Soliator General
Scan + Upload +
File R 21/10/20.

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

AM 21 of 2020

BETWEEN:

VILIAMI LATU Appellant
(formerly TA'AI SIALE FINANCE and MAKALITA SIALE)

-and-

[1] MAGISTRATES COURT OF TONGA
[2] SELA MAFILE'O Respondents

JUDGMENT

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
Appearances:	Mr V. Latu, the Appellant
	Ms A. Kafoa for the Second Respondent
Date of hearing:	27 August 2020
Date for further submissions:	18 September 2020
Date of judgment:	13 October 2020

INTRODUCTION

1. This appeal concerns a costs order against a lawyer personally. It raises important issues of practice and procedure for the legal profession and the costs jurisdiction of the Magistrates Court. It also serves as a salient admonition against the inherent risks for law practitioners who fail to attend a listed hearing because they accepted one or more briefs in another court on the same day.

BACKGROUND

2. The appellant, Mr Latu, is an enrolled law practitioner. In Magistrates Court proceedings CV 24 of 2020, Mr Latu acts (or acted) for Ta'ai Siale Finance and Makalita Siale who are (or were) the defendants in that proceeding.

20 OCT 2020

3. On 17 July 2020, Mr Latu failed to appear before the Magistrates Court for the hearing of the case because he was detained on two other matters before the Supreme Court which were not completed until approximately 2:30 PM that day. By the time he returned to the Magistrates Court, his matter there had been adjourned and Senior Magistrate Pahulu-Kuli had ordered that Mr Latu pay the Plaintiff $400 in costs thrown away by reason of the adjournment.

4. Mr Latu appeals that decision.

5. The original Notice of Appeal named the appellants as his clients below. They were not proper parties to the appeal. On 27 August 2020, directions were made to correct the names of the parties as shown in the title hereof. The Second Respondent is the plaintiff below.

6. On that date, Mr Latu also indicated that he did not wish to rely on any affidavit material or other submissions save for those he filed on 14 August 2020. They were directed to stand as his effective affidavit in support of the appeal in respect of factual matters.

7. Ms Kafoa indicated that her client did not oppose the appeal.

8. Directions were also made for a translation of the proceedings and decision below, for any further submissions to be filed by 18 September 2020 and that absent any request for a further oral hearing, the appeal would be decided on the papers.

9. No further submissions were filed nor did any party request a further oral hearing.

The decision below

10. The translation of the proceedings below records the following. The case had been adjourned in the last week of June 2020 by Magistrate Tuita to be called for hearing on 17 July 2020. The reason for that adjournment was not stated in the material on this appeal.

11. When the matter was called on 17 July 2020 (the time was not recorded), the Defendants appeared. However, their lawyer, Mr Latu. did not. Senior Magistrate

Pahulu-Kuli asked them about his whereabouts. They said that Mr Latu was at the Supreme Court but that he had asked the Magistrates Court clerk to "vacate the case to be called in the evening hours". The Magistrate noted that Mr Latu had not informed the Court or requested an adjournment. Ms Kafoa, who appeared that day for the plaintiff, said that she had not been informed by Mr Latu that he had requested the case to be called later that day. At that point, the Magistrate stood the matter down for 30 minutes for the Defendants to contact Mr Latu.

12. When the matter resumed, the Defendants told the Magistrate that they had tried to call Mr Latu but that he had not answered his phone. The Magistrate then asked Ms Kafoa what her attitude was to a further adjournment. Ms Kafoa did not oppose the matter being adjourned but asked for $300 in costs thrown away for the time taken to "prepare (the Plaintiff's) case" for that day.

13. In her decision, Senior Magistrate Pahulu-Kuli noted that Mr Latu had appeared in her court the day before but had not then mentioned that he required the subject proceeding to be deferred the next day to the 'evening hours' so that he could attend other matters in the Supreme Court. Nor had he requested an adjournment on the day in question nor contacted his opponent about the matter. Her Worship then recorded that:

> *"The clerk advised me that the defence counsel informed her that the matter be adjourned to the evening hours, however the clerk was busy with all the matters that were to be called that day that she forgot to inform me. She thought that counsel would inform me and as she went to the counter to check whether counsel was there, he had already left. The court has other matters to work on this evening."*

14. In response to Ms Kafoa's application for costs thrown away by reason of the adjournment of $300, the Senior Magistrate decided to award $400, to be paid by Mr Latu, (apparently) because there was "*no reasonable confirmation to the court that the matter was requested for an adjournment*".

GROUND OF APPEAL

15. The ground of appeal relied upon by Mr Latu in his Notice of Appeal dated 27 July 2020, and repeated in his submissions filed on 14 August 2020, is that the

learned Magistrate's decision was "wrong in law and fact" because she made it without affording him an "opportunity to be heard before he was fined".

16. The balance of both documents (referred to as 'Particulars' in the Notice of Appeal and 'Grounds for Appeal' in the submissions) set out an account of Mr Latu's version of what occurred on the day in question and the reason he failed to appear before the Magistrates Court when his matter for hearing there was called on. As noted above, I have treated that account as Mr Latu's evidence for the purpose of this appeal. No objection was taken by the Second Respondent to that course.

17. In short, Mr Latu said that he failed to appear because he was detained in the Supreme Court on two other cases there before me. The business of the court that day was such that the Court sat through the usual luncheon adjournment so that the hearing of all matters was concluded by approximately 2:30 pm.

18. Mr Latu stated that at about 9 am that day, he saw the Magistrates Court clerk and requested that Senior Magistrate Pahulu-Kuli be informed that he was to appear before the Supreme Court that morning, that he therefore may be late and so he asked whether his matter could be adjourned to the afternoon. He said that the clerk advised him that she would convey his explanation and request to the Magistrate.

19. He then added that:

> *"Advising the court clerk is for [sic] adjournment or late arrival of counsels due to other commitments at the higher courts is normal."*

20. By the time he enquired about his matter back in the Magistrates Court, he was advised that it had been adjourned and that he had been "fined'. Mr Latu described the 'clash' of hearings in his various matters between the two courts as "unfortunate" but "not an intentional neglect to prepare and appear before the learned Magistrate".

CONSIDERATION

21. The court was not referred to, nor have my researches unearthed, any published decisions in Tonga concerning orders for costs against lawyers personally.

22. This appeal is against an exercise of discretion and an asserted failure to afford natural justice. However, the appeal assumes that the Magistrate had jurisdiction to make the order. In her decision, the Magistrate did not specify the source of her power to make the order against Mr Latu.

23. As the making of such orders appears to be relatively new, novel and/or rare for the Kingdom, especially for the Magistrates Court, it is appropriate to consider the question of jurisdiction as an antecedent (and foundational) issue to the ground relied upon by Mr Latu.

24. Accordingly, this appeal presents the following issues for determination:

    (a) did the Senior Magistrate have power to order costs against Mr Latu personally;

    (b) if she did, was Mr Latu entitled to a reasonable opportunity to be heard before any decision was made;

    (c) if so, was he heard before the decision was made;

    (d) was the making of the order a proper exercise of discretion in the circumstances; and

    (e) was the quantum of the costs ordered fair and reasonable for costs thrown away by reason of the adjournment.

Does the Magistrates Court have power to order costs against a lawyer personally?

25. At common law, courts had no jurisdiction to award costs. Absent a statutory power, a Court has no power to award costs.[1] Whilst courts of equity always maintained the power to award costs, reflecting their flexible and discretionary

[1] *Byrnes v Barry* [2004] ACTCA 24 at para 60 per French J.

jurisdiction, the common law courts were obliged to go back to a legislative enactment in order to arrive at their power (if any) of dealing with costs.[2] The statutory jurisdiction in England has evolved gradually.[3] It was regarded as necessary in order to avoid injustice.[4] In modern times, the statutory language typically confers on the court a broad discretion to award costs, rather than declares that costs automatically follow the event:[5] *Oshlack v Richmond River Council* (1998) 193 CLR 83, 95.

26. A jurisdiction to order a lawyer to pay the cost of mismanagement recognises the reality that they, rather than the client, are responsible for conducting litigation. Negligent performance has long been a ground for ordering costs against a solicitor: *Myers v Elman* [1940] AC 282.

27. The sources for a court's power to make a costs order against a lawyer, who is acting for a party in a proceeding before a court, personally, are to be found in the statutory provisions which establish and define the court's jurisdiction; and/or, in the case of superior courts of record, their inherent jurisdiction.

Statute

28. In the United Kingdom, Canada and Australia, the superior (or senior) courts are statutorily imbued with broad discretion on questions of costs. In the ordinary course, and subject to the terms of the relevant provisions concerning the court's power to determine costs, the subjects of such power are usually confined to the parties to proceedings. However, for more than twenty years, specific statutory provisions have expressly conferred power on certain courts in those jurisdictions to make costs orders against non-parties, including lawyers in respect of costs thrown away or 'wasted costs' resulting from misconduct. [6]

---

[2] *Garnett v Bradley* (1878) 3 App Cas 944,953-954 per Lord Hatherley.
[3] Holdsworth, *A History of English Law*, 3rd ed (1945), vol IV, 536-537
[4] First Report of the Judicature Commissioners, (1868-69) [4130] vol 25 at 15 in IUP Series of British Parliamentary Papers, vol 13 at 23.
[5] The origin of the broad statutory discretion is O 55 of the Rules of Court in the First Schedule to the *Supreme Court of Judicature Act* (UK) which commenced with the familiar words: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court".
[6] **United Kingdom**: s.51(6) of the *Supreme Court Act* (or now, the *Senior Courts Act*), rule 44.11 of the Civil Procedure Rules and Practice Direction 46.
Canada: (AB) Rules of Court, Alta Reg. 124/2010, ss. 10.18(4). 10.41(4); (BC) Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 14-1(33), 14-1(35); (MB) Court of Queen's Bench Rules, Man. Reg. 553/88, r. 57.07(1); (NB) Rules of Court, N.B. Reg. 82-73, r. 59.13; (NS) Nova Scotia Civil Procedure Rules, Royal Gaz. Nov. 19, 2008, r. 77.12(2); (ON)

29. The so-called 'inferior' courts, such as the Magistrates Court, are creatures of statute. In the UK and within parts of Australia, legislation confers jurisdiction on those Magistrates Courts (or their hierarchical equivalent) to make costs orders against lawyers.[7]

30. The common themes running through the majority of those statutory provisions include that:

    (a) the relevant court may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be incurred by a party or another person or to be thrown away because of undue delay, negligence, improper conduct or other misconduct or default; and

    (b) before making an order, the court must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard.

31. New Zealand does not have legislation which expressly confers power on any of its courts to make orders for costs against lawyers.

Tongan Magistrates Court legislation

32. Clause 103 of the Tongan Constitution provides:

> **103 Powers of Magistrates**

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 57.07; (QC) *Professional Code*, CQLR, c.-26, s. 88(3); (PE) Rules of Civil Procedure, r. 57.06; (SK) Queen's Bench Rules, Sask. Gaz. December 27, 2013, 2684, r. 11-24 (NU) Legal Services Regulation, R.S.N.W.T. (Nu.) 1988 ,c. L-4, s. 38; (YT) Rules of Court, Y.O.I.C. 2009/65, Part 2, r. 60(36).
Australia: Australia: (CTH) High Court Rules 2004 r 50.05.2; (CTH) Federal Court of Australia Act 1976 s 43(3)(f); (CTH) Federal Court Rules 2011 r 40.07; (ACT) Court Procedures Rules 2006 r 1753; (NT) Supreme Court Rules r 63.21; (NSW) Civil Procedure Act 2005 s 99; (QLD) Uniform Civil Procedure Rules 1999 r 690; (SA) Supreme Court Civil Rules 2006 r 13(2); (TAS) Supreme Court Rules 2000 r 61; (VIC) Supreme Court (General Civil Procedure) Rules 2015 r 63.23; (WA) Rules of the Supreme Court 1971 O 66 r 5.

[7] **United Kingdom**: ss 64 and 145A of the Magistrates' Courts Act 1980; Magistrates' Courts (Costs Against Legal Representatives in Civil Proceedings) Rules 1991. In the criminal jurisdiction, see also ss 111 and 112 of the Prosecution of Offences Act 1985.
Australia: See e.g. s.79 of the *Federal Circuit Court of Australia Act* 1999 and Rule 21.07 of the *Federal Circuit Court Rules* 2001; s.132 of the Victorian *Magistrates Court Act* (Vic) 1989; s.25 of the Western Australian *Magistrates Court (Civil Proceedings) Act* 2004. In Queensland, the *Magistrates Court Act* does not provide for costs orders against lawyers, although regulation 690 of the Uniform Civil Procedure Rules 1999, which apply to the Magistrates Court, permits an order for a lawyer to reimburse any costs to be paid by the client party as a result of the lawyer's delay or neglect.

> The Legislature shall determine the time and place for holding the Courts and shall limit the powers of the magistrates in criminal and civil matters and shall determine what cases shall be committed for trial to the Supreme Court.

33. The powers of Magistrates were first enacted in 1919. In its original form, apart from some specific proceedings[8] and the limited discretion to award costs only to successful parties in civil proceedings,[9] the *Magistrates Court Act* did not provide any general jurisdiction in respect of costs.

34. In *Pohiva v Nuku'alofa Magistrates Court* [2015] TOSC 22, Paulsen LCJ considered an appeal against a decision by a Magistrate to order costs of an unsuccessful private prosecution. The Magistrate's ruling did not specifically identify the source of his purported power to award those costs. None of the provisions of the Act concerning the court's general jurisdiction or its criminal jurisdiction and conduct of preliminary enquiries contained any express power to award costs. The then Chief Justice accepted, as a matter of common sense and statutory construction,[10] that the specific conferral of power to award costs in other parts of the Act led to a proper inference that such power had by implication been excluded in the court's preliminary inquiry jurisdiction. His Honour also found that the implication of a costs power was not necessary nor did the interests of justice require such power for a Magistrate to effectively exercise his/her preliminary inquiry jurisdiction.

35. In 2016, in a seeming response to the shortcomings identified by Paulsen LCJ in the *Pohiva* decision, Parliament amended the *Magistrates Court Act* by inserting at the end of s.8 of the primary Act the following additional limb to the Magistrates' general powers and jurisdiction.[11]

> "(n) to award costs in the appropriate circumstances."

---

[8] For example, s.60, for unlawful detention of goods.
[9] Section 66.
[10] Including the *expressio unis est exclusio alterius* rule of interpretation.
[11] Magistrate's Court (Amendment) Act 2016, s.2.

36. With that, for the first time, the Magistrates Court was conferred with a general discretion in relation to costs. Had the provision been in force at the time of the *Pohiva* decision, the result (or at least the analysis) may have been different.[12]

37. Other provisions within the Act must now be read by reference to, and in conjunction with, s.8(n). For instance, where, on the date of a hearing, either party is absent and unrepresented by a lawyer, s.65 permits a Magistrate to strike out or adjourn the case. In the case of an adjournment, any costs thrown away by reason thereof may be considered pursuant to s.8(n).

38. The present question then distils to whether s.8(n) of the *Magistrates Court Act* permits that court to make a costs order against a lawyer, in appropriate circumstances?

39. The interpretation of s.8(n) here attracts the following guiding principles:

    (a) the legal meaning of a statute (which is not necessarily the same as its grammatical meaning) can be determined from the express words and by necessary implication;[13]

    (b) a provision empowering a Court should be broadly construed so as to give it full efficacy and to enable justice to be administered;[14] and

    (c) it is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. It is preferable to interpret the words according to their natural and ordinary meaning as conferring a grant of jurisdiction to order costs not limited to parties on the record and ensure that the jurisdiction is exercised responsibly.[15]

40. On a literal reading of s.8(n), the language employed is arguably as wide as is linguistically possible. The provision is unfettered and unqualified as to, for

---

[12] See Paulsen LCJ's observation in *Public Service Commission v Public Service Tribunal* [2018] TOSC 53 at [123].
[13] *Pohiva v Nuku'alofa Magistrates Court*, ibid, at [19]. See *also Queensland Fish Board v Bunney* [1979] Qd R 301 at 303.
[14] Estate of Wong v Commercial Factors Ltd [2011] TOCA 9 at [35].
[15] *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, per Gaudron J at [2].

example, who may be ordered to pay costs or in what circumstances orders may be made save that they be 'appropriate'.

41. In the absence of any definition or other indication within the Act (not already provided for, such as s.66), the determination of what might constitute 'appropriate circumstances' is wholly a matter of discretion, guided by the common law rules and principles developed over time, and any rules of court promulgated pursuant to the Act, in relation to costs awards.

42. Even though the provision does not expressly refer to orders against non-parties, no limit is imposed upon the discretion conferred and in the absence of any implied limit there is no justification for confining the jurisdiction with regard to the persons against whom costs may be awarded.

43. By comparison, s.15 of the *Supreme Court Act* provides, relevantly, that 'the costs of every proceeding in the Court shall be in the discretion of the Court as regards the person by whom they shall be paid'. As discussed recently in *Jurangpathy v Tonga Communications Corporation* [2020] TOSC 2, even that apparent limitation to the discretion is to be interpreted broadly and consistent with the Supreme Court's inherent jurisdiction.[16] Further, and in the context of whether a court has jurisdiction to order costs against a non-party, it has been held that the phrase "determine by whom ... costs are to be paid" is not to be read as if it were "determine *the party* by whom ... costs are to be paid": *Oshlack v Richmond River Council* (1998) 193 CLR 83 at [38].[17]

44. The purposive approach to interpreting the provision reveals something of a conundrum. Section 8 of the *Interpretation Act* provides that the preamble of an Act *may* be referred to for assistance in explaining its scope and object. The preamble to the amendment Act describes it as an Act:

> ... TO PROVIDE FOR THE EXPRESS POWER FOR A MAGISTRATE TO AWARD COSTS IN PRIVATE PROSECUTIONS

[16] *Uata v Kingdom of Tonga* [2006] Tonga LR 205.
[17] Referring to Knight v FP Special Assets Ltd, ibid, and Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965.

45. And yet, by its plain terms, s.8(n) is not confined to only costs of private prosecutions. There are no explanatory notes to the amendment, or other indications within that Act, to explain the apparent inconsistency. However, it is the operative words of the statute that must be considered in divining Parliament's intention. The preamble may be of assistance but is not part of the substantive legislation. Had Parliament intended the added jurisdiction to be limited to only costs in private prosecutions, it would have been simple and expected for the provision to read "(n) to award costs in private prosecutions in appropriate circumstances". That Parliament did not include that limitation is sufficient to demonstrate that it did not intend the jurisdiction to be so limited.

46. Looking more broadly at the purpose of a costs provision such as s.8(n), it is evident that Parliament intended to equip the Magistrates Court with a flexible and wide-reaching power to deal with the panoply of costs issues which arise from the volume and variety of cases brought before that Court, including where costs are unnecessarily incurred or otherwise wasted as a result of default by a lawyer.

47. Another allied consideration are the procedural rules. As a general proposition, unless an enabling enactment expressly permits regulations or rules promulgated thereunder to confer, add or qualify jurisdiction on a court, the rules of that court only apply to the mode in which costs powers are exercised, and the procedure generally governing their exercise.

48. Section 97 of the *Magistrates Court Act* provides that rules may be made for, inter alia, generally carrying out and giving effect to the provisions of the Act.

49. Rule 7 of the Magistrate's Court (Civil) Rules mirrors s.65 but also provides at subrule (1)(d) that the court may make such other order as it considers proper. Apart from that, the Rules are silent as to costs.

50. However, rule 3(2) provides that in relation to civil actions:

> **3 Application of rules**
>
> ...
>
> (2) If a situation arises that is not covered by —

(a) the provisions of the Magistrate's Court Act;

(b) these Rules; or

(c) any directions that a Magistrate may make concerning the case,

the corresponding rule applicable to or adopted by the Supreme Court shall apply, with any modifications that, in the opinion of the Chief Magistrate, are necessary to make them appropriate to actions in the Magistrate's Court.

51. It ought be immediately recognised that rule 3(2) is unusual in that it has the effect of the Magistrates Court being able to adopt relevant Supreme Court rules where the Magistrates Court legislation does not cover a particular situation even though the Supreme Court Rules are a product of, and give effect to, the Supreme Court's statutory jurisdiction conferred by the *Supreme Court Act*.

52. The Supreme Court Rules contain many in relation to various costs scenarios. Of particular relevance is Order 19 rule 3, which provides:

Attendance at directions hearing

If a lawyer, receiving notice, fails to attend a directions hearing at the appointed time then the Court may make orders, including any order as to costs, *in absentia*.

53. That the rule specifies a lawyer, rather than the party for whom that lawyer acts, as failing to attend, is a clear indication that the reference thereafter to "any order as to costs" is intended to include an order for costs against the defaulting lawyer.

54. Also, Order 25 rule 6 enables the Supreme Court to adjourn a trial to such time and place, and upon such terms, as it thinks fit. Those terms clearly include orders as to costs of adjournments and are regularly exercised. Rule 11 thereof provides that rule 6, among others, may also apply to hearings other than trials. It is not clear from the material on this appeal whether the matter before the Senior Magistrate was listed as a mention, directions hearing or a trial; only that it was for hearing. My impression from the history recorded by the Senior Magistrate in her reasons is that it was listed for trial.

55. Even though there is no need to examine the point because of the Supreme Court's inherent jurisdiction, I can see no sound reason, in principle or policy, for any meaningful distinction between the scope of costs orders provided by O.19

r.3 in relation to directions hearings and the more general 'on such terms as [the court] thinks fit' in O.25 r.6. In appropriate cases, they both permit costs orders against lawyers where that lawyer's failure to attend either a directions hearing, or a trial, has resulted in the adjournment of the hearing and wasted costs incurred by other parties who did attend.

56. For those reasons, I consider that, on its proper interpretation, s.8(n) of the *Magistrates Court Act* is broad enough to empower Magistrates to make costs orders against lawyers in appropriate circumstances.

Implied power

57. If there be any doubt about the above analysis, then I turn to consider the circumstances in which Courts will imply powers where other powers contained in a statute would be rendered ineffective without them.[18]

58. In *Pohiva v Nuku'alofa Magistrate's Court*, ibid, Paulsen LCJ also considered whether any power of the Magistrate to award costs in that case arose by implication directly suggested by the express words of the statute or because they are necessary and proper by principles of interpretation and law that are not displaced by the words expressed.[19] His Honour was not satisfied that the power contended for could be implied from the *then* provisions of the Magistrates Court Act and that a costs power was not necessary for the conduct of preliminary enquiries.

59. Here, there is no longer any question of the Magistrates Court having a general costs power. The only question which may arise, as identified above, is whether that power extends to non-parties such as lawyers.

60. Subject to the terms of the statutory conferral, the aims of any costs jurisdiction include to ensure that any party who has unnecessarily incurred costs by reason of the unreasonable conduct of another should be compensated for those costs, or so much of them as the court considers appropriate. To justly achieve that aim,

---

[18] *DPP v Carey* [1970] AC 1072, *Bodden v Commissioner of Police of the Metropolis* [1990] 2 WLR 76 referred to in Bennion at 368 and *R v Kahu* [1995] 2 NZLR 3 (CA).

[19] At [19].

the circumstances of a given case may require the court to enquire into whom is truly responsible for those costs having been incurred. Where that enquiry results in identifying the reason as the default or other misconduct of a lawyer, then in my view, it is not only appropriate, but necessary, for a court with a general discretion as to costs to be able to make an order against that lawyer personally.

61. To be limited to the usual course, in say cases of adjournment, to making an order for costs thrown away (or 'wasted') against the party who is represented by the lawyer who is truly responsible for the adjournment, risks injustice and inconvenience. Firstly, such an order would not be an accurate response to any act or omission of the party (assuming they were not involved in any way in causing the adjournment). Secondly, enforcement against the party may be problematic and impose undue hardship on that party. Thirdly, any alternative order (seen in some of the legislation elsewhere referred to above) requiring the lawyer to reimburse his/her client for the costs that client may be ordered to pay, again may cause difficulties with enforcement and will almost inevitably damage the client/lawyer relationship.

62. For those reasons, I consider that the power to order costs against non-parties, including lawyers, may be implied from the terms of s.8(n) and the adopted Supreme Court Rules as discussed above, as a necessary concomitant to the general jurisdiction provided and to enable the just and proper exercise of that power.

Inherent power, not jurisdiction

63. The superior courts have inherent jurisdiction; inferior courts, being statutory bodies of limited jurisdiction, do not.

64. In addition to their statutory power, the inherent jurisdiction of the superior courts empowers them to order costs against a lawyer for, inter alia, negligent performance of a professional duty.

65. As noted above, New Zealand is an example where there is no express statutory power for costs orders against lawyers. The High Court has broad statutory

jurisdiction in relation to costs, including as against non-parties.[20] However, it is the inherent jurisdiction of that court confers power to order costs against a party's lawyer.[21] In *Harley v McDonald* [2001] UKPC 18; [2002] 1 NZLR 1 at [45], Lord Hope, who delivered the judgment of the Privy Council explained that:

> *"The undoubted inherent jurisdiction of the Courts in New Zealand to make a costs order against a client's solicitor rests upon the principle that, as officers of the Court, solicitors owe a duty to the Court, while the Court for its part has a duty to ensure that its officers achieve and maintain an appropriate level of competence and do not abuse the Court's process. The Court's duty is founded in the public interest that the procedures of the Court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible. In New Zealand barristers are also officers of the High Court. This being so, there would seem to be no reason in principle why the Court should not exercise the same jurisdiction over them as it does over solicitors".*

66. The relative New Zealand equivalent to the Tongan Magistrates Court is the District Court. The *District Court Act* (NZ) 2016 defines[22] that court's civil jurisdiction. Apart from specific proceedings for costs recoverable under any enactment,[23] orders relating to misconduct by Registrars, bailiffs and other administrative officers of the court,[24] transfer proceedings,[25] and a number of indirect references such as in relation to judgments for the payments by instalments,[26] the Act does not contain any express provisions conferring jurisdiction on the District Court generally to make costs orders. However, s.20 provides that the jurisdiction of the court may be exercised by a Judge if authorised by the Act or any other Act or by the rules. Rule 14.1 of the District Court Rules 2014 provides that all matters relating to costs of or incidental to a proceeding or of a step in a proceeding, are at the discretion of the court.

---

[20] Section 162 of the *Senior Courts Act* 2016 and Part 14 of the High Court Rules. *Carborundum Adhesives Ltd v Bank of New Zealand (No 2) Ltd* [1992] 3 NZLR 757 at 763–764, where the Court confirmed that what was then r 46 (now r 14.1) can apply in favour of or against a person who is not a party to the litigation.

[21] *Utah Construction & Mining Co v Watson* [1969] NZLR 1062 (CA), affirmed by the Court of Appeal in *Gordon v Treadwell Tracey Smith* [1996] 3 NZLR 281 (CA) and by the Privy Council in *Harley v McDonald* [2002] 1 NZLR 1 (PC). See also *Cash for Scrap Ltd v Canwest TV Works Ltd* (Unreported Judgments, High Court of New Zealand — Auckland Registry, CIV 2006-404-5175, 9 July, 17 November 2008).

[22] Part 4, s.74 ff.

[23] Section 75.

[24] Section 70.

[25] Section 90.

[26] Section 118.

67. Notwithstanding, in *Hughes v Ratcliffe* (unreported, HC, Hamilton, 21 July 2000), Hammond J held that the New Zealand District Court has no jurisdiction to make an award of costs against a lawyer, because District Courts are a creature of statute and therefore lack 'inherent jurisdiction'.[27] Recently, in *Jin v Konishi* [2014] NZHC 1150, when referring to the decision of Hammond J, Judge Sharp (the trial judge below) was persuaded that with the introduction into the District Courts Rules of rules concerning lawyers' duties, "*it is now time for this Court to do differently*". On appeal, the High Court rejected that view and affirmed the Privy Council's advice that the power to make a costs award against a client's solicitor is based on the High Court's inherent jurisdiction to supervise the conduct of its officers. Therefore, as the District Court does not have any inherent jurisdiction, it has no power to make any costs award other than those specifically authorised in the District Courts Rules or by statute.[28]

68. Despite the terms sometimes being used interchangeably, 'inherent jurisdiction' and 'inherent power' are distinct concepts. Jurisdiction is 'the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision'. Jurisdiction is a substantive power to hear and determine a matter which may be conferred by the statute under which the court is constituted ('statutory jurisdiction') or it may be 'inherent' in a superior court ('inherent jurisdiction').

69. In contradistinction, all courts possess 'inherent powers' which are incidental or ancillary to their substantive jurisdiction. These ancillary powers are procedural, rather than substantive, in nature: *Taylor v Attorney General* [1975] 2 NZLR 675, 689. They enable a court to give effect to its jurisdiction by enabling the court to regulate its procedure, to ensure fairness in trial and investigative procedures, and to protect its proceedings and prevent abuse of its processes: *Zaoui v*

---

[27] See also *Ng v Cavanagh* [2000] DCR 495. However, if a claim is appealed from the District Court to the High Court, the High Court has jurisdiction to award costs against lawyers in respect of District Court proceedings as well as the appeal: *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC). Other courts without the inherent jurisdiction of the High Court, including specialist courts and the Supreme Court, are also unable to award costs against lawyers.

[28] In criminal proceedings, as discussed recently in *Bublitz v R* [2019] NZCA 379, s.364 of the *Criminal Procedure Act* 2011 provides power to make wasted costs orders against counsel for dereliction of duty. The intent of such orders is not just compensatory but punitive, for as Lang J opined in *McLean v Auckland District Court* [2018] NZAR 684 at [8], it was "obvious" that s 364 was intended to increase the criminal justice system's efficiency and effectiveness.

Attorney-General [2005] 1 NZLR 577 (CA); [2005] 1 NZLR 666 (SC).[29] The existence of the ancillary powers is parasitic on the court possessing jurisdiction, and thereby, are 'inherent'.[30]

70. In an article entitled "Inherent jurisdiction and inherent powers in New Zealand",[31] the learned author postulated that the power to award costs:

> *"... could be considered as an incident of every court's inherent power to regulate its own proceedings. The power is incidental or ancillary to the court's jurisdiction to hear and consider the matter before it, because the power to award costs can necessarily only arise when there are proceedings already before the court. Every court has an interest in ensuring that those who appear before it maintain an appropriate level of competence and do not abuse the court's processes. Therefore, every court should have the power to award costs against a legal advisor who misconducts litigation."*

71. Similar to the analysis above on implied power, the Australian courts have also found that a court's inherent powers are implied from statutory provisions conferring a particular jurisdiction but are restricted to those powers which arise by 'necessary implication' in the exercise of statutory jurisdiction.[32]

72. In *Police v Sikuea* [1996] TOMC 1, Principal Magistrate Tapueluelu relied upon a New Zealand decision[33] as support for finding that he had inherent power under Clause 12 of the Constitution and with necessary implication under the *Magistrates Court Act*, to dismiss the cases before him as an abuse of the process and procedure of the Court. As far as the published decisions in the Kingdom reveal, that decision was not overturned on appeal (if it was appealed) nor has it been referred to since.

---

[29] The Supreme Court cited Wylie J's decision in *Department of Social Welfare v Stewart* [1990] 1 NZLR 697, 701 one of the few cases in which inherent powers and inherent jurisdiction are appropriately distinguished.
[30] Joseph, Rosara --- "Inherent jurisdiction and inherent powers in New Zealand" [2005] CanterLawRw 10; (2005) 11 Canterbury Law Review 220.
[31] Supra.
[32] *R v Bevan* (1942) 66 CLR 452, 464-5; *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1,7; *Parsons v Martin* (1984) 5 FCR 235, 241; *DJL v Central Authority* (2000) 170 ALR 659, 667 and 689.
[33] *Department of Social Welfare v. Stewart* [1990] 1 NZLR 697 per Wylie J, for the proposition that the District Court does not have inherent jurisdiction under the Summary Proceedings Act 1957 (NZ) to dismiss information on the grounds of delay in effecting service on the Defendant, but that the Court did have inherent power to 'discuss the information on the ground of delay in effecting service on the Defendant'.

73. In *Pohiva v Nuku'alofa Magistrate's Court*, ibid, Paulsen LCJ noted that recent New Zealand cases[34] had made clear that there are limits on the exercise of the Court's inherent powers, that it has only such powers as are necessary to enable it to act effectively and that those powers do not extend to further general public interest other than the due administration of justice. In that case, Paulsen LCJ held that, as a matter of principle, as there was no express or implied statutory power to award costs (as the Magistrates Court Act then provided), it was difficult to see how the Court's inherent power could extend so far as to empower it to award costs of the unsuccessful preliminary enquiry.

74. So too in *Public Service Commission v Public Service Tribunal* [2018] TOSC 53, Paulsen LCJ rejected a claim that the Public Service Tribunal, another creature of statute, had inherent power to order costs because although the Tribunal has express powers to control the conduct of proceedings at hearings before it under r. 25 of the *Disciplinary Regulations*, there is no provision conferring on it the power to award costs.[35]

75. In the United Kingdom, Justices of the Magistrates Court have an inherent power to regulate the procedure in their courts in the interests of justice and of a fair and expeditious trial: *Simms v Moore* [1970] 2 QB 327, [1970] 3 All ER 1 at 3, DC.[36] The power can be exercised either on general grounds common to many cases or on special grounds arising in a particular case. Its exercise is not confined to cases where there is a strict necessity. A magistrate may exercise the discretion in order to secure or promote convenience, expedition and efficiency in the administration of justice.[37]

76. In Australia, the Federal equivalent of the Magistrates Court here is the Federal Circuit Court. Part 6 of the *Federal Circuit Court of Australia Act* 1999 deals with Practice and Procedure. Within that Part, s.79 provides, relevantly, jurisdiction to award costs in all proceedings before the Court other than proceedings in respect of which any other Act provides that costs must not be awarded. Except as

---

[34] *Zaoui v Attorney-General* [2005] 1 NZLR 577; *Seimer v SolicitorGeneral* [2013] 3 NZLR 441; *Moevao v Department of Labour* [1980] 1 NZLR 464.
[35] At [129].
[36] See also *Mayes v Mayes* [1971] 2 All ER 397.
[37] Referring to the advice given by the Judicial Committee in *O'Toole v Scott* [1965] 2 All ER 240 at 247, per Lord Pearson.

provided by the Rules of that Court or any other Act, an award of costs is in the discretion of the Court or Judge. Section 86 enables the Rules of Court to make provision for or in relation to, among other things, the costs of proceedings in the Court. Rule 21.07 of the *Federal Circuit Court Rules* 2001 permits the Court or a Registrar to make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be incurred by a party or another person or to be thrown away because of undue delay, negligence, improper conduct or other misconduct or default which includes, relevantly, if a hearing cannot proceed conveniently because the lawyer has unreasonably failed to attend, or send another person to attend, the hearing. Before making an order, the Court or Registrar must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard. The Court or Registrar may also order that notice of the order, or of any proceeding against the lawyer, be given to the lawyer's client or any other person.

77. In *Robinson v Blackheart Industries Pty Ltd & Ors* [2014] FCCA 1353, Judge Manousaridis was required to consider whether the Federal Circuit Court had jurisdiction to make a costs order against a lawyer personally as s.79 of the relevant *Act* did not contain any express reference to such orders. His Honour opined[38] that apart from, or in addition to, s.79, the court's power to make such orders was derived from the:

> *"implied incidental power of a Federal court to regulate the conduct of legal practitioners appearing before it to the extent necessary to ensure the observance of their duties to the court and the integrity of its procedures".*

78. The nature and source of that power was considered by French J (as his Honour then was) in *De Pardo v Legal Practitioners Complaints Committee* as being: [39]

> *".... Like the power to deal with contempts, it is 'inherent' and is 'a power of self protection' or a power incidental to the function of superintending the administration of justice."*

---

[38] At [125] to [128].
[39] [2000] FCA 335; (2000) 97 FCR 575, Citing *Re Colina; Ex parte* Torney (1999) 73 ALJR 1576 at 1580-1581 where the plurality of the High Court citied *Porter v The Queen; Ex parte Chin Man Yee* (1926) 37 CLR 432 at 443.

79. The Tongan Magistrates Court too has power to deal with contempt. [40]

80. Judge Manousaridis also considered that the existence of an implied incidental power was referred to, or at least assumed, in s.81(1)(b) of the Act which provides that Rules of Court may be made for or in relation to all matters and things incidental to any such practice or procedure … or necessary or convenient to be prescribed for the conduct of any business of the Federal Circuit Court of Australia, which his Honour opined was:

> *"... broad enough to empower the Judges of the Court to make rules that specify the circumstances in which the Court may make an order for costs against a lawyer appearing before it. The power to order costs against lawyers that appear before the Court is a matter that is incidental to the practice and procedure of the Court fixed by rules made under s.81(1)(a); it is 'a power of self protection or a power incidental to the function of superintending the administration of justice'. And r.21.07 is a rule that regulates the circumstances in which the Court may make an order for costs against a lawyer appearing before it."*

81. The rationale in *Robinson* has been applied in a number of decisions of the Federal Circuit Court, suggesting it has not been subject to any successful appeal. [41] Also, the source of the Circuit Court's jurisdiction was not questioned before Wigney J in the Federal Court decision in *Mitry Lawyers v Barnden* [2014] FCA 918.

82. Notwithstanding the Federal Circuit Court's position in the hierarchy of courts, I consider the analysis of inherent power in *Robinson* to be persuasive.[42]

Conclusion on jurisdiction

83. For those reasons, I consider that:

    (a) on its proper interpretation, s.8(n) of the *Magistrates Court Act* is broad enough to empower Magistrates to make costs orders against lawyers in appropriate circumstances; and

---

[40] Section 70 of the *Magistrates Court Act*.
[41] Including, most recently, in *El Souki v Macushla Pty Ltd (No.2)* [2020] FCCA 1986.
[42] Compare s.166 of the *Evidence Act*, (Cap. 15) which provides that decision of Commonwealth superior courts will be regarded as having persuasive authority.

(b) further, the relevant Supreme Court Rules supplement and inform (but do not dictate) the circumstances and manner in which the power may be exercised, particularly in cases of adjournment.

84. Further or alternatively, the power is also conferred:

(a) by implication as a necessary incident to the general power to order costs pursuant to s.8(n); and/or

(b) through the court's inherent power of self protection as a power incidental to the practice and procedure of the Court fixed by rules (which include the Supreme Court Rules where applicable), to the function of superintending the administration of justice and to regulate the conduct of legal practitioners appearing before it to the extent necessary to ensure the observance of their duties to the court and the integrity of its procedures.

Opportunity to be heard

85. Mr Latu's sole ground of appeal, and basis for asserting that the Magistrate's decision was 'wrong in law and fact', is that he says he was not afforded an opportunity to be heard before he 'was fined'. Although the amount of costs ordered may be perceived as reflecting a punitive element (discussed further below), of course, Mr Latu was not fined.

86. The legislative provisions of the other Commonwealth jurisdictions referred to above, which expressly provide for costs orders against lawyers, all require that the lawyer in question be given a reasonable opportunity to be heard before any decision is made. Those provisions reflect the fundamental principle that where the rules of procedural fairness apply to a decision-making process, a person whose rights, interests or legitimate expectations are imperilled by, or liable to be directly affected by the decision, will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made: *Hakeai v Minister of Lands & ors* [1996] Tonga LR 142, 143. The ultimate touchstone is fairness: *DHP19 v Secretary of the Department of Health* [2019] FCA 1451.

87. The search for any rigid set of rules for natural justice has proven elusive, if not impossible. In *Tukuafu v Kingdom of Tonga* [1999] TOCA 2, the Court of Appeal

referred to *Mobil Oil Australia Proprietary Limited v The Commissioner of* (1963) 113 CLR 475 at 503-504, where Kitto J observed, relevantly:

> *"... the books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place."*

88. Therefore, the requirements of natural justice must depend on the circumstances of the case, including the nature of the inquiry, the rules under which the tribunal is acting and the subject matter that is being dealt with: *University of Ceylon v Fernando* [1960] 1 All ER 631 at 637. The requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness': *South Australia v O'Shea* (1987) 163 CLR 378 at 389.

89. An opportunity to be heard must be preceded by full and sufficient notice of the complaint and, where appropriate, of the decision being considered: *Utah Construction and Mining Company v Watson* [1969] NZLR 1062 (CA); *Y v M* [1994] 3 NZLR 581.[43]

90. In the instant case, the Senior Magistrate did not give notice to Mr Latu of the fact that she was considering ordering costs occasioned by the adjournment against him personally before she made the order. There was no evidence before the Magistrate, at least as revealed by her reasons or on this appeal, to indicate whether Mr Latu had any appreciation that he was at risk of a personal costs order when he decided to leave the Magistrates Court to attend his other matters in the Supreme Court. Given there could be no doubt as to the available and (albeit rare) practice in the Supreme Court of costs orders against practitioners in appropriate cases, I doubt very much that Mr Latu could genuinely be heard to say that he had no idea a similar order could or might be made by the Magistrate in the matter before her that day. Be that as it may, I must view the failure to provide notice before making the order as a technical breach of the requisite rules of procedural fairness.

---

[43] See also, infra, *Myers v Elman* (at 318) and *Ridehalgh* (at 229).

91. Court orders against lawyers can have serious ramifications. As noted above, the Supreme Court Rules permit orders to be made against lawyers who have failed to appear at directions hearings, in absentia. In deference to the rules of natural justice, I suggest that such orders should only be made in the simplest and clearest of cases.

92. Otherwise, the procedure to be followed in determining applications for wasted costs where the lawyer is present must be fair and as simple and summary as fairness permits. Hearings should be measured in hours, and not in days or weeks. Judges and Magistrates must be astute to control what could "threaten to become a new and costly form of satellite litigation": *Lemoto v Able Technical Pty Ltd & 2 Ors* [2005] NSWCA 153.[44]

93. In any other case, and in the absence of express rules of either court governing the procedure, I consider that in cases such as the present, where a lawyer fails to attend court, a judicial officer who is considering, but not certain about, making a costs order against a lawyer on the basis that the court believes the lawyer's default is responsible for the adjournment (or other wasted costs), should give consideration to the following:

    (a) orders should be made setting out in summary the information and evidence then before the court which suggests that the proposed order may be appropriate, the terms of the order being considered, and directing the lawyer to show cause within a short period as to why the order should not be made;

    (b) it the lawyer does not oppose the order being made, he/she should file a memorandum of consent, and upon which, the costs order will be made;

    (c) alternatively, if the lawyer opposes the making of the order by filing material seeking to show cause as to why it should not be made, any other party who is the intended beneficiary of the proposed order, or who might be affected by the making of it, and who takes issue with any of the lawyer's evidence or submissions, should be given an opportunity to respond;

---

[44] See also *Ridehalgh* (at 238–239); *Harley v McDonald* at 703 [50]; *Medcalf* (at 136 [24]).

(d) if there is no dispute in relation to the lawyer's position and he/she does not require an oral hearing, a decision may be made on the papers;

(e) otherwise, if there is any dispute on the material filed and/or either party requires an oral hearing, the court should hear further from the parties before making a decision.

94. Despite the above finding of error on the part of the Magistrate, I am not satisfied that, in practical terms, Mr Latu was not heard before the order was made. His situation was simple. He accepted multiple briefs to appear before more than one court on the same day. He endeavoured to explain the position in which he placed himself to the Magistrates Court clerk earlier that morning and left with a request that his matter be deferred to the evening hours of the court's sitting that day. He did not then seek, and has not now sought, to explain his predicament as being due to anything other than his own decision to accept the multiple briefs. He has not suggested, for instance, unforeseen circumstances or urgency.

95. Putting aside the lack of formal notice for the moment, even if Mr Latu did not have a reasonable opportunity to be heard before the Magistrate made the order, and that on that basis, the decision should be set aside, Mr Latu has been heard on this appeal and the relevant facts are unchanged. In other words, even if the procedure set out above had been implemented, it is unlikely, in my view, that Mr Latu's explanation would had any significant impact on the Magistrate's exercise of discretion.

Exercise of discretion

96. The order against Mr Latu was the result of the court's exercise of discretions in four respects, namely:[45]

(a) whether to adjourn the hearing rather than proceed with the Plaintiff's claim against the unrepresented defendants;

(b) whether to make any costs order in respect of the adjournment;

---

[45] Compare *Rex v Tupou* [2001] TLR 169.

(c) who should pay those costs; and

(d) the quantum of those costs.

97. Powers conferred on a court, such as those found in s.8(n) of the *Magistrates Court Act*, must be exercised judicially and in accordance with legal principle. Even though a discretion may be absolute and unfettered, it must not be exercised arbitrarily or capriciously, or to work oppression or abuse, or by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation: *Oshlack v Richmond River Council*, ibid, [65].[46]

98. It is well established that an appellate court will be very slow to interfere with an exercise of discretion so broadly based, unless no ground at all could be seen for the order made, or a specific error of law were apparent: *Rex v Tupou* [2001] TLR 169.

99. The authorities across the jurisdictions considered above provide a number of common principles to guide the exercise of power to order costs against a lawyer personally.[47] They include:

(a) It is appropriate for the court to make a wasted costs order against a legal representative, only if:

(i) a lawyer representing a litigant has acted improperly, unreasonably or negligently;

(ii) the lawyer's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted; and

---

[46] See also *Latoudis v Casey* (1990) 170 CLR 534 at 557; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; and *In re Elgindata Ltd (No 2)* [1992] 1 WLR 1207; [1993] 1 All ER 232.

[47] For example, *Myers v Elman* [1939] 4 All ER 484; *Saif Ali v Sidney Mitchell & Co* [1978] 3 All ER 1033 at 1041, 1043, HL; *Re a Barrister (wasted costs order) (No 1 of 1991)* [1992] 3 All ER 429, CA; *Ridehalgh v Horsefield* [1994] 3 All ER 848, CA.; *Cassidy v Murray* (1995) 19 Fam LR 492; *Medcalf v Mardell* [2002] 3 All ER 721; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; *Goldsmith v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 130; *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd (No 4)* [2013] VSC 14; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No. 5)* [2014] VSC 400; *Gippsreal Ltd v Kenny* [2016] VSCA 319; *Young v Hughes Trueman Pty Ltd (No 4)* [2017] FCA 456; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, [2017] S.C.J. No. 26, 2017 SCC 26 (S.C.C.); *EBR Holdings Limited (in liquidation) v Van Duyn* [2019] NZHC 3325.

(iii) it is just in all the circumstances to order the lawyer to compensate that party for the whole or part of those costs.

(b) 'Improper' covers, but is not confined to, conduct which would ordinarily be held to justify striking off, suspension from practice or other serious professional penalty.

(c) 'Unreasonable' describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive.

(d) 'Negligence' should be understood in an untechnical way to denote failure to act with the competence reasonably expected of ordinary members of the profession. It is not necessary to prove negligence in the sense necessary in an action for negligence. Such conduct includes where a lawyer fails, without good cause, to turn up to a hearing.

(e) Under the statutory or rule-based jurisdiction, the lawyer's misconduct or negligence may justify a personal costs order. The inherent jurisdiction of the superior courts requires a serious dereliction of duty owed to the court, gross negligence or serious misconduct in promoting the course of, and the proper administration of, justice. An error of judgment or a mere slip will not warrant the court exercising its jurisdiction to order costs against the lawyer who made the error or slip.

(f) It is in the public interest that a lawyer is not to be held to have acted improperly or unreasonably or negligently simply because he acted for a party who pursued a claim or defence which was plainly doomed to fail. There is a distinction between this and an abuse of process. If there is a doubt, the lawyer is entitled to the benefit of it.

(g) The other public interest is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers.

(h) A judge considering making a wasted costs order arising out of an advocate's conduct of court proceedings must make full allowance for the

exigencies of acting in that environment; and only when, with all allowances made, a legal practitioner's conduct of court proceedings is quite plainly unjustifiable can it be appropriate to make a wasted costs order.

(i) In cases of adjournment, the assessment involves, fundamentally, an enquiry into, and the identification of, the reason or reasons for the adjournment, whether it/they include misconduct or other default by the lawyer in question and therefore whether the lawyer has caused costs to be thrown away by his or her misconduct.

(j) Demonstration of the causal link between improper, unreasonable or negligent conduct and the waste of costs is essential. Where such conduct is proved but no waste of costs is shown to have resulted, the case may be referred to the appropriate disciplinary body or the legal aid authorities; it is not a matter for the exercise of the wasted costs jurisdiction.

(k) Where a party applies for a wasted costs order against his own lawyer, he will be taken to have waived his legal professional privilege as regards relevant communications between them. However, where a party applies for a wasted costs order against the opposing party's lawyer, the opponent may not be willing to waive his privilege, leaving the lawyer at a disadvantage since he will be hampered in his defence, not being able to reveal privileged communications indicating what advice he gave to his client or what instructions he received. Thus, where there is room for doubt, the opponent's lawyer will be given the benefit of it, unless his conduct is quite plainly unjustifiable. An application for a wasted costs order against another party's legal representative is therefore unlikely to succeed unless his conduct can be shown to have been improper without recourse to privileged material.

(l) The purpose of the jurisdiction is to compensate for a failure of duty to the Court, where the failure causes unnecessary costs. The usual order is for payment of costs thrown away or lost because of the conduct complained of. However, the jurisdiction necessarily has a punitive element in that it

requires the lawyer to pay those costs rather than what would otherwise be the usual order against the party for whom the lawyer acts.

(m) The power should not be used to compensate a client for a failure of duty to the client, though this may be a spin-off effect.

(n) The jurisdiction should be confined to questions which are apt for summary disposal, and should ordinarily be decided as part of the overall decision as to costs. Complex factual questions about the lawyer's conduct and actions, including breaches of duties to their client, should not be addressed through an award of costs but through disciplinary proceedings or through a claim against the lawyer directly.

(o) By reason of the serious consequences for lawyers of such an order, the power to order costs against a lawyer involves a discretion which must be exercised with care, considerable caution and and only in clear cases.

(p) The ultimate question is whether in all the circumstances it is just to make the order.

100. In the present case, I see no error in the approach taken by the Senior Magistrate in the exercise of her discretion to make a costs order against Mr Latu.

101: Firstly, I do not accept Mr Latu's contention that 'advising the court clerk of an adjournment or late arrival of counsel due to other commitments at the higher courts is normal';[48] or if it is a usual practice, it was not one which bound the Magistrate here in the exercise of her discretion. That submission coupled with his further attempt at mollification by asserting that the 'clashes' in the hearings in the two courts was 'unfortunate' and the oxymoronic reference to his absence in the Magistrates Court as not being 'an intentional neglect',[49] conveyed a tone of indignation and reflected an unfortunate misconception about the nature of a lawyer's duty to the court and the responsibilities of professional legal practice.

102. Litigation in any form does not exist for the benefit of lawyers. A lawyer's duty is first and foremost to the court and the due administration of justice and then, to

[48] Paragraph 2.4 of his submission.
[49] Paragraph 2.8 of his submissions.

his/her client. Far beyond that lies a lawyer's personal and professional interests which must never conflict with his/her duties to the court and his/her client.

103. The practice described by Mr Latu was erroneous in that while he may have informed the clerk of his other commitments in the Supreme Court, he left the Magistrates Court without having informed his opponent, Ms Kafoa, of his situation. Further, not only did he not obtain her consent to any arrangement deferring the hearing to a later time that day or for it to be adjourned to another day, Mr Latu failed to secure a firm response from the clerk or the Magistrate to his request for the matter to be heard later in the day. No doubt, that was due to him having to leave to be able to attend the Supreme Court in time for the commencement of the hearings before that court. Therefore, when he left the Magistrates Court, Mr Latu did not know whether his request had been or would be approved or whether the Magistrate even received it, and if she did, whether the court's other business that day enabled it to consider whether it could accommodate Mr Latu's possible late arrival. As the Magistrate mentioned in her decision, it was in fact not possible. Therefore, when Mr Latu decided to leave the Magistrates Court that morning without any firm arrangement in place, he, to put it colloquially, 'took a punt'. As noted above, I consider Mr Latu knew or ought reasonably to have known that in doing, so he exposed himself to the risk of failing to appear on the Magistrates Court matter and, in that event, a resultant possibility of an order for costs.

104. The root cause of Mr Latu's difficulty in fact occurred well prior to the day in question.

105. As all lawyers in the Kingdom were recently reminded, the practical requirements of their duty to the court, and their clients, include, to conduct cases efficiently and expeditiously. At a minimum, and other things, that requires a lawyer to 'show up at hearings, on time, every time'. [50]

106. In order to fulfil that obligation, counsel must be mindful of their other court commitments whenever dates are being set whether as part of interlocutory timetabling or for hearings. In the vast majority of cases, when such dates are

[50] Continuing Legal Education seminar, hosted by the Tonga Law Society, on 26 August 2020.

being considered by the court, counsel will be asked whether proposed dates are convenient in the sense that counsel will be available to attend to whatever work is required by that date or on that date in the case of hearings. If counsel remain mute during that process or do not otherwise indicate that they will or may not be available by or on a certain date, the court proceeds on the assumption and in the expectation that counsel will attend court on that date. Where counsel do indicate that a particular proposed date is not convenient, the court will endeavour to accommodate counsel by finding other dates which are. Of course, there are limits to the latitude available in such cases due to the demands on the court in servicing other matters before it and to ensure the timely progress of the particular matter in which counsel are involved. On the rare occasion that a lawyer in a particular matter is so busy with other matters that he or she cannot be sure of their availability to attend to work required or future appearances in the particular matter, they are duty bound to inform their client in that matter accordingly. If the lawyer cannot secure other assistance or means by which to properly service that matter, or make suitable arrangements for the future conduct of the matter with counsel for the other parties or the other parties if unrepresented, and the court, that lawyer may have to consider returning the brief and seeking leave to withdraw from the case. Not to do so, and thereafter breaching the lawyer's duty to the court and his/her client by, for example, failing to attend a hearing, runs the very real risk of engaging in unsatisfactory professional conduct; or in serious or repeated cases, possible professional misconduct.

107. To be mindful of other commitments and to know whether a lawyer will be available on a given day usually requires all lawyers to refer to their professional diaries when proposed dates are being discussed in court. I am struck by the number of occasions on which that exercise has been conducted before me without any lawyer referring to his/her diary. That suggests either that the lawyer knows his/her availability (sometimes months) in advance, perhaps due to a then modest level of future work commitments; or, more worryingly, that the lawyer has little or no idea of their future commitments and availability. Their assent, either express or by silence, to the dates then set by the court has the potential to mislead the court and other parties and practitioners into believing that the particular lawyer will in fact be available on the dates agreed. The other

possibility, which I have observed on more than one occasion, is that some lawyers in the second category only turn their minds to whether they will in fact be available on the dates directed after they leave court and return to their offices, only to find that they are already committed to appear elsewhere on those dates.

108. Even if for some reason a lawyer fails to keep track of the dates for appearances in their cases, in the Supreme Court at least, the court list for each week is published on the Friday before. Therefore, lawyers with matters listed that week can see how many other matters are also listed on a given day before each judge so as to gauge how long they may have to wait before their matter is called on.

109. That is not to say that a lawyer cannot take more than one appearance brief on a given day. Where all those matters are before the one court, there will rarely be a problem. But where they are before different courts, it is incumbent on the lawyer, well in advance of the day for appearance, to contact his/her opposing counsel or other parties and seek to agree on arrangements which, if agreed to by the courts involved, will hope to ensure that the lawyer with the 'clash' will be able to appear on all his/her matters when they are called. Once those arrangements are in place, the lawyer must contact the courts in question to convey the joint arrangements proposed by the parties and seek the court's indulgence in granting those arrangements. Only once that confirmation is secured can the lawyer then responsibly proceed to appear on all matters that day. Those arrangements may include asking for the matter to be called first, or at a specific time (sometimes referred to as a 'special fixture' or appointment) or for a 'not before time' to be set meaning that the matter will not be called before a certain set time to allow the lawyer to complete his/her appearance in the other court.

110. Otherwise, or if the court is unable to accommodate such proposed arrangements that day with any certainty, the matter may have to be adjourned for a short time to allow all counsel and parties to appear when they are all firmly available. In any of those events, if dealt with sufficiently in advance of the hearing date in question, such arrangements can usually be accommodated (subject to any serious opposition by an affected party) and there will rarely ever be any costs thrown away or wasted. However, if the 'clashed' lawyer leaves it all to the last

minute, whether that be the night before or, worse, the morning of the hearing, there is a real likelihood that those arrangements will not be able to be accommodated and that costs will be thrown away by any late adjournment due to the lawyer's inability to attend one or other of the matters he/she took for the day.

111. In those cases, and where nothing useful can be done to progress the case that day, there can be little doubt that the innocent parties who did attend the hearing and, if represented, incurred legal costs in having their lawyers appear, will be entitled to a costs order to compensate them for those costs unnecessarily incurred. In the absence of agreement otherwise, a lawyer who did appear will be entitled to charge his/her client an appearance fee in accordance with the terms of the lawyer's retainer with the client. However, as a result of the other defaulting lawyer's failure to appear, those legal fees will have produced no value for the other parties who have had to incur them. That opens the jurisdictional door to an order for those costs against the defaulting lawyer.

112. In the instant case, Mr Latu failed in three respects:

(a) Firstly, he accepted three briefs on one day before two courts. He did not mention in his material on this appeal whether he was aware of the impending clash when he accepted each subsequent matter after the first listed for that day. Apart from asserting that his situation was not due to any "intentional neglect", he did not explain the circumstances which led to it.

(b) Secondly, he failed to ensure that proper arrangements were secured with his opponent and the Magistrates Court to enable him to appear before that court on time before leaving that court to attend the Supreme Court.

(c) Thirdly, he left his attempts to make those arrangements with the Magistrates Court far too late. As observed in her Worship's reasons, Mr Latu in fact appeared in her court the day before but failed to say anything about his matter before her the next day and that he was also briefed to appear in the Supreme Court on two other matters that same day. I have little doubt that if he had done so, the learned Senior Magistrate would have endeavoured to accommodate him as far as practicable, in which case, this

appeal, and the order the subject of it, would almost certainly have been avoided.

113. With that, and by apparently assuming that his request to the clerk would be automatically granted, Mr Latu assumed the risk that he may not have been in the Magistrates Court when his matter there was called on. That risk was fuelled by Mr Latu's unexplained decision to continue to hold all three briefs that day rather than seek the assistance of an associate or other lawyer. As far as I am aware, Mr Latu did not approach my clerk on the day in question, before court commenced, to explain his situation or seek to have any of the above arrangements put in place for his matters before me that day (which included a number of long and difficult applications) which might have enabled him to attend to his Magistrates Court hearing first.

114. The Senior Magistrate was correct to stand the matter down when it was first called on to allow the defendants to contact Mr Latu. As perhaps a fourth error, Mr Latu was unable to be contacted while he sat in the Supreme Court waiting for his matters there to be called. Presumably, he had his phone on silent, as is required. Knowing that he had the other matter in the Magistrates Court pending, and not knowing when it would be called on, had Mr Latu perhaps kept his phone screen in view, or had it set to vibrate, he would probably have been able to step out to take his clients' call to find out that their matter was being called.

115. It was also appropriate, in my view, for the Magistrate to have adjourned the matter after standing it down only to be told that the defendants had not been able to contact Mr Latu. It would not have been fair to the plaintiff, Ms Kafoa or indeed the defendants themselves to be left waiting to some indeterminate time later that day when Mr Latu may or may not have appeared. The Magistrate and the parties simply had no idea whether, and if so, when, he might 'show up'. In any event, the Magistrate had other matters to attend to later that day. These were all matters that could have been discussed with Mr Latu had he mentioned the situation to the Magistrate when he appeared before her the day before.

116. In those circumstances, any usual costs order against the defendants themselves, as parties to the action, would have been wholly inappropriate given

that they had attended the hearing on the appointed day and had done all they could to contact Mr Latu. He let them down. No act or omission on their part warranted them being liable for the costs thrown away by reason of the adjournment.

117. Accordingly, apart from the failure to place Mr Latu on notice before doing so, this was a clear case in which to order that the costs thrown away by reason of the adjournment be paid by Mr Latu personally.

Quantum

118. The remaining issue is the quantum of the costs ordered. Again, even though Mr Latu did not specify this as a ground of his appeal, the unusual circumstances by which the Magistrate ordered that $400 be paid when only $300 was sought, attract consideration by this Court.

119. For the reasons which follow, I consider that the Magistrate's exercise of discretion miscarried on the question of the quantum of the costs ordered.

120. Firstly, the learned Magistrate did not explain how she arrived at a calculation of $400.

121. Secondly, while the learned Magistrate's expressed reason for making the costs order was that there had been no reasonable confirmation to the court that an adjournment of the matter was requested, she did not explain why she decided to award more than that requested by Ms Kafo. In the absence of any other explanation, it may be inferred that the Magistrate sought to punish Mr Latu for his failure to attend by the effective premium imposed of $100 on top of the amount claimed by Ms Kafoa. Costs orders are not a penalty: *Attorney General v Ulakai* [2000] Tonga LR 10. As noted in the principles above on the exercise of discretion, costs orders are intended to be compensatory, not punitive, although there is a natural punitive element in a costs order against a lawyer by requiring the lawyer to pay the costs of other parties which the lawyer's client would otherwise be required to pay.

122. Thirdly, Ms Kafoa described her client's claim for costs thrown away as being the 'plaintiff's time preparing its case' for that day. Costs thrown away by reason of

an adjournment of a hearing do not normally include preparation for a hearing which is adjourned to a future date. Unless the adjournment also results in some change in the case, such as further or amended pleadings, discovery, evidence or other material to be filed, the preparation time will rarely, if ever, be truly wasted. That is especially the case where the matter is adjourned for only a short period. Here, the matter was adjourned for 10 days, albeit for a mention. It is not known whether the hearing took place that day or, if not, when a new hearing date was set. However, that usual limitation does not foreclose the possibility that, in appropriate cases, such as complex matters involving multiple issues and witnesses and substantial evidence expected to be heard over a number of days, a court's discretion on costs thrown away by reason of adjournment could not include allowance for some "trial focused" costs because they will have to be incurred all over again in preparation for the fresh fixture: *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 640.

123. Fourthly, Ms Kafoa's claim did not descend to particularity in distinguishing between the costs of her appearance that day and any costs her client might incur for preparation work she may have to repeat for the next hearing date. Therefore, the only costs of which the Magistrate could have been certain were those of Ms Kafoa's appearance that day. That amount was not specified. From the overall amount claimed, it would appear unlikely that Ms Kafoa was at court for any more than an hour that day.

124. Unless stated to be on an indemnity or solicitor/client basis, costs are awarded on a party/party basis. Such costs are intended to provide the successful party with a measure of indemnity against the expense of professional legal costs actually incurred in the litigation*: Fakafanua v Nishi Trading Ltd* [2020] TOLC 5. They are not intended to be comprehensive compensation for any loss suffered by a litigant: *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 at [33].

125. Practice Direction No. 1 of 2009 specifies a party/party rate for counsel of $200 per hour. In my view, an order for that sum was an appropriate exercise of the Magistrate's discretion on the quantum of costs thrown away, being of Ms Kafoa's appearance, that day.

126. I conclude by observing that had the Senior Magistrate decided not to adjourn the hearing of her own volition, and instead proceeded to hear the claim,[51] and if as a result, judgment was entered for the plaintiff for reasons which could be attributed, in whole or part, to the defendants not being represented by Mr Latu as they had engaged him to do, any opprobrium he may feel at the result of this appeal would likely pale into insignificance by comparison to any claim for negligence the defendants may have brought against him.

RESULT

127. The appeal is allowed in part.

128. The order of Senior Magistrate Pahulu-Kuli in Magistrates Court proceeding CV 24 of 2020, on 17 July 2020, in which she ordered the Appellant to personally pay the Second Respondent's (the Plaintiff below) costs thrown away in the sum of $400, is set aside.

129. In lieu thereof, pursuant to s.80 of the *Magistrates Court Act*, I order that the Appellant pay the the Second Respondent's (the Plaintiff below) costs thrown away by reason of the Appellant's non-attendance and resultant adjournment of the hearing in the said Magistrates Court proceeding, fixed in the sum of $200.

130. In light of the Second Respondent's neutral position on this appeal and the limited success enjoyed by Mr Latu, there will be no order for the costs of the appeal.

NUKU'ALOFA
13 October 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE

[51] As she was entitled to do pursuant to s.66 of the Act.