IN THE SUPREME COURT OF SAMOA
HELD AT MULINUU

BETWEEN: **SAVALENOA MAREVA BETHAM-ANNANDALE**

Plaintiff

AND: **THE ATTORNEY GENERAL**

First Respondent/Defendant

AND: **HON. FIAME NAOMI MATAAFA**

Second Respondent/Defendant

Court: Justice Harrison

Counsel: Rodney Harrison KC & Fuimaono Sefo Ainuu for the Plaintiff
Taulapapa Heather-Latu & Ben Keith for Respondents

Hearing: 24-25 June 2024
Judgment: 30 July 2024

JUDGMENT OF THE COURT

Introduction

[1] The plaintiff, Savalenoa Betham-Annandale (the Former Attorney), held office as the Attorney General of Samoa between July 2020 and August 2021. The final three months of her brief tenure coincided with the unprecedented constitutional crisis which followed the uncertain results of the 9 April 2021 general election. That crisis generated extensive litigation between the two rival political factions - the Human Rights Protection Party (the HRPP), the Government in power before the election, and Fa'atuatua i Le Atua Samoa ua Tasi (the FAST Party) - and was compounded by a series of public attacks on the integrity and independence of the Samoan judiciary led by the former Prime Minister, the Honourable Tuilaepa Sailele Malielegaoi (the former Prime Minister), and his

supporters. Its course is narrated in a series of judgments delivered by this Court and the Court of Appeal.[1]

[2] This electoral uncertainty was finally resolved by the Court of Appeal's declaration on 23 July 2021 that the FAST Party had secured the most seats in the General Assembly, and was thus the winner of the election and entitled to form a government.. Its leader, the Honourable Fiame Naomi Mataafa, formally took office as Prime Minister that day. The Former Attorney had been appointed as Attorney General by the HRPP government for a fixed term of three years. Within a month of the FAST Party becoming the Government, and just over one year into her term, the Former Attorney was suspended then removed by the Head of State acting on the advice of the new Prime Minister (the Prime Minister).

[3] The Former Attorney challenges the lawfulness of those suspension and removal decisions in two parallel proceedings. The first proceeding is an application for judicial review of the Prime Minister's decisions on the orthodox grounds of unlawfulness, unreasonableness, improper purpose and breach of natural justice and seeks a range of public law remedies. The second proceeding incorporates the first and adds the claim that the Prime Minister's decision to advise the Former Attorney's removal constituted the torts of misfeasance in public office, malicious abuse of power or conspiracy with other cabinet members to injure. This second proceeding provides the platform for claiming compensatory, aggravated and exemplary damages. By consent, both proceedings were heard together.

[4] There were no significant factual differences between the parties. The core evidence is found in contemporaneous documents, the public record of the judgments of this Court and the Court of Appeal, and in correspondence, principally the Prime Minister's letters of suspension and removal. Both parties swore affidavits and were cross-examined at trial.

[5] Counsel comprehensively surveyed the relevant legislative provisions and common law principles, and the facts were subjected to detailed scrutiny. It was common ground that neither the Constitution nor any relevant statutory provision confers an express power on the Head of State to remove the Attorney General. So the threshold issue is whether the Head of State held that power by

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[1] *FAST Party v Attorney General* [2021] WSSC 24 (17 May 2021); *FAST Party v Electoral Commissioner* [2021] WSSC 23 (17 May 2021); *Electoral Commissioner v FAST Party* [2021] WSCA 2 (01 June 2021)[the Electoral Commissioner Judgment]; *FAST Party v Attorney General* [2021] WSSC 24 (17 May 2021); *FAST Party v Attorney General* [2021] WSSC 25 (23 May 2021) [the Suspension Judgment]; *Attorney General v Latu* [2021] WSSC 31 (28 June 2021); *Attorney General v Latu* [2021] WSCA 6 (23 July 2021)[the Election Result Judgment] ; *FAST Party v Malielegaoi* [2022] WSSC 7 (23 March 2022). [the Contempt Judgment]

implication from other statutory provisions or the Constitution. Some or all of these consequential issues arise:

(1) If there was such a power of removal, on what grounds can it be exercised;

(2) Whether the Prime Minister as decision maker advising the Head of State had lawful grounds for advising removal;

(3) Whether the opportunity afforded by the suspension letter to respond was sufficient to meet the requirements of natural justice;

(4) If not, what are the consequences?

(5) If the Prime Minister erred in law in advising removal, did she commit one of the identified torts;

(6) If so, is the Former Attorney entitled to damages and in what amount.

[6] In broad summary, Mr. Harrison for the Former Attorney submitted that she was appointed for a fixed term of three years and in the absence of an express constitutional provision or a condition in her terms of engagement the Prime Minister had no legal power to advise removal. While acknowledging the absence of an express power, Mr. Keith argued to the contrary that at a constitutional level the Prime Minister was not obliged to justify the stated grounds for her advice provided it is shown that she had lost trust and confidence in the Former Attorney and that the grounds on which she relied related to the performance of the Former Attorney's constitutional functions.

Office of Attorney General

[7] It is common ground that the Attorney General holds high office pursuant to Article 41 of the Constitution. That article provides:

> **41. Attorney General - (1)** The Head of State, acting on the advice of the Prime Minister, shall appoint an Attorney General, who shall be a person qualified to be a Judge of the Supreme Court.
> **(2)** The Attorney General shall advise on legal matters referred to him or her by the Head of State, Cabinet, the Prime Minister or a Minister and shall have power, exercisable in his discretion to institute, conduct or discontinue any proceedings for an offence alleged to have been committed.

(3) The Attorney General shall have a right of audience in, and shall take precedence over any other person appearing before, any Court or tribunal.

(4) The powers of the Attorney General may be exercised by the Attorney General in person or by officers subordinate to the Attorney General, acting under and in accordance with his or her general or special instructions.

(5) The Attorney General shall hold office for such term or terms and under such conditions as may be determined by the Head of State, acting on the advice of the Prime Minister.

[8] The Attorney General is the chief law officer and principal legal adviser of the State. He or she is not a member of the Government, is an office holder but not an employee of the State, and has all the power of an Attorney General at common law unless either the Constitution or another statute restricts or amends them.[2] The Attorney General is the subject of a special statutory enactment, the Attorney General's Office Act 2013 (the AGO Act), which defines the Attorney General as "the person appointed as such under Article 41 of the Constitution." The Attorney General has the powers of appointment and engagement under contracts of employments of all other officers and staff.

[9] Two provisions of the AGO Act assumed particular relevance in argument. First, section 6(2) describes the Attorney General's operational functions as follows:

6. Functions of Attorney General

....

(2) In addition to the constitutional functions, the Attorney General has the following functions:

(a) to formulate, implement, monitor and review policy directives for the Office;
(b) to attend and advise Cabinet;
(c) to manage, supervise and control legal officers, staff and the operations of the Office, including training of legal officers and staff;
(d) to supervise legal officers in Ministries and government agencies who carry out legal services or other legal duties;
(e) if necessary, to instruct a lawyer in private practice to provide a legal service;
(f) to carry out statutory and common law functions.

[10] Second, section 7 provides for the Attorney General's independence as follows:

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2 *Teo v Attorney General* [2011] WSCA 7 (23 November 2001).

7. Independence – **(1)** When carrying out a constitutional, statutory or common law function, the Attorney General is not subject to the direction of a person except the direction of the Head of State, Prime Minister, Cabinet, a Minister, a court or a direction required under an Act.

(2) The Attorney General and prosecutors in the Prosecution Division (including other persons authorised by the Attorney General) are not subject to the direction of any other person (except any direction of a court) when carrying out the functions under Article 41 of the Constitution (including statutory or common law function):

(a) to institute, conduct or discontinue any proceedings for an offence alleged to have been committed; or

(b) in relation to any other matter relating to an offence or a criminal matter.

[11] A third provision of importance is Article 111(7) of the Constitution, providing that:

111. Interpretation –

………..

(7) Where this Constitution confers any power to make any appointment to any office, the person or authority having power to make the appointment shall, unless the context otherwise requires, have power, exercisable in a like manner:

(a) to direct that a person other than the person appointed shall, during any period that the person appointed is unable to perform the functions of his or her office owing to absence or inability to act from illness or any other cause, perform the functions of that office;

(b) to appoint another person substantively to an office notwithstanding that there is a substantive holder thereof, when that substantive holder is on leave of absence pending relinquishment of his or her office;

(c) to direct that a person shall perform the functions of that office when no person has been appointed thereto, either until a contrary direction shall be given by the person or authority having power to make the appointment or until a person shall have been appointed substantively thereto, whichever shall be the earlier.

[12] Cabinet gave notice of the Former Attorney's appointment in a brief memorandum issued on 22 July 2020. The terms and conditions were amplified in a letter from the Public Service Commission on 29 July 2020 which provided materially that;

(1) Your appointment is effective from Tuesday 11 August 2020 (commencement date) in line with your preference and at the salary rate of CEO 1 SAT$124,854;

(2) The position of Attorney General is a constitutional appointment formalised by a Warrant of Appointment duly signed by the Head of State;

(3) The position is a 3 year term and is *not* on a contractual arrangement;

(4) Terms and Conditions of the Position are determined by policies approved by cabinet;

(5) The Commencement Date letter dated the 28th July 2020 is void.

[13] The Former Attorney's warrant of appointment was signed on 12 August 2020

[14] The Former Attorney held office on those conditions until her receipt on 20 August 2021 of a letter written by the Prime Minister that day suspending her from office. That letter (the Suspension Letter) contained an appendix of six grounds on which the decision to suspend was made. The Former Attorney replied by letter dated 30 August 2021. The Prime Minister's letter advising her dismissal from office (the Removal Letter) was sent on 2 September 2021. Those three letters are attached as appendices to this judgment.

Background history

[15] It is convenient at this juncture to recite the background events preceding the Prime Minister's formal assumption of office on 23 July 2023. The general election of the 51 constituency members of the Legislative Assembly had been held on 9 April 2021. As noted, the principal protagonists were the HRPP, which had been in government for 40 years and previously held at least 66% of the seats in the Assembly, and the FAST Party which had been recently formed under the Prime Minister's leadership. On election night each party had won 25 seats. Later an independent member decided to support FAST, giving it a working majority. However, around that time the office of the Electoral Commissioner recommended that a HRPP woman candidate be appointed as an additional Member of Parliament. This step was taken to satisfy the constitutional guarantee of a minimum number of women members under Article 44(1A) of the Constitution. The parties were then deadlocked. The HRPP continued in power as a caretaker government.

[16] These events followed:

(1) On 4 May 2021 the Head of State issued a proclamation calling for a fresh election on 21 May 2021 apparently acting on advice from the caretaker government.

(2) On 17 May 2021 a Full Court of this Court, acting under urgency after hearing counsel for all parties, set aside the proclamation as being without legal validity and directed the Head of State to call for Parliament to convene. On the same date a Full

Court of this Court declared that the Electoral Commissioner's decision to recommend the appointment of an additional woman member was unconstitutional and that the warrant of the member so appointed was void;

(3) On 20 May 2021, acting in accordance with this Court's direction, the Head of State issued a proclamation calling for Parliament to convene on 24 May 2021, which was the following Monday. However, on 22 May 2021, without giving reasons, the Head of State issued a proclamation suspending his 20 May proclamation ;

(4) On 23 May 2021, a Sunday, the FAST Party applied urgently to this Court without formal notice to the Attorney General for orders setting aside the Head of State's 22 May suspension proclamation. A Full Court of this Court directed that the Former Attorney in her capacity as Attorney General should be served with the application and supporting papers at home as a representative of the caretaker government. The Former Attorney appeared in Court but declined to participate and later withdrew. This Court set aside as unlawful the Head of State's 22 May 2021 proclamation suspending his 20 May proclamation for the meeting of the Legislative Assembly on 24 May.[3] I shall return to these events.

(5) On 24 May 2021 Parliament reconvened in accordance with the Head of State's 20 May proclamation to swear in the FAST Party as the Government and the new Prime Minister in office. The doors of the Parliament building were locked and entry was barred to the Chief Justice, other Supreme Court Judges and Judges from other jurisdictions who had walked across from the Supreme Court building in accordance with tradition for the ceremonial opening of Parliament. The Prime Minister and her cabinet of members from the FAST Party were then lawfully sworn in as the government in the grounds of Parliament. However, the Former Prime Minister and his government refused to cede office.[4]

(6) On 25 May 2021, the Former Attorney in her capacity as Attorney General applied to the Supreme Court for a declaration that the earlier declaration ordering that Parliament be convened was unlawful.

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[3] See the Suspension Judgment at fn1 above.

[4] See the Election Result Judgment at fn1 above, at [87]

(7) On 26 May 2021 the Former Attorney filed an application for orders that all Judges of the Supreme Court recuse themselves from presiding over a pending appeal by the Electoral Commissioner from the earlier judgment of this Court[5] on the ground that their actions when hearing all previous claims by the FAST Party "demonstrates a perceived, real and/or apparent bias that strongly suggests favouritism and partiality…" for the FAST Party. Extensive particulars were given including that the Chief Justice's conduct strongly suggested pre-determination of proceedings. I shall return to this document also.

(8) On 27 May 2021 a press release was purportedly issued by the Attorney General's office which summarised the Former Attorney's intention to apply to disqualify the Judges and the grounds given in her formal application. The Former Attorney publicly denied that the press release was authorised by her. She disclaimed responsibility for its contents. In an affidavit later sworn on 27 August 2021 she expressed her "shock and concern" at its "disrespectful" contents. She said that she was "mortified" by the release. She issued a public apology and instructed her counsel to withdraw the recusal application when the substantive proceedings were called in Court on 31 May 2021.

(9) On 28 May 2021 the FAST Party filed a motion for committal for contempt against a number of parties including the former Prime Minister and the Former Attorney. The application against her relied on the grounds of the press release allegedly issued by her office the previous day and on her conduct as legal advisor to the then government.

Change of Government

[17] As noted, the new Government and new Prime Minister were sworn in on 23 July 2021. This event followed the Court of Appeal's dismissal of an appeal from the earlier judgment of this Court declaring that Parliament was lawfully convened on 24 May 2021, meaning that a new Government with the FAST Party holding a majority of seats was lawfully formed on that date.[6] However, the former Prime Minister and the HRPP immediately set about repeatedly and publicly denigrating the Court of Appeal's decision. As the Prime Minister noted in her letter to the Former Attorney on 4 August 2021, in the 11 days following the decision the former Prime Minister had made serious

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[5] See the Electoral Commissioner Judgment at fn 1 above.

[6] See the Election Result judgment at fn 1 above.

attacks on the judiciary and the HRPP had organised large rallies near and around the Mulinuu Courthouse where speakers used a loud hailer to urge members of the public to take action against the Judges.

[18] The Prime Minister's 4 August 2021 letter to the Former Attorney recited "the fundamental duty of any Attorney General to uphold and defend the independence of the judiciary, and hold safe its members against attacks of this kind, any kind. Despite the exceptional nature of these attacks and the clear risk to public order, I am not aware of any step that you may have taken to date in accordance with that duty." The Prime Minister requested the Former Attorney to advise what steps she had taken for that purpose including filing or preparing proceedings for contempt of Court and what steps she would now take within the next 48 hours. She asked for a written response by 4.00 pm that day.

[19] The Former Attorney sent a brief letter in reply that day, observing that "…my possible response/counsel/advice would be best left to convey in a meeting with your good self." Her letter went on to emphasise her view that the public discourse in the country was a demonstration of every citizen's right to freedom of speech and expression in accordance with Article 13 of the Constitution, "However critical it may be." She noted that the criticism had been directed at a range of public figures, not just the judiciary, She acknowledged that the right to freedom of speech was not absolute and that it was necessary to assess whether public statements had met the threshold for commission of an offence and what steps she could initiate.

[20] The Prime Minister and the Former Attorney met the next day, 5 August 2021. They give differing accounts of what transpired. It is unnecessary to resolve those differences for the purposes of this judgment. It is, however, highly unusual as Mrs Heather-Latu noted in cross examination that the Former Attorney did not prepare and circulate a memorandum of what was agreed at such an important meeting in circumstances where she was subject to an explicit request to advise the steps which she intended to take within the 48 hour time span following receipt of the Prime Minister's 4 August 2021 letter.

[21] The Former Attorney did not provide a substantive reply to that 4 August 2021 letter. Nor did she take any steps to prosecute for contempt the former Prime Minister or any other party responsible for the preceding public attacks on the judiciary or those which continued over the next 14 days. It was against this background that the Prime Minister sent the Suspension Letter, received the Former Attorney's response and then sent the Removal Letter on 2 September 2021.

Power to Remove

[22] The threshold question lying at the heart of the Former Attorney's claim is this: in the absence of an express constitutional or statutory power, on what ground could the Prime Minister have lawfully advised the Head of State to remove the Former Attorney from office?

[23] The Constitution's silence on this issue gives rise to the inference that its drafters never contemplated that a situation might arise requiring the Head of State to remove an Attorney General, as is borne out by the fact that the Former Attorney's removal was apparently unprecedented in the preceding 60 years of Samoa's political independence.[7] Or they may have assumed, consistently with other common law jurisdictions and the orthodox relationship between solicitor and client, that the tenure of the state's senior law officer would be terminable at will. The effect of that assumption would of course be neutralised by a decision to appoint the office holder for a fixed term.

[24] Mr Harrison's submission for the Former Attorney is based squarely on the absence of an express legislative power of removal either in the Constitution or in the conditions of her warrant of appointment for a three year term. Mr Keith's contrary submission is based on the proposition that the proper and effective performance of the constitutional and statutory functions of the office of Attorney General requires the continued trust and confidence of the government, a feature common to all relationships between lawyer and client.[8] To be fully effective, he submits, the Attorney General must develop and retain the trust and confidence of the government of the day in the office holder's advice and advocacy.[9] It followed that the Prime Minister was lawfully entitled to advise removal of the Former Attorney from office and terminate the relationship once she formed the provisional judgment based on objective grounds that she lacked that trust and confidence and, having afforded the Former Attorney an opportunity to respond and considered that response, she affirmed her judgment.

[25] In support of this submission Mr Keith cited *Barratt v Howard*,[10] a decision of the Full Court of the Federal Court of Australia. At issue in that case was the lawfulness of a proposed recommendation by Cabinet to the Governor General to dismiss the Secretary of Defence under an express statutory power to terminate even though the appointment was for a fixed term. The claim

[7] By contrast the Constitution provides express powers of suspension and removal for the Head of State (Art 21), the Prime Minister and other Ministers (Art 33), Members of Parliament (Art 46) , the Speaker and Deputy Speaker (Arts 49 & 50) , Chief Justice (Art 67 (6)) and other Judges (Art 79 (4)).

[8] See, for example, s3 (2) of the Lawyers and Legal Practice Act 2014.

[9] See J McGrath : " Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor- general" [1998] 18 New Zealand Universities L Rev 197.

[10] Barratt v Howard [2000] FCA 190 (FC); 170 ALR 529.

proceeded on two pre-emptive interlocutory challenges by the Secretary on receipt of advice of his proposed dismissal. The first claimed a breach of natural justice; the second claimed that the proposed recommendation was wrong in law. The proposed ground for dismissal was the new government's loss of trust and confidence in the Secretary's performance of his statutory duties. The Full Court held that the recommendation by the executive could not be impugned, provided the statutory discretion was exercised on a ground which was capable of being related and was not extraneous to the object of the governing statute. It was no business of the Court to conduct a merits based review by determining the sufficiency of the proposed ground.

[26] In my view *Barratt* is readily distinguishable. In decisive contrast to this case, the governing statute provided an express power of termination. *Barratt* does not assist in resolving the threshold issue in this case of whether removal is justifiable where that power is absent. Its authority is limited to the orthodox consequential issue of the reviewability of the grounds on which the power to remove is exercised. Mr Keith's argument based on a loss of trust and confidence would readily prevail in a common law relationship between solicitor and client where the retainer is traditionally at will without an agreed provision which provided otherwise. Here, by contrast, the government agreed to a retainer for the Former Attorney for a fixed period without an express right of termination.[11] If the government had wished to import the subjective criterion of loss of trust and confidence as a ground for termination, it could easily have included a condition to that effect in the warrant of appointment.[12] In my judgment that ground has no principled constitutional basis.

[27] The Dismissal Letter advanced three related arguments to support the Prime Minister's primary ground of removal for loss of trust and confidence which were also the subject of detailed submissions. However, I am not satisfied that they provide a valid legal foundation for the Prime Minister's decision. By reference to each of them:

(1) First, the recognition expressed in section 7(2) of the AGO Act of the Attorney General's subjection to executive direction in three functions,[13] was said to be consistent with the existence of an advisory role. Thus, it must be open to the

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[11] Mr. Keith referred to the wide range of statutory provisions in Australian state and other Pacific jurisdictions for tenure and removal of the senior government law officers. While they are of comparative interest, they do not assist in deciding this question.

[12] Mr. Keith did not challenge Mr. Harrison's submission that the term of and conditions on which the Attorney General holds office under Art 41(2) are those initially determined by the Head of State contemporaneously with the formal appointment under Art 41 (1). Those provisions do not allow the Head of State unilaterally to vary the term or change the conditions at a later date.

[13] At [10] above.

government to decide whether it had continuing confidence in the Attorney General and, if not, to act accordingly. I am satisfied that this proposition misconstrues section 7. Its concern is with express limitations on the degree of independence enjoyed by the office holder when performing "constitutional, statutory or common law functions." Those limitations may well be consistent with the existence of the advisory role. But they do not add anything material to the explicit identification of that function already found in s 6. It is drawing an impermissibly long bow to reason that such an advisory role imports an implicit power to remove for a loss of trust and confidence.

(2) Second, the power of appointment found in Article 111[14] is said to support the power to remove an Attorney General. However, that article allows for substitution of an office holder in three clearly defined circumstances - where an office holder is unable to act from illness or any other cause or is absent with leave; or where an office is vacant. It says nothing about a power of or grounds for removal of an Attorney General.

(3) Third, support was invoked from the general rule stated in section 31(1) of the Acts Interpretation Act 2015 that the "…power in an Act to appoint a person…includes the power to suspend, remove or re-appoint…" However, as Mr. Harrison notes, the statutory definition of an "Act" does not include the Constitution, which is separately defined (and rarely referred to in the body of the Act).

[28] I agree with Mr Harrison that in the absence of an express provision, the power to advise removal could only arise by necessary implication from the terms of the Constitution.[15] It follows that the circumstances justifying removal must be of an extraordinary nature, striking at the heart of the office holder's ability to perform his or her constitutional duties and functions. To borrow from the law of contract, the power to remove must be so obvious that it goes without saying.

[29] I disagree with Mr Keith's submission, again based on the decision in *Barratt*, that it is sufficient for the Prime Minister to show within the constitutional constraints that grounds exist which are capable of justifying removal. He submits that the Court's inquiry is limited to whether there is an adequate legal or factual foundation for the impugned decision, and cannot encroach into an evaluation of its merits, which was entirely within the Prime Minister's discretion. However, while

[14] At [11] above.

[15] See Poynter v Commerce Commission [2010] NZSC 38; [2010] 3 NZLR 300 at [78].

that light touch approach is appropriate when considering the exercise of a statutory discretion which is absent here, I agree with Mr Harrison that the bar on review of this decision must be set at a high level, consistently with the absence of an express power of removal and the high nature and guaranteed independence of the Attorney General's office. The stated grounds require close scrutiny. For these purposes I am content to apply Mr Harrison's test, articulated in closing argument, of whether the Prime Minister's decision was right.

[30] What then are permissible grounds for advising an Attorney General's removal from office? Mr Harrison cited serious misconduct by the Attorney General as a justifiable ground. An uncontroversial example would be conviction for a criminal offence punishable by imprisonment. The conviction would provide an objective benchmark against which to measure the Attorney General's continued fitness to hold constitutional office. Public loss of respect, trust and confidence would be the inevitable consequence, based upon a perception of a lack of the probity and integrity necessary for the government's principal law officer when discharging his or her advisory duties and an inability to act honestly and independently in upholding the criminal law as required by the Constitution. His or her standing would be irretrievably compromised. The Prime Minister would be bound to act in the public interest by advising removal.

[31] While criminal offending is an obvious example of serious misconduct justifying removal from office, the power to remove is not disciplinary or punitive. The inquiry must always be into whether removal is necessary in the public interest because the acts or omissions of the Attorney General so materially undermine or compromise his or her ability to perform the constitutional functions or discharge the responsibilities required by the office. Applying that criterion, a situation may arise where the Prime Minister decides on objectively justifiable grounds that the Attorney General's conduct demonstrates that he or she is incapable or unable to perform those functions or discharge those responsibilities. Or a situation may arise where the Attorney General is suffering such a degree of physical or mental incapacity as to be unfit to continue in office. In these two latter cases, satisfaction of any degree of misconduct is not required.

[32] However, my acceptance of Mr Harrison's thesis about the limitations on an implied power of removal and the strict standard to be applied on review is subject to this qualification. The corollary of the highness of the Attorney General's office is that it demands that its incumbent discharges his or her constitutional duties and functions according to the highest professional standards. He or she is the government's senior law officer. His or her performance of the essential functions of the office must be beyond reproach if public confidence is to be maintained in that office. His or her standards must be consistent with those expected of a lawyer who enjoys precedence over all others appearing before

Samoa's courts, and whose independence in prosecuting criminal proceedings is absolute and in carrying out constitutional, statutory and common law functions is subject only to narrow limitations.

[33] While it is perhaps unrealistic to expect the Attorney General of Samoa with its limited legal resources to have the experience and constitutional familiarity of a senior law officer in Australia or New Zealand, the office requires that its holder faithfully and unconditionally uses the powers of the office to uphold the rule of law. At its heart is the Attorney General's duty to ensure that public confidence and respect is maintained at all times in the competence, integrity and independence of the Courts and Judges in the performance of their constitutional functions. That duty is reinforced by the office holder's power to prosecute for contempt those who scandalise the Courts by publicly calling into unjustifiable question the integrity and impartiality of the judiciary.

Prime Minister's Grounds

(a) Introduction

[34] The Removal Letter lists six grounds for removal. All were earlier amplified and explained in an appendix to the Suspension Letter. Mr Harrison's submission is that the Former Attorney's application must succeed if she can establish that one of the stated grounds is unlawful; and that it is impermissible to uphold the Prime Minister's decision for the reason that it can be justified on one or more of the other stated grounds. Proof of a material error on one ground is said to be sufficient to vitiate the decision regardless of the strength of the other grounds. On that basis Mr Harrison focussed on a perceived vulnerability of the first listed ground, related to the Former Attorney's advice to the previous government in one case and on the Head of State's post-election proclamations.[16]

[35] I disagree with Mr Harrison's thesis. Its logical conclusion is that the decision must fail unless all its stated grounds are valid. Mr Harrison relies on *Peters v Davison.*[17] In that case the Full Court of the New Zealand Court of Appeal allowed an appeal against an interlocutory decision of the High Court striking out an application for judicial review of the report of a Commission of Inquiry relating to certain taxation transactions. The Court of Appeal was satisfied that such a report was judicially reviewable and that the Commission arguably made two errors of law. The question of whether in combination the errors were sufficiently material overall to go to the substance of significant parts of the report should remain for trial. *Peters v Davison* does not stand as authority for Mr Harrison's far broader submission that proof of a material error in one of the Prime Minister's six stated grounds is

[16] See the judgments at fn 1.

[17] Peters v Davison [1999] 2 NZLR 164 CA).

sufficient to vitiate the decision. To the contrary, the judgment reinforces the need to determine materiality by a global assessment of all the grounds for the decision.

[36] In keeping with Mr Harrison's submission, the Prime Minister's first stated ground for the Removal Decision attracted a good deal of argument at the hearing. However, for reasons to which I shall briefly return, I am not satisfied that any error in that ground is ultimately material to the validity of the Prime Minister's decision. Her six grounds appear to be listed in chronological order. Her numerical ranking of them is less important than their individual or collective validity. I shall start by addressing together the second and third grounds which relate directly to the Former Attorney's conduct as an officer of the Court, and separately the sixth ground which is based on the Former Attorney's failure to use her powers of prosecution for contempt. I shall group them into three principal grounds, and analyse them accordingly.

[37] In this respect it is material that the first two grounds relate solely to the Former Attorney's performance of her professional duties as an officer of the Court and the government's senior law officer charged with upholding the rule of law. The third ground relates to performance of the Former Attorney's independent function of instituting proceedings for contempt of Court. These grounds do not call into question or raise any issues about advice given by her in her capacity as the government's senior legal officer or about her conduct of litigation on the previous government's behalf.

(b) First Ground for Removal: Misconduct on 23 & 24 May 2021

[38] The first ground, the Prime Minister's second ground for removal, was based upon the Former Attorney's conduct at the hearing before this Court on 23 May 2021.[18] As previously noted, a Full Court was convened urgently on a Sunday morning to hear an application by the FAST Party to set aside a proclamation made by the Head of State the previous day. He had purportedly suspended his earlier direction for the General Assembly to convene as ordered by a Full Court of this Court. The application was made ex parte. The Chief Justice directed that it be served informally on the Former Attorney on a Pickwick basis. The Former Attorney refused to accept service. She appeared before the Full Court but then withdrew while the Court was still sitting. The Full Court later set aside the Head of State's decision.

[18] See earlier reference at [16] (4) above.

[39] In delivering the Suspension Judgment[19] the Court recited that:[20]

> "10. The Chief Justice on being advised of the urgent application directed the Registrar to call the urgent application in Chambers at 11.00 am…and for the applicants to serve the application on the Attorney General on a Pickwick basis; this meant the Attorney General would have notice of the application and have an opportunity to appear when it was called in compliance with simple rules of natural justice.
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> 11. When a Court proceeds on a 'Pickwick basis' it does so in order to "prevent imminent mischief and irremediable harm… The Court does so in urgent situations which are time sensitive and where urgent redress is sought to prevent irreparable and uncompensatable damage…
>
> 13. When the matter was called…the Attorney General appeared and advised the Court that she did not appear for anyone but only appeared as a matter of courtesy to the Court. After an exchange with the Bench, the Attorney elected to leave and did not use the opportunity afforded by the Pickwick service to listen to the application and to make submissions as appropriate to advance the interests of her clients, the government and the Head of State."

[40] The Full Court noted the seriousness of the issue before it, and considered that in view of its importance and its urgency it should sit on a Sunday given that the application concerned the maintenance of the rule of law.[21] In this respect the Court was empowered to sit "…in any part of Samoa or at any time or place."[22] After repeating the circumstances of its direction for Pickwick service on the Former Attorney and its expectation that she might "provide constructive submissions", this Court noted:

> "24. The Court wished and needed to hear from the Attorney General, but she declined the opportunity relying on procedural rules; we consider such reliance completely missed the point – Samoa was on the verge of entering a new legal and Constitutional space. The Court needed to hear whether there was a proper basis for the suspension of the clear requirements of the Constitution."
>
> "28. We do not make any criticism of the Head of State, or attribute to him any malevolence; it is clear that he has been poorly advised, and then left undefended before the Court."

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[19] At fn 1 above.

[20] See the Suspension Judgment, fn 1 above, at [11] onwards.

[21] See at [21] – [23] above.

[22] Section 32 of the Judicature Act; see the Suspension Judgment, at fn 1 above, at para 3.

[41] The Former Attorney issued a press release immediately after this Court's reasons for the Suspension Judgment were published. Her press release opened by emphasising the legal prohibition on formal service of Court documents on a Sunday to justify her refusal to accept the documents personally delivered to her home at the Registrar's direction. She referred to her protest at the hearing that she "was not there to represent anyone as I had had not been served." She said the Chief Justice answered her objection with a direction "…to sit down". She said that when she realised this Court intended to hear the substantive application she advised that "…I would take my leave as I felt it was not appropriate. I then walked out of what I had been advised to be an in-chambers meeting". She concluded by implying that the Court had not allowed her clients a fair hearing and had not adhered to the principles of natural justice.

[42] In relation to these events, the Suspension Letter recited the Prime Minister's view that it was inconsistent with her expectations of an Attorney General to:

(1) fail to acknowledge that Pickwick service is a conventional practice in urgent proceedings or that in urgent circumstances a Court may modify procedural requirements;

(2) decline to make submissions or otherwise seek to assist when invited by the court;

(3) continue to stand and address the Court at an inappropriate time and manner and also fail to properly respond to the Chief Justice's directions, given three times, to take her seat and stop talking;

(4) take the extraordinary step of walking out of Court when it was still in session; and

(5) attempt to rebut or criticise the Court's directions through a press release.

[43] Mr Harrison challenges the validity of this ground. He relies on the Former Attorney's affidavit in support of her claim for judicial review, which is essentially a summary of the contents of her press statement, and on the Former Attorney's right to take the legal point that she had not been lawfully served with the proceedings. He also takes issue with this Court's statement in its Suspension Judgment that Pickwick service is a conventional practice which the Court may adopt in urgent circumstances.

[44] I am satisfied that the Former Attorney's conduct on 23 May 2021 and her subsequent press release were openly defiant and scornful of this Court. It was faced with deciding an urgent

application on an issue of great public importance in a time of acute constitutional uncertainty. The Head of State had proclaimed without reasons his plan to reverse his earlier decision to convene a hearing of the General Assembly the next day. He was effectively announcing his refusal to abide by an order of this Court. He was setting the legislature on a collision course with the Courts. The risk to the rule of law in Samoa was obvious.

[45] It is understandable that the Chief Justice and his colleagues on the Full Court wanted to enlist whatever lawful means were available to them to avert that possibility. The circumstances were unprecedented. It is equally understandable that the Full Court would want the constructive assistance of the Attorney General as the government's senior legal adviser. The Head of State acts on the advice of the Prime Minister, the cabinet or a particular minister.[23] The Former Attorney, as the cabinet's principal legal adviser, would logically have been best placed to advise on this use. Leaving aside possible questions about privilege, which were never raised by the Former Attorney, she would have been uniquely placed to provide constructive assistance to this Court. For example, she could have sought a brief adjournment to allow time to brief and advise the Head of State through the Prime Minister or cabinet on the constitutional ramifications of his decision, to take instructions on what was a critical but narrow legal point, and then to address the Full Court on the Head of State's reasons. The Full Court was entitled to assume that with the benefit of informed legal advice he would reconsider and withdraw his proclamation. As this Court observed in the Contempt Judgment, it was "…almost unthinkable..." that the Head of State would knowingly defy the Court's declarations.[24]

[46] The Judges were entitled to assume also that the Former Attorney would respond responsibly in the spirit of their request for her participation. The Chief Justice had directed that the papers be served on the Former Attorney with full knowledge of the procedural prohibition on the effect of service on a Sunday. She refused to accept them in defiance of the direction. Her arguments based on that ground now, or a quibble with what is meant by Pickwick service, miss the point, to borrow the Full Court's phrase. She refused to participate in the hearing, drawing another technical distinction between a hearing in Chambers and in open Court. She then departed the Court while it was sitting, without discharging the elementary professional courtesy of seeking formal leave. Her actions that day were an open and discourteous challenge to the authority of this Court. Its restrained criticism of her was well justified. It can be readily inferred that the Judges would never have expected such conduct from the state's senior law officer.

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[23] Article 26 of the Constitution.

[24] See the Contempt Judgment at fn 1 above, at paras 41 & 42.

[47] The Former Attorney compounded her disrespect in the face of the Court by the terms of her press release. She justified her actions by asserting that this Court's judgment had earlier been leaked to the media. She sought to justify her own unprofessional conduct and by clear implication criticized the Chief Justice and his colleagues, culminating in the suggestion that they had denied her clients natural justice. She had no business calling into public question the Chief Justice's judgment. The appeal process exists for that purpose. It was a highly improper statement which had the clear tendency to undermine public respect for the adherence to the judicial oath to act fairly and impartially in all proceedings.

[48] I am satisfied that this ground on its own was a valid basis for the Prime Minister's decision and would have justified the Former Attorney's summary removal.

(c) Second Ground for Removal: Misconduct on 26 May 2021

[49] The second ground, the Prime Minister's third stated ground for removal, was based upon the application for recusal filed by the Former Attorney in the Supreme Court on 26 May 2021.[25] The application, which appears to be of an originating nature, sought a direction that all the Judges of this Court should recuse themselves from sitting on an appeal against the Electoral Commissioner Judgment[26] or any other appeal relating to Article 44 (1A) of the Constitution.

[50] The application asserted the guaranteed constitutional right to a fair trial "**by a fair and independent tribunal"** (emphasis in the original) before claiming that the Judges by their actions when determining all five originating applications brought by the Former Attorney in the Supreme Court "…demonstrate a perceived, real and/or apparent bias that strongly suggests favouritism and partiality for…" the FAST Party and its members. The application then listed at least five examples of this Court's "..consistent pattern.." of breaching the Former Attorney and her clients' constitutional rights to a fair hearing and natural justice.

[51] The recusal application singled out the Chief Justice by name in six of the seven particulars in support, mostly alone but also with other named Judges. Its primary assertion was that the Chief Justice "…has already predetermined the outcome or leaning towards the unsuccessful outcome…" in the pending appeal against the Electoral Commissioner Judgment. It repeated the allegation of "..a perceived, real and/or apparent bias.." against the Chief Justice and other members of the judiciary

[25] See [16] (7) above.

[26] See the Electoral Commissioner Judgment, at fn 1 above.

because they marched in procession to the opening of Parliament on 24 May 2021. It sought the appointment of "…an overseas constituted bench to preside over…" that appeal.

[52] As already noted, on 28 May 2021 a press release was published under the heading of the Attorney General's Office, advising that later that morning the Office intended to apply to the Supreme Court for the recusal of the Chief Justice and the other two Judges due to sit on the appeal against the Electoral Commissioner Judgment on 31 May 2021. The ground stated was the Judges' potential favouritism and bias - "there is now substantive evidence before our office that questions the appearance of impartiality and integrity of our judiciary". The first four paragraphs paraphrased the substance of the Former Attorney's recusal application filed on 26 May 2021. The fifth and sixth grounds amplified a claim made in the recusal application of bias by the Chief Justice and members of the judiciary in attending the attempted opening of Parliament on 24 May 2021, suggesting that the Chief Justice's actions "…indicate that he may be in contempt of Parliament."

[53] As noted earlier also, the Former Attorney referred to her "shock and concern" when the existence of the press release was drawn to her attention by her husband, also a lawyer. She disclaimed all knowledge of it and asserted that it was unauthorised by her office. She later tendered her apologies to the Chief Justice. She withdrew her recusal application following publication of the press release.

[54] It is not easy to reconcile the Former Attorney's immediate public disclaimer of the contents of the press release with her authorship of the recusal application drafted in similar terms a few days earlier. The press release went a little further than the Former Attorney's recusal application, in particular by asserting that the Chief Justice and Prime Minister are closely related. Some of its language was more adjectival. But the intemperate and unfounded assertions of favouritism or partiality and bias were the common themes of both. Each questioned the integrity of the judiciary, with the references in the recusal application to a consistent pattern of denial of constitutional rights coupled with the appointment of overseas judges to hear the Election Commissioner's appeal. The allegation in the press release that the Chief Justice's conduct suggested his contempt of Parliament was a shorthand summary of the claim made in the recusal application that the purpose of the Judges' procession was to confirm that the opening of Parliament had taken place, which was said to be a matter for the Former Attorney and FAST Party to resolve.

[55] The Former Attorney's evidence that she was acting on instructions from the caretaker government when applying for recusal must be accepted for these purposes. However, it is not the existence of the instructions to act which is question but the manner in which the Former Attorney performed them. The duty to act professionally would have been implicit in such instructions. It was

a major step for an Attorney General to take in the midst of a constitutional crisis. The risks to the rule of law were plain. The Suspension Letter rightly noted that great care was required to ensure that the recusal grounds were factually correct and sustainable, and its terms were restrained, courteous and respectful.

[56] The recusal application breached these basic requirements in numerous ways. For example:

(1) It opened by claiming real or actual bias against the Judges of the Supreme Court. The gravity of such an allegation cannot be overstated particularly in its temporal context. When asked at the hearing about its basis, the Former Attorney simply referred to the recognition of this legal ground. She did not attempt to identify its factual foundation. Her withdrawal of the application speaks to its unsustainability.

(2) It made the equally serious allegation of predetermination by the Chief Justice of a pending appeal. As the Suspension letter pointed out, that claim was made on the basis of a minute issued by this Court referring to the practical effect of a pending appeal. It gave no indication of its predetermination whatsoever.

(3) It asserted that the presence of the Judges marching in procession to Parliament on its ceremonial opening showed real or actual bias. At the hearing the Former Attorney accepted Ms Heather Latu's point that the judiciary attended the ceremonial opening of Parliament as a matter of convention. It is inexplicable that the country's senior law officer with the constitutional responsibilities attendant on her office was then unaware of this convention, one which she described in the recusal application as "unnecessary or unwarranted", or that she would rely on it to show real or apparent bias.

(4) It reasoned that the Judges were biased, or had denied the Former Attorney's clients natural justice, because they had dismissed her preceding five applications relating to the general election. As the Suspension Letter noted, the existence of adverse decisions does not equate to bias or a denial of natural justice. The fallacy underlying this reasoning does not need further explanation.

(5) It used emotive and intemperate language when repeatedly referring to opportunities unfairly afforded to the FAST Party but denied to the then government and others before asserting the existence of a "consistent pattern" of failing to adhere to the constitutional right to a fair hearing and natural justice.

[57] The recusal application graphically manifests the Former Attorney's total loss of objectivity. She had abandoned all pretence of neutral advocacy in arguing the then government's cause. Her language showed her personal adoption of her client's partisan position at the expense of her professional obligations as an officer of the Court. The terms and language of the document showed that she was no longer capable of fulfilling her constitutional function of upholding the rule of law.

[58] Mr Harrison submitted that the recusal application was limited to process or natural justice issues, and did not make substantive allegations of bias. That distinction overlooks its primary allegation of real or actual bias. But even if it could be drawn in fact or law, it does nothing to diminish the overall content, tone and gross inaccuracy of the recusal application. And its subsequent withdrawal did nothing to expunge its originating damage.

[59] In the Contempt Judgment this Court found that the contents of the disclaimed press release were insultingly critical and contemptuous.[27] This Court was not asked at the contempt hearing to consider the terms of the recusal application. Having reviewed the terms of each document, I repeat my satisfaction that while the press release was more extreme and intemperate, their core contemptuous essence was the same. The recusal application was plainly calculated to question the authority of this Court,[28] and its personalised focus on the Chief Justice's actions was disgraceful.

[60] The chronological context of the recusal application must also be noted. It was drafted and filed within a few days of the Former Attorney's improper conduct relating to the hearing on 23 May 2021, the subject of the previous ground, and her first press release implying that this Court had denied her clients natural justice.

[61] In summary, the Prime Minister's knowledge of this sequence of events, encompassing the compressed period between 23 and 26 May 2021 and constituting the first and second grounds for removal, may justifiably have caused her to lose trust and confidence in the Former Attorney and validated her view that the Former Attorney's conduct did not meet her expectations. However, those consequences were incidental to the real point: in combination the Former Attorney's actions manifested gross discourtesy to and disrespect for the judiciary at a time when it was under sustained and unjustified attack from the Former Prime Minister and other public figures. She demonstrated her inability to discharge her fundamental duty, both as a lawyer and as entrusted to her by the Constitution, to uphold the rule of law by publicly respecting and supporting the judiciary.[29] I am

[27]See the Contempt Judgment at fn 1 above, at para 78.

[28] See the Contempt Judgment at fn1 above, at para 25.

[29] See also s.3(2)(a) of the Lawyers and Legal Practice Act 2014.

satisfied that her actions were in fact designed to have the opposite effect of undermining public confidence in and the standing of the Courts and judges.

[62] I am satisfied that this ground also was on its own a valid ground for the Former Attorney's decision and would have justified the Former Attorney's summary removal.

(d) Third Ground for Removal: Failure to act on continuing attacks on judiciary

[63] The third ground, the Prime Minister's sixth stated ground, was based upon the Former Attorney's failure to take any legal action to prevent the unprovoked attacks on the judiciary. Following 23 July 2021. This issue had been the subject of the Prime Minister's 4 August 2021 letter to the Former Attorney.[30]

[64] The Former Prime Minister had intensified his attacks on the judiciary in the aftermath of the Election Result Judgment.[31] For example:

(1) On 28 July 2021 he publicly stated that the judiciary had colluded with the FAST Party; had brought about an unlawful government; had "trampled on the Constitution"; and had lost its integrity and independence. He called on the general public to attend a protest march and rally outside the Mulinuu Courthouse;

(2) On 30 July 2021 he publicly asserted in a live streamed broadcast that Supreme Court Judges had "…brought shame on the judiciary"; that the Chief Justice had become "…the king of Samoa…" and assumed the power traditionally vested in the Head of State; and that the Judges had allowed others to commit treason. It would not be an overstatement to describe his speech as a rambling, intemperate tirade. Of particular concern was his assertion that the Chief Justice and two of his colleagues should be taken to Tanumalala Prison;

(3) On 1 August 2021 he repeated the same message in another live streamed broadcast, this time singling out two of the Judges by reason of their female gender, and calling on the Judges to apologise in traditional ceremonies before going away and resigning;

[30] See at [17] – [20] above.

[31] See the Election Result Judgment, at fn 1 above.

(4) On 2 August 2021 he addressed a large rally outside Parliament and, among other things, described the Judges as " crooked";

(5) On 5 August 2021 in a livestreamed programme he referred repeatedly to "tricky" judges who had given "tricky" judgments;

(6) On 11 August 2021 in another livestreamed panel discussion he repeated his attacks on the judiciary in slightly different terms than before;

(7) On 27 August 2021 he publicly referred to a large billboard displayed at the front of the headquarters of the HRPP as, among other things, reminding the public that when they go to the Supreme Court for their cases that "… there is a big problem with those presiding over their matters. So we hope those judges from overseas will arrive soon"

[65] The first four of these events had occurred within the 11 day period between the new government's assumption of power on 23 July 2021 and the Prime Minister's 4 August 2021 letter. They were consistently abusive, vitriolic and personalised, and were characterised by threats against individual Judges themselves. Their intensity was escalating. They illustrated the Former Prime Minister's pattern of "...egregiously denigrating and insulting" and "plainly express[ed] contempt for the Court".[32] They were some of the gravest examples of contempt in their call for legal anarchy. They damaged the fabric of Samoa.[33] They called for an immediate response by the public office holder charged with upholding the rule of law in Samoa.

[66] The Former Attorney's 4 August 2021 letter, her affidavits and evidence at the hearing rationalised her failure to apply to commit the Former Prime Minister for contempt on a number of grounds:

(1) First, in the Former Attorney's opinion the public discourse over the political situation in Samoa in recent months demonstrated the participants' exercise of their constitutional right to freedom of speech, however critical it may be. However, the Former Attorney did not require this Court's Contempt judgment delivered in March 2022 to make the undisputable point that the right to freedom of speech is not a right to make grossly contemptuous statements about Samoa's courts and its judges[34];

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[32] See the Contempt Judgment at fn 1 above, at [61] & [62].

[33] See the Contempt Judgment at fn 1 above, at [3] & [4].

[34] See the Contempt Judgment at fn 1 above, at [24].

(2) Second, she observed that the threats were made to a number of public figures, not just judges. However, as the Suspension Letter observed, the fact that others may have been threatened is irrelevant to the existence of threats against the judiciary who the Former Attorney well knew had been the unwavering focus of the Former Prime Minister's recently intensified attacks;

(3) Third, the Former Attorney said she proposed to talk to the Former Prime Minister about his public behaviour. Clearly that step should have been taken on or about 24 July 2021, not prospectively on 4 August, and if the Former Attorney did in fact speak with the Former Prime Minister his subsequent behaviour proved its ineffectiveness.

(4) Fourth, the Former Attorney said she needed time to investigate whether statements had been made and their circumstances. However, the evidence was clearly and immediately available. It would not have taken more than a day to gather the relevant facts and file an urgent application to commit the Former Prime Minister for contempt.

[67] The Former Attorney later rationalised her inactivity on a ground which particularly demonstrates her inability to understand and implement her constitutional duties. She said that at their 5 August 2021 meeting she advised the Prime Minister that the issues causing the latter concern were currently before this Court in the form of the contempt proceedings brought by the FAST Party;[35] and that she was not in a position to take any steps until their determination given that she was herself a named respondent. In her words, "the allegedly contemptuous statement of the Former Prime Minister was already before the Supreme Court" In re-examination at the hearing she justified her failure to take the lesser step of issuing a public statement calling on the Former Prime Minister to desist from his scandalous attacks because "if I did, I would be seen as taking a stand on an issue instead of allowing matters before the Court to be taken care of."

[68] Mr Harrison expressed the thrust of this proposition in submitting that it was neither feasible nor appropriate for the Former Attorney to resign in protest at the scandalising comments of others or speak out against them, let alone take additional enforcement action, whether criminal or civil, when those very same matters were sub judice in the contempt proceedings brought by the FAST Party interests.

[35] See at [16] (9) above.

[69] This argument is misconceived and could never have justified the Former Attorney's inactivity. As Mr Keith emphasised, the FAST Party's contempt proceedings filed on 28 May 2021 were based on preceding scandalising statements made by the Former Prime Minister between 20 May and 24 May 2021. While contemptuous, they were less extreme than his statements after 23 July 2021.The Prime Minister's 4 August letter was referring to the separate attacks made by her predecessor in the immediately post 23 July 2021 period.

[70] The Former Attorney's advice to the Prime Minister that the Former Prime Minister's statements made in that 11 day period were already before the Supreme Court was plainly wrong. So was her assertion that they were "allegedly contemptuous" – they were undeniably so. The same matters would not have been before the Court as those pleaded in the FAST contempt proceedings if the Former Attorney had promptly issued contempt proceedings arising from the post 23 July 2021 period. Those matters only came before this Court for determination because the FAST Party amended its contempt proceedings on 10 September 2021 to add the Former Prime Minister's seven statements listed above.[36] All were the subject of express findings of contempt.[37] The same legal principles would have applied in both cases but the factual inquiries would have been discrete.

[71] While the primary actor and his pattern of abuse was similar, his attacks intensified following the change of government and directly raised threats to the personal safety of identified judges and called for protest action at the Supreme Court itself. The Former Prime Minister obviously saw himself as above the law. The risks to the rule of law could not have been more present. If ever a situation called for an Attorney General as the government's senior lawyer to take a public stand, and to act swiftly, decisively and publicly in exercising her constitutional function of implementing and conducting contempt proceedings, this one did.

[72] The Former Attorney's reliance on her existing participation as a respondent in the FAST Party contempt proceedings was also misplaced. It may have been awkward or embarrassing for her to take separate contempt proceedings against the Former Prime Minister, her immediately past official client, and other respondents. But consideration of her personal discomfort was secondary to her constitutional duties. She described her situation as "invidious and conflicted". If so, she should have resigned without delay if she was unable to perform a critical legal function because of a personal or professional conflict. The office is always greater than its holder.

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[36] See at [63] above.

[37] See the Contempt Judgment at fn 1 above, at paras 61 & 62.

[73] I acknowledge that the Former Attorney enjoyed absolute independence in exercising her constitutional function to initiate proceedings for contempt of Court. It is unnecessary to enter the debate about whether contempt of court is a branch of the criminal law.[38] The Attorney General normally brings contempt proceedings within his or her remit for the purpose of enforcing the law and restoring public dignity in the Courts.[39] It does not matter whether the Former Attorney was legally required to answer the Prime Minister's requests contained in her 4 August 2021 letter, although the fundamental elements of a working and cooperative relationship between lawyer and client would have dictated a constructive response. It is the fact of the Former Attorney's decision to take no steps in circumstances which called for immediate and effective action, and her deeply flawed rationalisation for her inactivity, which demonstrate her inability or unwillingness to perform her critical function of upholding the rule of law by protecting the judiciary from public attack.

[74] I am satisfied that this ground on its own also was a valid ground for the Prime Minister's decision and would have justified immediate removal.

[75] In summary, applying Mr Harrison's stringent test on review, I am also satisfied that these three grounds, whether taken separately or together, justified the Prime Minister's decision acting in the public interest to advise the Head of State to remove the Former Attorney .

(e) Other Grounds

[76] The Removal Letter gave three additional grounds for the Prime Minister's decision.

[77] The first ground given in the Removal Letter was based on the previous government's activation of Article 44 (1A) of the Constitution to appoint an additional member of the General Assembly and the Former Attorney's participation in a series of three proclamations issued by the Head of State between 4 May and 4 July 2021 about the election results which this Court and the Court of Appeal held to be unlawful. The Prime Minister's letters acknowledged that these steps may have been taken against the Former Attorney's advice. If so, the Prime Minister reasoned, the Former Attorney should have resigned. If not, and the actions were taken on her advice, then they demonstrated the poor quality of the Former Attorney's advice, falling short of the Prime Minister's expectations of the office holder.

[38] See J McGrath at fn9 above, at p213.

[39] See the Contempt Judgment at fn1 above, at para 16.

[78] This ground received a disproportionate amount of attention in submissions and at trial, presumably because it was the platform for Mr Harrison's primary head of argument that proof of an error on one ground was sufficient to vitiate the Removal Decision. I agree with Mr Harrison to the extent that this ground on its own could never have justified the Former Attorney's removal. The Prime Minister's reasoning on it was wrong. She may well have entertained strong suspicions. But in the absence of evidence that the Former Attorney gave affirmative advice she cannot be held accountable for the Head of State's ill-advised proclamations. This ground was a makeweight, inconsequential and unsustainable. Its presence is inexplicable given the plain strength of the three primary grounds. However, for the reasons given, I am not satisfied that this error was material to the validity of the decision, which I am satisfied was correct.

[79] The two other stated grounds for removal were the Former Attorney's failure to correct misrepresentations made by the Former Prime Minister about the Electoral Commissioner Judgment and her non-attendance at a chief executives' meeting on 24 July 2021. Again these two grounds were inconsequential. They added nothing to the overwhelming weight of the three primary grounds. They do not merit further consideration.

Natural Justice

[80] Mr Harrison submits that both the decisions to suspend and then remove the Former Attorney were taken in breach of natural justice. He relies on two streams of argument.

[81] First, Mr Harrison says that the strongly worded terms of the FAST Party's application filed on 28 May 2021 to hold the Former Attorney, the Former Prime Minister and others in contempt of Court showed the Prime Minister had already formed an adverse view of the Former Attorney by the time of the Suspension Letter sent on 20 August 2021. In his submission she had condemned the Former Attorney by virtue of her conduct which was the subject of the FAST contempt proceedings and her official association with the previous government. On his argument, the Prime Minister's pre-judgment remained operative at the dates of the suspension and removal decisions; she had effectively determined the Former Attorney's fate before hearing her explanations. These events are said to have shown bias and predetermination, and reflected a conflict of her interests between her role as decision maker and an active pursuer of the Former Attorney in the contempt proceedings. The Prime Minister should have delegated her decision making role to another member of cabinet

[82] It is unnecessary to address this submission given my findings that the three valid grounds for the Prime Minister's decision, whether separately or in conjunction, justified the Former Attorney's summary removal. I would add that the Prime Minister plainly had an adverse view of the Former

Attorney at the time she wrote the Suspension Letter. It may well have been affected by the Former Attorney's association with the previous government and by the Prime Minister's judgment on her conduct which was the subject of the FAST contempt proceedings. But I am not satisfied that it was the operative or an operative factor in her advice to suspend or dismiss. Those events had been well and truly overtaken by the three grounds on which I am satisfied the Prime Minister's decision was correct. And I do not accept Mr Harrison's submission that the Prime Minister should have delegated the decision making power to another cabinet minister; his or her state of knowledge of the Former Attorney's conduct would have been the same.

[83] Second, Mr Harrison submits that the Prime Minister acted unfairly in allowing the Former Attorney only six working days to respond to the Suspension Letter. The Former Attorney complained in her affidavit that she was denied an adequate opportunity to answer the serious claims made against her. In particular she protested that she was not allowed sufficient time to instruct and consult independent legal counsel, nor was she afforded access to voluminous litigation records which she needed to consider in time consuming detail. She asserted that she was denied the right to natural justice to be heard on the central claim of loss of trust and confidence and on each of the six stated grounds. Mr Harrison submits that there was no cause for urgency in seeking a response, or in removing the Former Attorney, a point he explored firmly with the Prime Minister in cross examination.

[84] I agree with Mr Keith that extensive analysis of documents was not required for the Former Attorney to give effective answers to the six stated grounds which were largely addressed to the Former Attorney's own conduct and its effect on the performance of her constitutional office. They were amenable to an immediate response from the Former Attorney's own state of recent knowledge. It is notable that her 30 August 2021 letter did not engage directly with specific grounds. Instead its primary direction was a challenge to the lawfulness of removal. The tone of her letter was combative. She made no attempt to mend fences or strike a conciliatory note with her new constitutional client or establish a framework for developing a relationship of trust and confidence with her.

[85] I appreciate that the Prime Minister was acting in accordance with professional advice in giving the Former Attorney an opportunity to respond to the six grounds for suspension. But I repeat that for the reasons given her immediate removal was justified.

[86] This challenge to the Prime Minister's decision fails.

Remaining Issues

[87] I have answered the first three primary issues[40] in the Prime Minister's favour – I have found that she had a power to advise removal of the Former Attorney which is necessarily implied by the Constitution; that the grounds on which the power were exercised were lawful; and that the Suspension Letter did not deny the Former Attorney natural justice. It is thus unnecessary to consider the three consequential issues which would have followed an adverse answer to one of the first three issues.

[88] It is appropriate to add this brief finding. In argument and cross examination Mr. Harrison sought to establish that the Prime Minister committed the conscious torts of misfeasance in public office or malicious abuse of power (he did not actively pursue an argument of a conspiracy with other cabinet members to injure the Former Attorney). His purpose was to lay the principled foundation for the Former Attorney's claim for various heads of damage which would have likely been unavailable if she had succeeded on her judicial review claim alone.

[89] I have reviewed all the relevant documents. I have also had the advantage of seeing and hearing the Prime Minister giving evidence under probing cross examination designed to establish that the true reason for her removal decision was essentially retaliatory. In Mr Harrison's submission the Prime Minister was motivated by her determination to remove the Former Attorney for the part she had played in the litigation and related events following the 2021 general election.

[90] I am not satisfied that the Prime Minister's decision was motivated by personal ill will or malice towards the Former Attorney. It was plain from her correspondence shortly after her own appointment that the Prime Minister was dissatisfied with the Former Attorney's non-performance of her essential constitutional functions. I have found that the Prime Minister's dissatisfaction was well justified and that her decision to advise removal was soundly based on three particular grounds. I am satisfied also that the process followed by the Prime Minister was fair and reasonable in the extraordinary circumstances then prevailing in Samoa; and that she was entitled to exercise her judgment in the public interest to act decisively when setting in train and acting upon the time limits for the Former Attorney's removal after sending the Suspension Letter on 20 August 2021.

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[40] See at [5] above.

Conclusion

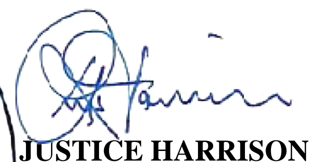
[91] I have been conscious when writing this judgment that the acute constitutional crisis which Samoa endured for those three months after the April 2021 general election would have been well beyond the Former Attorney's foresight or expectation when she accepted appointment to the office of Attorney General in July 2020. Nor was the Former Attorney ever likely to have foreseen that she would become a central figure in the events which unfolded. I acknowledge that her experience was most unlikely to have equipped her for carrying out the demands which the crisis placed upon the skill and resources of her office. Its magnitude was unprecedented in Samoa's post-independence history.

[92] I have allowed for that reality in accepting Mr Harrison's invitation to apply a stringent standard when reviewing the validity of the Prime Minister's removal decision. I have subjected it to careful scrutiny. In concluding that the decision was right or correct I have found that the Former Attorney failed to perform her core constitutional functions in a number of material respects. Her removal from office was justified as a result. The significant legal challenges which the Former Attorney faced throughout those three critical months were all capable of prompt and effective resolution in two elementary ways. The first was by applying well settled principles of law with the standard of skill, competence and independence expected of a senior lawyer in Samoa. The second was by displaying unquestioned respect for the authority of this Court and courtesy to its Judges, a requirement which was heightened by the level and ferocity of the attacks to which the judiciary was subjected. I am satisfied that the Former Attorney's serious failures in both respects coupled with her failure to discharge her constitutional duty to uphold the dignity of the judiciary and the rule of law showed her inability to maintain the necessary degree of professional independence and demonstrated her unsuitability to retain the office of Attorney General.

Result

[93] The Former Attorney's claims for both judicial review and damages are dismissed. Judgment is entered for the Prime Minister on both claims.

[94] The Former Attorney is ordered to pay the Prime Minister's costs in the sum of $5000 together with usual disbursements.



JUSTICE HARRISON