

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

AM 8 of 2014

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BETWEEN: TAXPAYER A

- Appellant

AND MINISTER OF REVENUE

- Respondent

Counsel Mrs. P. Tupou for the appellant/applicant

Mr. M. O'Shannassy for the respondent

Hearing On the papers

RULING

[1] Taxpayer A was successful in an appeal from a decision of the Tax Tribunal. The appeal was heard by Chief Justice Scott who issued his ruling on 19 September 2014. He called for submissions as to costs and on 5 November 2014 he awarded the appellant costs to be taxed if not agreed. The costs were taxed by the Registrar who

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issued a decision on 8 April 2015. From that decision Taxpayer A has filed the following:

- [1.1] An application to extend time under Order 5 Rule 1 Supreme Court Rules for applying for an order to recover costs at a higher rate than provided for under the relevant Practice Direction; and
- [1.2] An appeal from the Registrar's refusal to award costs for legal research, the higher rate of overseas Counsel and flight costs.
- [2] When the matter came before me on 15 May 2015 Counsel agreed that I should deal with the application to extend time on the basis of written legal submissions without a hearing. The case is to be called again for mention on 12 June 2015 to set the date for the hearing of the appeal.
- [3] This ruling deals only with the application to extend time.

Order 47 Rule 5 Supreme Court Rules

[4] The Registrar would not certify for the higher rate claimed for overseas Counsel because of Order 47 Rule 5 which provides:

- (1) Any party seeking to recover costs at a higher rate than those provided for in the relevant practice direction shall make application to a Judge to have the higher rate certified for.
- (2) Application for certification under this rule may be made orally at a directions hearing or informally by letter to the Registrar.
- (3) In the absence of exceptional circumstances, application under this rule must be made prior to the hearing in respect of which the costs are to be incurred.
- (4) Additional costs may be certified as appropriate under paragraph (1) upon special cause being shown.

[5] There is no dispute that Taxpayer A did not make application to a Judge to recover costs at a higher rate prior to the hearing or when objection was raised before the Registrar on taxation.

[6] The appellant accepts that such an application ought to have been made in advance of the hearing and that it is not open to it to argue exceptional circumstances for delay in making application until after the hearing.¹ For that reason it applies for an extension of time under Order 5 Rule 1 to have the rate of overseas counsel certified for.

The application of Order 5 Rule 1

[7] The reliance upon Order 5 Rule 1 is misconceived. That rule gives the Court a wide discretion to extend a period of 'time' within which some act must be done under the Rules. It does not apply where the Rules require that some act must be done before another. Re Pilcher² and Saunders v Pawley.³

[8] In the absence of exceptional circumstances Order 47 Rule 5 (3) requires an application for higher costs to be made to a Judge prior to the hearing. There is no 'time' appointed by the Rule within which a party is "required to or authorised to do any act". Order 47 Rule 5

¹ Paragraph 22 of appellant's notice of appeal dated 22 April 2015.

² (1879) 11 Ch.D. 905.

³ (1885) 14 Q.B.D. 234.

provides a right to apply for certification of higher costs but the right exists only because of the Rule and must be limited by its terms.

- [9] In support of this view, I note that Order 47 Rule 5 has at least two objects. First, to ensure that costs awards are limited to what is reasonable and sensible for Tongan conditions and, secondly, to ensure that parties to litigation are forewarned as soon as it is apparent that costs are to be claimed at a higher than normal rate (which is an important factor against which parties assess their risk). Contrary to what appears to be the appellant's position, I consider that the exceptional circumstances referred to in Order 47 Rule 5 (3) might arise before or at/after the hearing. In the former case, the exceptional circumstances might have caused the failure to apply to a Judge. In the latter case, something totally unforeseen might have arisen at the hearing which resulted in the successful party incurring costs for which recovery at a higher than normal rate is appropriate. A general right to apply for an extension of time under Order 5 Rule 1 is inconsistent with the second of the objects of Order 47 Rule 5 and would render the requirement to prove exceptional circumstances under Order 47 Rule 5 (3) redundant.

[10] Even if I had considered that the Court had the power under Order 5 Rule 1 to extend time I would not have done so in this case despite all that has been said in the appellant's submissions. The appellant could have applied to a Judge to have a higher rate certified for at any time up to the issue of the Registrar's decision. No such application was made despite the appellant knowing of the respondent's objection to its application to recover costs at a higher rate and four months elapsing between the first taxation hearing and the Registrar's decision.

[11] The Registrar exercises a quasi-judicial function when taxing costs and his decisions are subject to appeal. Having failed to apply to a Judge under Order 47 Rule 5 (3), despite having plenty of opportunity to do so, the appellant is limited, in my view, to its right of appeal.

Result

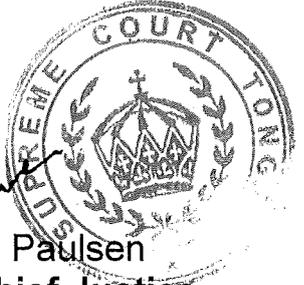
[12] The application for an extension of time is dismissed.

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[13] The respondent is entitled to its costs which are to be taxed if not agreed.

NUKU'ALOFA: 9 June 2015



Owen Paulsen
Lord Chief Justice

The seal of the Supreme Court of Tonga is circular, featuring a central crown emblem surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal. A signature is written across the seal.