

IN THE COURT OF APPEAL OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

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AC 15 of 2018
[CV 48 of 2014]

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13/04/19

**BETWEEN: FRIENDLY ISLANDS SATELLITE TELECOMMUNICATIONS
LTD**

- **Appellant**

**AND: 1. PUBLIC SERVICE ASSOCIATION INCORPORATED
2. SAMIUELA 'AKILISI POHIVA
3. KINGDOM OF TONGA**

- **Respondents**

**Coram : Handley J
Blanchard J
Randerson J**

**Counsel : Mr. S. Stanton SC for the Appellant
Mrs. M. 'Amanaki for the first Respondent
Dr. R. Harrison QC SC for the second Respondent
Mr. 'A. Kefu SC for the third Respondent**

Date of Hearing: 9 April 2019

Date of Judgment: 17 April 2019

JUDGMENT OF THE COURT

- [1] On 17 August 2018 following a 7 day trial the Lord Chief Justice gave judgment in this action. On 5 September 2018 he made a formal declaration (par 1) that a payment of \$US24.45 million received by the Kingdom from the Peoples Republic of China on 4 September 2008 was a grant and accordingly was public money within the Public Finance Management Act (declaration 1). He declared (par 7) that a second payment of \$US25.45 million received by the Kingdom from the Peoples Republic of China on 9 June 2011 was a grant and therefore public money within that Act. He also made consequential declarations relating to the disbursement of the funds from the benefit of the appellant. He refused to grant coercive relief in respect of the monies received by the appellant from those grants.
- [2] The second defendant has appealed from this judgment and has applied for leave to adduce further evidence pursuant to Order 8 rule 1 (3) which relevantly provides:
- “The Court shall not receive further evidence on questions of fact ... without leave which shall only be granted on special grounds”
- [3] The further evidence comprises affidavits from Lord Matoto, Sunia Fili, ‘Aisake Eke and ‘Aholotu Palu.
- [4] Lord Matoto was the Minister for Finance in September 2008 who was appointed on behalf of the Kingdom to go to Beijing and sign the agreement with the Peoples Republic of China that provided for the two payments in question. This occurred on 14 July that year. At the same time another agreement between China Electronic System Engineering Company and the appellant was signed. Lord Matoto was not involved in the receipt or disbursement of the second payment. He had not been asked by the legal representatives for the Kingdom to give evidence at the trial.
- [5] Clearly the executives of the appellant involved in the negotiations for the agreement with the PRC were aware of the involvements of Lord Matoto.

- [6] Sunia Fili was the Minister for Finance at the time of the second payment. He had discussions with representatives of the appellant including Mrs Anna 'Ilaiu a Director and Mr Panuve its Managing Director. He arranged for the opening of a specifically designated account with the Reserve Bank to receive the second payment and copied the appellant with the correspondence. He later gave instructions to the Bank for the disbursement of the funds. Clearly his involvement was known to the relevant executives of the Appellant.
- [7] 'Aisake Eke was the Secretary of the Department of Finance at the time of the first payment reporting to the then Minister Lord Matoto. As such he was aware at the time of the agreement with the PRC and the receipt and disbursement of the funds from the first payment. He had been approached by the Acting Attorney General who was to appear for the Kingdom in the trial to give evidence. He told the Acting Attorney General that he was too busy, but said in his affidavit that if the Acting Attorney General had repeated his request he would have agreed. In the result he was not called by the Kingdom. He does not depose to any direct contact with the appellants' representatives, but his potential role as a witness would have been known to them.
- [8] The last affidavit was from 'Aholotu Palu who was head of the Budget Division of the Ministry of Finance in 2011 when the second payment was received. He was aware of the pending payment and its intended disbursement to the appellant. He deposed to discussions with Anna 'Ilaiu and Semisi Panuve representing the appellant.
- [9] The appellant also complains about the inadequate discovery of documents by the Kingdom, but it made no attempt to enforce further discovery before the trial or to obtain further documents by an appropriate subpoena at the trial.
- [10] The principles which guide the exercise of the Court's power to receive further evidence on questions of fact are not in doubt and were not challenged by counsel

for the appellant. They were summarised by Denning L.J in *Ladd v Marshall* [1954] 1 WLR 1488, 1491;

“To justify the reception of fresh evidence or a new trial three conditions must be fulfilled : first it must be shown that the evidence could not have been obtained with reasonable obiligence for use at the trial, secondly the evidence must be such that, if given, it would probably have an important influence on the result of the case though it need not be decisive, and thirdly the evidence must be such as was presumably to be believed, or in other words it must be apparently credible”.

- [11] The appellant’s difficulties center on the first requirement. The proposed evidence was not discovered for the first time after the trial. The role and involvement of the new witnesses was known to the appellant’s senior executives in 2008 and 2011, the witnesses were living in Tonga and available to be interviewed here, and it was known that the Kingdom did not intend to call them at the trial. There was no practical, legal or ethical impediment to them being approached by the legal representatives of the appellant to give evidence in the trial.
- [12] There is no property in a witness, even one who may be thought to be in the camp of another party, least of all in such a witness who is not to be called by the party which might have been expected to call him or her.
- [13] The new evidence could have been obtained by reasonable diligence for the trial.
- [14] The notice of motion of 16 October 2018 for leave to adduce fresh evidence is dismissed with costs. The money in Court as security for the second respondents’ costs may be paid out to the solicitor for the second respondent.



J R Handley
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Handley J
Peter Blanchard
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Blanchard J
A P Randerson
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Randerson J