

15/05/18

IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 1 of 2018

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BETWEEN : LORD LUANI

Appellant

AND : LORD NUKU

First Respondent

YAN JIAN GROUP LIMITED

Second Respondent

YAN JIAN TONGA LIMITED

Third Respondent

Counsel: Mr S. Fonua for the appellant

Mr W.C. Edwards Snr SC for the third respondent

Hearing: On the papers

Date of Ruling: 15 May 2018.

RULING

The issue

- [1] This ruling is concerned only with the issue of costs following the withdrawal of an appeal.

The facts

- [2] On 4 January 2018, the appellant appealed from a decision of the Land Court of 24 November 2017 specifically in relation to the dismissal of the appellant's application for a charging order absolute

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over assets alleged to be owned by the second respondent but in the possession of the third respondent.

- [3] On 14 February 2018, the third respondent applied to strike out the appeal on the ground that it was being brought against an interlocutory order and the appellant had not obtained leave to appeal under s.10(1)(b) and (2) of the Court of Appeal Act.
- [4] The appellant took the position that leave to appeal was not required and filed an opposition to the strike out application on 8 February 2018.
- [5] On 23 March 2018, the second respondent was put into liquidation by the Supreme Court.
- [6] The strike out application was to be heard on 23 April 2018 but on 13 April 2018 the appellant's Counsel filed a memorandum which stated that as the second respondent had gone into liquidation proceedings against it were 'suspended' and the appeal was withdrawn.
- [7] I saw Counsel in chambers on 23 April 2018. Mr. Fonua confirmed that the appeal was withdrawn. Mr. Edwards advised that his client took no issue with the withdrawal of the appeal but was seeking costs.
- [8] As Mr. Fonua opposed any award of costs I made directions for the parties to file submissions on costs on the basis that I would deal with the matter on the papers.

The application

- [9] The third respondent seeks costs relating to both the appeal and its strike out application.

[10] Mr Edwards submits that the appeal was filed for a collateral purpose to provide the appellant with grounds to refuse repayment of money wrongly garnished from the bank account of the third respondent.

[11] He also submits that costs should follow the event in any case and that his client has been forced to incur costs for which it should be compensated.

[12] Attached to Mr. Edwards memorandum is a bill of costs setting out the amounts claimed.

The response

[13] The appellant opposes the application for costs and argues that each party should bear their own costs. Mr. Fonua advances two grounds in support of this submission.

[14] First, he argues that the appeal was discontinued as a matter of law and not because it was hopeless or had little prospect of success. This is because, he submits, s. 257(1)(c) Companies Act 'prohibits continuation of proceeding against the second respondent' when it was put into liquidation.

[15] Secondly, he argues that it is uncertain whether the appeal and/or the strike out application would have been successful. It is unjust, Mr. Fonua argues, to award costs against the appellant in those circumstances when there has been no decision on the merits.

Discussion

[16] The general law and starting point is that costs will follow the event of a proceeding. This approach dictates that an appellant who chooses to withdraw an appeal should, in the ordinary case, pay the

costs of the other party. The rationale is that the other party should not be out of pocket for defending an appeal which the appellant chooses not to proceed with.

- [17] This general approach is not inflexible and it must be recognised that an appellant might withdraw an appeal for many reasons. In some circumstances it may be appropriate for the Court to order costs to lie where they fall or, in rare cases, even order a respondent to pay the cost of a discontinuing appellant (see for instance Dal Pont '*Law of Costs*' at [14.48]-[14.55]).
- [18] Mr. Fonua's submission that the appeal was withdrawn by operation of law upon the second respondent going into liquidation is incorrect. Under section 257(1)(c) of the Companies Act the appellant was not able to continue with the appeal against the second respondent except with the permission of the liquidator or the Court. There is no evidence that the liquidator's view on the matter was ever sought and no application for the leave of the Court to continue with the appeal was ever made. There is nothing before me either to suggest that had the liquidator's permission or leave of the Court been sought it would not have been given.
- [19] Mr. Fonua's second submission, that it is uncertain whether the appeal would have been successful or not, is misconceived. The appellant has chosen to withdraw the appeal and the third respondent must be taken to have been vindicated in its opposition to the appeal and its application to strike out.
- [20] There is therefore nothing before me that displaces the general approach that costs should follow the event. The third respondent is entitled to its costs on both the appeal and strike out application.

[21] It is not necessary for me to consider Mr. Edwards' submission that the appeal was brought for a collateral purpose.

[22] As far as the quantum of the third respondent's costs is concerned, no objection has been taken to any specific items in the third respondent's bill of costs that is attached to Mr. Edwards' memorandum otherwise than on the grounds that I have rejected above. In those circumstances I can see no reason why I should not award the amounts claimed.

Result

[23] The appellant is to pay the third respondent's costs on the appeal and its application to strike out the appeal in the sum of \$1,428.

NUKU'ALOFA: 15 May 2018.



PRESIDENT