IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION **AC 16 of 2012**

NUKU'ALOFA REGISTRY **[CV 70 of 2010]**

BETWEEN: **1. CHRISTINE 'UTA'ATU**
2. TONGA INVESTMENTS LIMITED
- Appellants

AND : **1. SANDRA NAUFAHU**
2. ZUVVA COMPANY LIMITED
- Respondents

Coram : **Salmon J**
Handley J
Blanchard J

Counsel : **Mr. S. V. Fa'otusia for the Appellants**
Mr. L. Niu SC for the Respondents

Date of hearing : **9 April 2013**

Date of judgment : **17 April 2013**

JUDGMENT OF THE COURT

[1] The Court has before it an appeal and cross appeal from the judgment of the Lord Chief Justice of 15 June 2012 and his order for costs of 14 September 2012. His findings of fact in the action were not challenged in any way.

[2] The proceedings arose out of the removal by Mr. Peni Vea of part of a disused pipeline owned by the second plaintiff at Vuna Road Touliki, Ma'ufanga in August 2007. This was done, as the Lord Chief Justice found, with the permission of the first defendant, who was the Chief Executive Officer of the second defendant which had sold the pipeline to the second plaintiff in 1999 for TOP$5000.

[3] The issues at the trial centered on the second plaintiff's claim that part of the pipeline had been removed with the permission of the defendants; that it was a diesel pipeline, and not the disused coconut oil pipeline, and the second plaintiff had suffered damage of TOP$872,000 including TOP$132,000 paid to acquire the pipeline.

[4] The issue of authority was resolved in favour of the plaintiffs, but the Lord Chief Justice found that the damaged pipeline was the disused coconut oil pipeline, that the damage to that pipeline was worth TOP$300, and not TOP$132,000 and the second plaintiff had not suffered any consequential loss.

[5] He entered judgment for the plaintiffs for TOP$300 against the first defendant, appears, by necessary implication, to have given judgment for the second defendant, and reserved costs.

[6] On 14 September 2012 after further argument the Lord Chief Justice ordered the first defendant to pay the plaintiffs' costs of the action and of the application for costs.

[7] The defendants appealed challenging the judgment for the plaintiffs on liability on the ground that their only claim was for the damage to a diesel pipeline, and there was no claim for damage to the disused coconut oil pipeline. In their submission, the Lord Chief Justice, having

found that the diesel pipeline had disappeared before August 2007, should have dismissed the action. We will refer to this as the pleading point. It is not clear why the second defendant appealed, or that it had the standing to do so.

[8] The defendants also challenged the Judge's order for costs. The Lord Chief Justice held that the plaintiffs had succeeded in the action, and there was no reason for displacing the usual rule that costs should follow the event.

[9] The defendants' appeal provoked a cross appeal by the plaintiffs who sought judgment for TOP$300 and costs against the second defendant.

[10] Mr. Niu for the appellants took the Court through the plaintiffs' statement of claim and established that their only claim was for damage to the diesel pipeline, and there was no claim for the damage to the disused coconut oil pipeline, although it was mentioned. The defendants' case throughout was that it was the coconut oil pipeline that had been damaged.

[11] The plaintiffs did not seek leave to amend, and the Lord Chief Justice did not act to direct an amendment. However the parties litigated the question whether the diesel or coconut oil pipeline had been damaged.

[12] The position in such a case in Tonga, and elsewhere in the common law world, is that the Court is entitled, and indeed bound to give judgment on the issues litigated. In *Prasad v Morris Hedstrom (Tonga) Ltd (No. 2)* [1993] Tonga LR 69, 73 the Court of Appeal said:

> "...if despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings."

[13] This decision was applied by Ford J in *Fa'aoa v Tonga Development Bank* [2002] Tonga LR 317,327. We have no hesitation in following these decisions, and we reject the pleading point.

[14] The Lord Chief Justice gave judgment for TOP$300, not only in favour of the corporate plaintiff which was the legal owner of the coconut oil pipeline, but also in favour of the first plaintiff who sued as its managing director and shareholder. There was no appeal against the

judgment in favour of the first plaintiff but although nothing really turns on it, it should not be allowed to stand.

[15] A shareholder, even a sole shareholder, has no proprietary interest in the assets of a company, nor does its managing director. Since the first plaintiff had no proprietary interest in the pipeline she did not suffer a direct or personal loss when the pipeline was damaged.

[16] Any loss she suffered was purely economic, and was a derivative or reflective loss as a result of her shares being reduced in value by the company's loss. This derivative loss did not give the first plaintiff a cause of action against the defendants: *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No.2)* [1982] Ch 204,223-4 CA, *Johnson v Gore Wood & Co.* [2002] 2 AC 1.

[17] The judgment in favour of the first plaintiff must be set aside.

[18] We deal next with the plaintiffs' cross appeal. The Lord Chief Justice gave judgment for the plaintiffs for TOP$300 against the chief executive officer of the second defendant whose acts and omissions gave rise to the tort. In fact she was the only one implicated on behalf of the second defendant.

[19] The liability of a servant or agent who commits a tort in the course of his or her employment does not exclude vicarious liability on the part of his or her employer; indeed it attracts it: *Wah Tat Bank Ltd v Chan* [1975] AC 507, 514-5; *Standard Chartered Bank Ltd v Pakistan National Shipping Corporation* [2003] 1 AC 959. The first and second defendants were joint tortfeasors.

[20] The cross appeal therefore succeeds and judgment for TOP$300 will be entered against the second defendant.

[21] The remaining issue, the appeal against the costs orders made by the Lord Chief Justice on 14 September 2012, arises on the defendants' appeal. Mr. Niu supported his application for costs before the Lord Chief Justice by submitting that the plaintiffs' claim for damage to its diesel pipeline was made "most unjustifiably" and "even fraudulently", and that no claim had been made for damage to the coconut oil pipeline. Mr. Fa'otusia for the plaintiffs submitted that negligence had been found and damages awarded and costs should follow the event.

[22] The Lord Chief Justice held, in the absence of relevant local rules, that Order 2 rule 3 of the *Supreme Court Rules* (Tonga) applied the English rule in RSC Order 62 r(3) which directed the Court to order the costs "to follow the event except where it appears to the Court that in the circumstances of the case some other order should be made."

[23] He referred to the judgment of Nourse LJ in *Re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207 who said:

> "...a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs."

[24] The Lord Chief Justice held that the plaintiffs' claim for damage to the diesel pipeline had not been raised "improperly or unreasonably", or as Mr. Niu had submitted "most unjustifiably or even fraudulently".

[25] He accepted Mr. Fa'otusia's submission that "the central issue in the case" was whether the defendants' negligence had led to *a* pipeline owned by the plaintiffs being interfered with, and that this issue had been resolved in favour of the plaintiffs. He concluded that the usual rule that costs follow the event had not been displaced.

[26] The decision on costs is troubling because the defendants went to Court to defend a claim for TOP$872,000 which they successfully resisted save for TOP$300. The plaintiffs recovered .003% of their original claim, and the defendants succeeded in having 99.997% of the claim rejected. It is not self-evident that the relevant "event" was the judgment for TOP$300.

[27] Moreover the plaintiffs' case that their diesel pipeline had been damaged failed completely. Their limited success for damage to the coconut oil pipeline was based on a claim that had not been pleaded and reflected the defendants' assertion that this was the relevant pipeline.

[28] If the pleading point had been taken at the trial and the plaintiffs had obtained leave to amend, this may have been on terms as to costs which reflected the failure of the case originally pleaded.

[29] Another relevant consideration which could not have been drawn to the attention of the Lord Chief Justice, is that a claim for TOP$300 was within the civil jurisdiction of the Magistrates' Court where a reduced scale of costs applies. In *Knab v Hoeller* [2001] Tonga LR 83 which Mr. Niu supplied to the Court, by leave, after judgment had been reserved, Ward CJ said at p.85:

> "Where the plaintiff succeeds but is only awarded a substantially smaller sum than that claimed, it is unconscionable that the losing party should have to pay the costs unnecessarily incurred. In any case where the award is such that it would have fallen within the jurisdiction of a lower court the winning party's costs should be limited to the scale appropriate in that Court. This case could have been brought in the Senior Magistrate's Court."

[30] Practice Direction 5/2004 Taxation of Costs, which the Registrar helpfully made available to us, provides in para.3 that costs in the Magistrate's Courts are to be allowed at half the Supreme Court rate.

[31] The finding that the plaintiffs' claim for damage to the diesel pipeline was "neither improperly nor unreasonably" raised was not challenged. However the statement of principle by Nourse LJ quoted above included "making allegations on which he fails", and this limb appears to have been overlooked.

[32] It is beyond dispute that the plaintiffs made allegations on which they failed, allegations that the diesel pipeline was damaged, that this was a valuable pipeline and they had suffered substantial consequential losses.

[33] There was more than one central issue in the trial. Mr. Fa'otusia's submission that the "central issue" was whether the first defendant's negligence led to the Plaintiffs' suffering damage caused by "interference to a pipeline owned by them" was a considerable understatement.

[34] In his reasons for judgment in the action the Lord Chief Justice [10] identified 4 questions: which pipeline was cut, was it cut after Peni Vea was authorized to do so by the first Defendant, what

was the value of the pipeline that was cut, and did this result in consequential loss. The first question described by the Lord Chief Justice, as "crucial to the Plaintiffs' case" [18], was considered by him in paras [11] - [20], the second in paras [21] – [26], and the others in paras [27] – [31].

[35] The second question was resolved in favour of the plaintiffs, the first and fourth in favour of the defendants, and the third substantially so.

[36] What then was "the event" in this action? Cases cited in Halsbury provide helpful guidance. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 the plaintiff sued for £2028 damages for breach of contract alleging that the goods were worthless. It succeeded in receiving rectification costs of £52 following an amendment.

[37] Devlin J referred to the general rule that a successful plaintiff should not be deprived of his costs and continued at p.874:

> "In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful"

[38] Devlin J considered the effect of the plaintiff's limited recovery and the amendment and continued at p.875:

> "If their original pleading had contained the amended claim, while I do not suppose that I could have given [the plaintiff] the costs of the action since they recovered only £52 when their main claim was for a much larger sum, I do not think that it would have been right to order them to pay all the costs of the defendants...In this case, if the plaintiffs, in their statement of claim, had claimed as damages only the amount which they have recovered their claim would, I imagine, have been met either by a settlement of the action or by a payment into Court, as it was on the evidence of the defendants that the claim for £52 was ultimately made out and proved."

[39] In *Dering v Uris* [1964] 2 QB 669 a libel case where the jury returned a verdict for one halfpenny against the defendant author,

but the costs position was complicated by the position of the other defendants, Lawton J said at p.672:

> "I am now presented with a difficult problem, to make the order on the jury's verdict. In the ordinary way the problem would have been a simple one...Had there not been complications...I should have felt bound to enter judgment for the plaintiff and to make no order as to costs"

[40] In that case the effect of the jury's verdict was that the plaintiff proved that he had been defamed, and that the defence of justification failed, but he did not establish that there had been a significant injury to his reputation. In other words both parties had enjoyed a measure of success, but since the defendant had not paid into Court there would have been no order as to costs. If the defendant had paid into Court he would have been entitled to the costs of the trial.

[41] In our judgment, for the reasons expressed, the orders for costs in this case resulted from an erroneous exercise of discretion and this Court must intervene and re-exercise the discretion.

[42] The defendants did not pay into Court, the plaintiffs recovered more than nominal damages, and they succeeded in one of the major issues at the trial but they failed in substance. In these circumstances we will substitute orders that there be no order as to the costs of the trial and the application for costs before the Lord Chief Justice, but the defendants, the appellants in this Court, will have their costs of the appeal.

[43] The following orders are made:

(1) Appeal allowed with costs;

(2) Orders for costs made on 14 September 2012 set aside;

(3) Substitute an order that there be no order as to the costs of the trial, or of the application for costs;

(4) Judgment for the first plaintiff set aside, and substitute judgment for the defendants on her claim;

(5) Cross appeal allowed without costs;

(6) Judgment for the second defendant set aside, and substitute judgment for the second plaintiff against the second defendant.

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Salmon J

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Handley J

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Blanchard J