ors [2011] VSC 215 - a contamination case and class action involving claims in excess of \$100 million.
20. Solid Investments Australia Pty Ltd v Clifford & Anor [2010] VSCA 59.
21. Structural Systems (Constructions) v Hansen Yuncken Pty Ltd [2010] FCA 1358
22. 1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd [2009] VSC 317 and on appeal 1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd [2009] VSCA 308
23. A J Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2008] VSC 275 and special leave application: AJ Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2010] HCATrans 230.
24. Premier Building & Consulting Pty Ltd v Spotless Group Limited & Ors (No 14) [2008] VSC - a contamination case, on appeal - Collie Planning & Development Pty Ltd v Premier Building & Consulting Pty Ltd [2008] VSCA 146
25. Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors [2008] VSC 90 - cutting edge commercial building 'green' technology.
26. Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd [2002] VSC 579
27. Kane Constructions Pty Ltd v Sopov (No. 2) [2005] VSC 492
28. Rofin v Permasteelisa – 2004 arbitration in Hong Kong concerning a lighting system installed in the Cheung Kong Centre featuring 130,000 metres and 12,000 points of light.

Notable cases decided during my tenure as Chief Justice of Tonga

(Full text available on PACLII)

1. Tapueluelu v Speaker of the Legislative Assembly of Tonga [2023] TOSC 38 – application for leave to apply for judicial review of decision by the Legislative Assembly to grant its Members and staff a significant backdated salary increase; consideration of Tongan exception to common law privilege against the Courts inquiring into the internal proceedings of Parliament. See also [2023] TOSC 43, refusing the Defendants’ challenge to jurisdiction.
2. Re an application by Mahe'uli'uli Sandhurst Tupouniua [2023] TOSC 16 – declaration that Court Fees Act pertaining to probate matters amounting to an indirect inheritance or death tax was unlawful.
3. R v Etuate Lavulavu - CR 174/18 (19 May 2023) – refusal of application to strike out prosecution as an abuse of process due to amendment of indictment for retrial.
4. Attorney General v Tanginoa [2022] TOCA 20 – submission of question of law arising from acquittal where trial judge determined a sexual offence case on a basis contrary to that advanced by the Defence and on the basis of the Complainant’s clothing.
5. R v Cox [2022] TOSC 90 – sentencing for large amount of Class A drug; review of role and culpability considerations.
6. Fohe v Mahe [2022] TOCA 23 – obligations of a noble in respect of representations by his late father; succession to hereditary estates; unconscionability, estoppel.
7. Police v Tongatu'a [2022] TOSC 85 – Magistrates’ jurisdiction; approach to sentencing for sexual offences on young children.
8. Uhi v Mafi [2022] TOSC 80 – refusal by father to have his name recorded as father of an illegitimate child.
9. Lopeti v Lopeti [2022] TOLC 9 – alleged novel duties of care by Minister of Lands and Estate Holder.
10. Lavemai v Kingdom of Tonga (Director of Civil Aviation) [2022] TOSC 83 – indemnity costs orders against Government.
11. Helu v Electoral Commission [2022] TOSC 76 – judicial review; electoral law; whether permitting a Noble of the Realm with an outstanding judgment debt to stand for election as a Nobles’ Representative contravened clause 65 of the Constitution; and if not, whether that clause conflicted with clause 4: one law for all classes.
12. Lavemai v Kingdom of Tonga (Director of Civil Aviation) [2022] TOSC 67 – whether declaration under the Civil Aviation Act that the Plaintiff was not a fit and proper person was unlawful.

13. 'Amanaki v Weekly Newspaper Ltd [2022] TOSC 63 – claim for defamation by former Government owned newspaper.
14. H&M Imports v Dateline Transam Ltd [2022] TOSC 53 – international carriage of goods by sea; choice of governing law; forum non conveniens.
15. R v Vaiangina [2022] TOSC 41 – theft from Palace; fingerprint analysis; admissibility of expert opinion evidence.
16. Attorney General v Tuaime'i'uta [2022] TOCA 11 – importation of prohibited firearms; interpretation of s 95 of the Customs and Excise Management Act 2007; whether defence open under the Arms and Ammunition Act 1968.
17. Tu'ivakano v Police Commissioner [2021] TOSC 170 – civil claim for malicious prosecution; dismissal upheld on appeal: Tu'ivakano v Police Commissioner [2022] TOCA 15.
18. Lauti v Eke [2022] TOSC 45 – electoral petition for alleged bribery; consideration of principles relevant to proposed amendments and resulting adjournments in such cases.
19. Moeaki v Tapueluelu [2022] TOCA 2 – reversal and restatement of the applicable principles and approach to an application for a stay of enforcement of a judgment declaring the applicant's election void for bribery pending appeal.
20. R v 'Anitema [2022] TOSC 11 - rape trial; defendant's counsel declined opportunity to have Prosecution witnesses recalled to put his instructions; review of the rule in *Browne v Dunn*. Upheld on appeal: AC 6/23, 10 July 2023.
21. Barrett v Fulivai [2022] TOSC 8 – application under the *Reciprocal Enforcement of Judgment Act*.
22. Tamo'ua v R [2021] TOCA 25 - appeal against refusal of bail; review of approach to be taken to allegations by the Prosecution.
23. Attorney General v Fua'eiki [2021] TOCA 20 - correct approach to suspensions of sentences for Class A drug offending.
24. R v Tonga [2021] TOSC 163 – sentence for murder; review of death penalty vs life imprisonment.
25. Ikahihifo v R [2021] TOCA 21 – revision of approach to be taken on sentencing for offences of reckless or dangerous driving causing death or other serious harm.
26. Ezinet Ltd v DS Venture Ltd [2021] TOSC 162 – admiralty; whether a claim was admissible on a limitation fund established pursuant to the *Shipping (Limitation of Liability) Act* 1980; novel claim for pure economic loss; review of the English exclusionary rule and the development of the common law in Australia, New Zealand and Canada.

27. Nishi v Nishi [2021] TOSC 149 – application by one parent to remove a child from the country.
28. R v Langi [2021] TOSC 148 – criminal trial; voluntariness of alleged confession.
29. Kaufusi v Tukui'aulahi [2021] TOCA 7 – application to reopen decision of the Court of Appeal.
30. Vunipola v Tonga Rugby Union Incorporated [2021] TOSC 141 – judicial review; incorporated society; application to stay proceedings pending alternative dispute resolution required by club's constitution; whether alleged arbitration agreement was enforceable.
31. R v Tapueluelu [2021] TOSC 140; R v Maile [2021] TOSC 119 – sentences for manslaughter.
32. Kacific Broadband Satellites International Ltd v Registrar of Companies [2021] TOSC 93 – application to restore a Government owned enterprise, which was deregistered during extant international arbitration proceedings, to the Register of Companies.
33. Lavulavu v R [2021] TOCA 26 – application for bail pending appeal; reconciliation of tests in the Bail Act and the Court of Appeal Act.
34. Kaufusi v Tukui'aulahi [2021] TOCA 6 – appeal against decision of the Land Court; interpretation of rules of succession under the Land Act and the Constitution.
35. R v Soane [2021] TOSC 24 – uttering counterfeit currency; considerations on a Prosecution case based entirely on circumstantial evidence.
36. Royco Shipping Services Ltd v Matson South Pacific Ltd [2021] TOSC 12 - whether a stevedoring agreement contained an implied term of exclusivity; decision overturned on appeal albeit on a point not raised below: [2021] TOCA 17.
37. Mr and Mrs H for Letters of Adoption, In re [2021] TOSC 3 – application for adoption by the child's natural mother and her new husband.
38. Cocker Enterprises Ltd v McCarthy (trading as Le-Ata Fashion Boutique & Gift Shop) [2021] TOSC 1 – rights of a mortgagee bank to enforce its security and in respect of a tenancy agreement over the secured property which the mortgagor entered into without notice to the bank.
39. Taufahema v Taufahema [2020] TOLC 14 – requirements for surrender of an allotment of land granted under the Land Act before the Minister may regrant the land to another.
40. Rotomould (Pacific) Ltd v Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communications [2020] TOSC 114 - application by unsuccessful tenderer for leave to apply for judicial review arising out of a Government procurement tendering process.

41. DS Venture Ltd v Tonga Cable - Ruling [2020] TOSC 119 – admiralty; ship's anchor damaged Tonga's internet and telecommunications subsea cable; application for limitation of liability decree; International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 1957 and Convention on Limitation of Liability for Maritime Claims 1976 and Protocol of 1996.
42. Finau v Finau [2020] TOLC 13 – whether the Minister of Lands is required to communicate any decision to approve an application for a grant of land before the applicant may assert rights in respect of the land.
43. R v PMP [2020] TOSC 112 – approach to sentencing a verified police informant.
44. Jones Business Services Ltd v Kingdom of Tonga [2020] TOSC 101 – judicial review in respect of Minister's purported cancellation of extant licences held by whale watching tourism operators.
45. Kaufusi v Veatupu [2020] TOCA 7 – appeal against decision of the Land Court; whether Ministry of Lands misled Cabinet in its decision to cancel a lease.
46. Latu v Magistrates Court of Tonga [2020] TOSC 81 – first published decision on jurisdiction to order costs personally against a lawyer.
47. R v Haupeakui [2020] TOSC 70 – consideration of principles on similar fact or propensity evidence in Tonga for sexual offence cases.
48. Rex v VP (a pseudonym) [2020] TOSC 26 – recognition of marital rape as a crime.
49. Bloomfield v R [2020] TOCA 6 – application for leave to appeal against order for extradition.
50. R v Satini [2020] TOSC 62 – first decision on an application by the Prosecution to adduce evidence remotely by audio visual link during Covid-19 border closures; interpretation of clause 11 of the Constitution requiring witnesses in criminal trials to be brought "face-to-face" with the accused.
51. Lamelangi v Police [2020] TOSC 59 – validity of "National COVID-19 Restrictions Notices" issued by the Prime Minister under a Declaration of a State of Emergency pursuant to the *Emergency Management Act* in response to the coronavirus pandemic.
52. R v Sa'ili [2020] TOSC 48 – review of principles in relation to corroboration in rape cases.
53. Police v Tonga [2020] TOSC 42 – statutory elements for theft compared to mere borrowing.
54. Xi Yun Qian v Kingdom of Tonga [2020] TOSC 16 – application for return of money purportedly forfeited to the Crown under the *Money Laundering and Proceeds of Crime Act*.

55. Police v Fa'otusia [2020] TOSC 111 – appeal against a Magistrate's dismissal of a charge against the then Minister of Justice of interfering with the course of justice when he allegedly threatened to shoot a police officer investigating a theft; whether 'course of justice' only arises after criminal proceeding have commenced.
56. Minister of Revenue and Customs v Cost Low Co Ltd [2020] TOCA 2 – appeal against decision requiring the Minister to discover documents said to be protected by confidentiality under the Customs laws.
57. Luna'eva Enterprises Ltd v Manu [2020] TOSC 1 – first decision on the Supreme Court's power to order pre-judgment interest.
58. Jurangpathy v Tonga Communications Corporation [2019] TOSC 50 – employment law; wrongful dismissal.
59. R v Tu'ivakano [2019] TOSC 46 – first published decision in Tonga on an application by the Prosecution for a joint trial of multiple defendants on separate indictments before a single jury; application refused.
60. Minister of Lands v Penitani [2019] TOCA 21 – whether potentially thousands of leases registered by the Ministry other than in accordance with the strict requirements of the Land Act were invalid.