

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

**AC 3 of 2012
[CV 118 of 2011]**

BETWEEN: DANDIN GROUP LTD

Appellant

AND : MINISTRY OF POLICE

First Respondent

KINGDOM OF TONGA

Second Respondent

**Coram : Salmon J
Moore J
Handley J**

**Counsel : Mr. Pouono for the Appellant
Mr. Kefu (Soljicator General) for the
Respondent**

Date of hearing : 8 October 2012

Date of judgment : 12 October 2012

JUDGMENT OF THE COURT

- [1] This is an appeal by the Plaintiff from the decision of the primary judge on 24 February 2012 when he held that the Plaintiff's case disclosed no reasonable cause of action and should be struck out under Order 8 r 8(1) (a) and (b) of the *Supreme Court Rules*.
- [2] The statement of claim which was issued on 16 November 2011 sought damages of \$700,000 for the loss of the Plaintiff's trading stock and business during and as a result of the riots in Nuku'alofa on 16 November 2006 when Tungi Arcade was burnt down.
- [3] The statement of claim alleged (para 3) that the first defendant, the Ministry of Police, had a statutory duty to maintain law and order at all times throughout Tonga and that the second defendant, the Kingdom of Tonga, is vicariously liable for any civil wrongs committed by the first defendant (para 4).
- [4] The statutory duty was alleged to arise under clause 18 of the Constitution (para 6) and section 6 of the *Police Act*.
- [5] Clause 18 of the *Constitution* provides:

"All the people have the right to expect that the Government will protect their life, liberty and property and therefore it is right for all the people to support and contribute to the Government according to law. And if at any time there should be a war in the land and the Government should take the property of anyone, the Government shall pay the fair value of such property to the owner. And if the Legislature shall resolve to take from any person or persons their premises or part of their premises or their houses for the purpose of making Government roads or other work of

benefit to the Government, the Government shall pay the fair value."

- [6] Section 6 of the *Police Act*, as in force in 2006, provided, so far as relevant;

"The Force shall be employed in and throughout the Kingdom for the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged.."

- [7] The statement of claim alleged (para 8) that the *Police Act* "strengthens" the defendants' duties under clause 18 of the Constitution.

- [8] It further alleged (para 9) that on 16 November 2006 when Tungi Arcade was burnt down "the defendant (sic) did fail to perform its constitutional and lawful obligations set out" in clause 18 of the Constitution and section 6 of the *Police Act*, and "the defendant is in breach of those obligations."

- [9] The particulars to para 9 alleged (sub-para (c)) that the Police Force was not able to maintain law and order on the afternoon of 16 November 2006 and as a result, Tungi Arcade was burnt down and (sub-para (d)) this was a breach of clause 18 of the Constitution.

- [10] Thus the statement of claim relied on clause 18 of the Constitution and section 6 of the *Police Act* as the source of absolute statutory duties which on breach imposed liabilities on the Ministry and the Kingdom to compensate persons or companies which suffered loss during a breakdown in law and order.

[11] On 4 January 2012 the defendants applied for an order that the Plaintiff's action be dismissed because it disclosed no reasonable cause of action and was vexatious.

[12] The judge held [8] that the first sentence in clause 18 of the Constitution "is...aspirational", recognizing the primary responsibility of a Government. He continued:

"It does not however...impose a strict liability upon Government to protect all life, all liberty and all property in each and every circumstance. It would be wholly unreasonable to expect Government to compensate all those who have lost their lives, liberty or property in any and all circumstances...To suggest that clause 18 gives each victim the right to be indemnified, to my mind, makes no sense."

[13] The judge noted (para 5) that there was no allegation that the police were negligent in the performance of their duties.

[14] The opening sentence of clause 18 of the Constitution is in the nature of a recital (a "whereas" clause) which explains why the people should support and contribute to the Government according to law. It states that the people have "the right to expect" the Government to protect their life, liberty and property. In terms the sentence creates no more than "a right to expect", but an expectation is not a legal right enforceable by an action for damages.

[15] Clause 18 may arguably create legally enforceable rights in citizens if the Government takes property in time of war or land or houses are taken for public works. In those cases the clause may arguably impose on the Government a legally enforceable duty to

pay the fair value of the property taken. However in those cases the clause provides that "the Government shall pay".

[16] There is no such language in the earlier part of the section. It does not impose any duty on the Government to pay for property which it does not acquire that is lost or damaged during a breakdown of law and order.

[17] Section 6 of the *Police Act* defines the functions of the Police Force. It does not create legally enforceable statutory duties co-extensive with those functions. Its language is quite inadequate for that purpose.

[18] In our opinion the judge was clearly correct and the appeal must be dismissed.

[19] Having ruled that the statement of claim did not disclose a reasonable cause of action and should be struck out, the judge made this order and dismissed the action under the powers conferred by Order 8 r8 (1). The Plaintiff had not sought leave to amend during the hearing and did not seek such leave on 24 February 2012 after the judge published his reasons for judgment.

[20] The Plaintiff's notice of appeal filed on 4 March 2012 did not allege that leave to amend had been wrongly refused or seek leave to amend. That claim was first made on 9 March. However it was then too late as the action had been dismissed on 24 February.

[21] The appeal is dismissed with costs.

R. D. Salmon

Salmon J



J. Moore

Moore J

K. R. Handley

Handley J