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

CV 65 of 2016

**BETWEEN: PACIFIC INTERNATIONAL COMMERCIAL BANK
LIMITED**

- **Plaintiff**

AND: THE NATIONAL RESERVE BANK OF TONGA

- **Defendant**

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. J McBride for the plaintiff
Mr. H Waalkens QC KC for the defendant**

Hearing: 10 July 2017

Date of Ruling: 28 July 2017

RULING

The application

- [1] The plaintiff (PICB) has brought this action to challenge the decision of the defendant (the Reserve Bank) of 26 July 2016 revoking its banking license under the Financial Institutions Act 2004 (as amended by the Financial Institutions Amendment Act 2014) (the Act).
- [2] The statement of claim contains six causes of action. Five of the causes of action are for judicial review. The sixth cause of action is in tort. It alleges that the Reserve Bank was negligent in revoking PICB's licence when it was not entitled to. In respect of this sixth cause of action unquantified damages are sought.

Rec'd 28/07/17
Jat

[3] There are two applications before the Court (other than for costs). First, the Reserve Bank applies to strike out the sixth cause of action on the grounds that it does not disclose a reasonable cause of action or is an abuse of process (O.8 Rule 8 (1)(a) and (d) Supreme Court Rules). Secondly, the Reserve Bank seeks security for costs. Both applications are opposed by PICB.

Background matters

[4] This is not the first action between these parties over the same matter. On 2 August 2016 PICB commenced an action under CV 40/2016 against the Reserve Bank and also against its Governor, Dr. Sione Kioa, challenging the decision of 26 July 2016. At the time of filing it sought interim declaratory relief quashing the decision and directing the Reserve Bank to give PICB an opportunity to submit reasons why the licence should not be revoked. In addition to the interim orders it sought TOP\$10 million general damages and TOP\$5 million punitive or aggravated damages.

[5] In summary, the allegations in the statement of claim in CV 40/2016 were:

- a) That the Reserve Bank was a statutory body established under the National Reserve Bank of Tonga Act 1988.
- b) That it had on 26 July 2016 without notice unlawfully revoked PICB's bank licence.
- c) That this was invalid as the Reserve Bank had failed to give written notice of its intention to revoke the licence under section 10(2) of the Act and relied on grounds which had been the subject of an

earlier notice of intention to revoke that had been withdrawn on 2 April 2015.

- d) That between 28 July 2016 and 1 August 2016 the Reserve Bank had acted maliciously when giving the public false information concerning PICB's solvency, the need to revoke its licence and whether it had breached the conditions of its licence.
- e) That on 1 August 2016 Dr. Kioa made a public statement to the media that the Reserve Bank should appoint a receiver to recover loan monies owed by customers who had borrowed from PICB.
- f) As a result of the Reserve Bank's actions and Dr. Kioa's public statement there was a run of deposit account holders.
- g) That PICB had suffered and would continue to suffer substantial damage.

[6] The Reserve Bank opposed the application for interim orders. The application was withdrawn by PICB on 11 August 2016 without being heard. The Reserve Bank then applied to strike out the statement of claim (along with other orders). That application complained that the claim was subject to O.39 Rule 1 of the Supreme Court Rules and leave of the Court was required before the action was commenced. On 3 November 2016 Mr. Tu'utafaiva, then Counsel for PICB, sought an adjournment of the strike out application. When that was opposed an order was made by consent striking out the statement of claim in its entirety. I reserved leave to PICB to apply for judicial review of the Reserve Bank's decision of 26 July 2016 within 21 days.

[7] This proceeding was filed on 23 November 2016. On 27 January 2017 I granted PICB leave to apply for judicial review. Leave was

conditional upon payment of the costs awarded in CV 40/2016 and without prejudice to any application by the Reserve Bank to apply to strike out the proposed sixth cause of action in tort. The application to strike out (and for security for costs) was duly filed and is the subject of this ruling.

The statement of claim

- [8] It is essential to an understanding of what follows that I describe the basis for PICB's application for judicial review and the sixth cause of action. This was set out in a helpful manner at paragraphs 56 to 58 of Mr. McBride's written submissions.
- [9] PICB's case is that the Reserve Bank has the power under the Act to grant and revoke a licence to operate a banking business. The business of a bank necessarily depends on public trust and confidence which flow from the fact that the Reserve Bank has authorised its operations. PICB argues that once a licence is issued the Act recognises (in section 10) that a bank should ordinarily be given 10 working days notice of an intention to revoke its licence 'as the consequence of revocation ...will be self evidently dire'. It is said that the Reserve Bank unlawfully (and carelessly and recklessly) revoked PICB's licence without giving it prior written warning as required by the Act. Whilst acknowledging that there is provision in section 37 of the Act for a licence to be revoked without notice PICB submits that the provision (and the related section 36) are poorly drafted and do not apply and that in any event the Reserve Bank did not invoke those sections when revoking PICB's licence and cannot now provide 'retro reasons'. There are additional arguments that if the Act did not require that PICB be given notice under section 10 then it had a

legitimate expectation of further dialogue with the Reserve Bank and the revocation was unreasonable.

[10] As is plain, the kernel of PICB's case is that it was entitled to be given notice to respond to the Reserve Bank's intention to revoke its licence and that the Reserve Bank's notice was unlawful and of no effect because it did not afford to PICB the prescribed 10 working days for a response.

[11] As far as the sixth cause of action is concerned the pleading is curt but clearly follows the same line described above. I set it out as follows:

48 PICB repeats paragraphs 1 to 31 above and says that

- a) the Reserve Bank owed a duty of care to PICB to supervise its operations carefully and reasonably, and only revoke its licence in the circumstances prescribed in the FIA, once PICB had been given a reasonable opportunity to submit reasons why its license should not be revoked:
- b) the Reserve Bank negligently breached its duty of care to PICB by:
 - i) failing to give PICB a reasonable opportunity to submit reasons why its license should not be revoked; and
 - ii) purporting to revoke the Licence when it was not entitled to; and
- c) The Reserve Bank's negligence caused PICB loss.

Relevant principles on a strike out application

[12] Mr. McBride reminded the Court of the principles upon which it must proceed when dealing with a strike out application. These can be summarised as follows:

- a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even though they are not or may not be admitted.
- b) Before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.
- c) The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material to safely make a decision.
- d) The fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction.

[13] I do not take issue with any of this. I would add that O.8 Rule 8(2) provides that when an application to strike out is based on the ground that the claim discloses no reasonable cause of action no evidence shall be heard on the application. It is all too common for parties to apply to strike out a claim or defence with affidavits containing what turns out to be contested evidence. That is not permitted under the Rules. However Mr. Waalkens made the interesting point (with reference to the White Book) that in a case such as this the Court may have regard to the evidence already put before the Court in supporting affidavits comprising the original application for leave to seek judicial

review. When applying for leave PICB relied upon the lengthy affidavits filed in CV 40/2016. Both Counsel referred to a limited extent to the affidavit evidence and no objection was taken.

The strike out application

- [14] In their submissions Counsel first dealt with the Reserve Bank's ground that the sixth cause of action was an abuse of process (because it should have been raised in the first action) and then with the ground that the sixth cause of action does not disclose a reasonable cause of action. In my view the second of ground is unanswerable and is sufficient to determine this application. It is not necessary for me to deal with the abuse of process ground or indeed the Reserve Bank's further argument advanced by Mr. Waalkens that if a duty of care was owed it had not been breached.
- [15] The Reserve Bank says that it is not reasonably arguable that it owed PICB a common law duty to take reasonable care in performing its supervisory functions under the Act. The issue then is whether the claim by PICB that such a duty was owed to it by the Reserve Bank is clearly untenable, assuming the facts pleaded in the statement of claim are true.
- [16] Mr. McBride emphasised, and I accept, that this Court is not required to decide with any finality whether such a duty is actually owed. In the case of an application to strike out on the basis that a particular duty of care does not exist, the question for the Court is whether the circumstances relied on by the plaintiff are capable of giving rise to a duty of care and if the duty of care cannot confidently be excluded (the onus being upon the Reserve Bank in this case) the claim must be allowed to proceed.

The approach to determining the existence of a duty of care

- [17] The Reserve Bank is a public body and PICB's sixth cause of action alleges that it acted negligently in the exercise of a statutory power to revoke PICB's banking licence. It is well established that the careless performance of a statutory duty or power does not of itself create liability for loss that may result (*X (Minors) v Bedfordshire City Council* [1995] 2 AC 633 (HL) per Lord Browne-Wilkinson at 734-744).
- [18] Relying on *X (Minors)* (supra) Mr. Waalkens submitted that in considering whether to impose a duty of care upon a public body arising from the careless exercise of a statutory power or duty the Court needs to consider two broad issues. First, whether the claim is justiciable and, if so, secondly whether it is appropriate to impose a common law duty of care upon the body in question.
- [19] In relation to the first issue Mr. Waalkens argued that negligence actions should not be used to impugn a discretionary decision of a public body. In relation to the second issue, Mr. Waalkens argued that the considerations that are relevant concern whether there is a sufficient relationship of proximity between the parties to justify the imposition of a duty of care and whether upon consideration of any relevant policy factors it is fair, just and reasonable that the law impose such a duty on one party for the benefit of the other (*Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL)).
- [20] In *X (Minors)* (supra) Lord Browne-Wilkinson was of the view that if a decision falls within the ambit of a statutory discretion a common law duty to take care in relation to it cannot exist and it is not necessary to go on and consider the second limb of the inquiry as to whether a duty of care might arise on common law principles. However in some

decisions the question whether the decision was within power has not been treated as determinative. Todd at 6.6.01 notes:

Questions as to whether a public body has acted rationally or within the ambit of a discretion is better seen as relevant in determining whether the authority is in *breach* of a duty independently held to exist

- [21] For PIBC Mr. McBride noted that the Courts in England and Wales, Australia, Canada and New Zealand have struggled to formulate methodology for determining whether a duty of care exists in novel situations and advocated for the Australian approach under which it is of the utmost importance to identify and consider all of the salient features of the case. The salient features fall broadly under the headings of the nature of the claim, foreseeability, proximity and policy.
- [22] In this case I do not think it matter which approach I adopt as Counsel agreed that the Court must to consider the same relevant range of factors.

Discussion

- [23] There was no difference between Counsel that negligence actions should not be used to impugn a discretionary decision of a statutory body because for a Court to substitute its own discretion is to usurp the function of the public body (Stephen Todd, *The Law of Torts in New Zealand* 7th Ed, Thomson Reuters, Wellington, 2016 at 6.06.02 and page 349).
- [24] In *X (Minors)* Lord Browne Wilkinson at page 737 said:

Since what are under consideration are discretionary powers conferred on public bodies for public purposes the relevant factors will often include policy matters, for example social policy, the allocation of finite financial resources between the different calls made upon them or ... the balance between pursuing desirable social aims as against the risk to the public in so doing. It is established that the courts cannot enter upon the assessment of such "policy" matters.

- [25] Mr. McBride argues that PICB is not pursuing a complaint about the exercise of a statutory discretion, or indeed that the Reserve Bank implemented a flawed policy or even a 'political decision'. He submits PICB's complaint is that the Reserve Bank failed to appreciate that it needed to give a prior notice of its decision to revoke. I do not accept that submission.
- [26] The decision of the Reserve Bank to revoke PICB's licence was undoubtedly the exercise of a statutory discretion in a context where the Reserve Bank was required to consider and balance a range of policy considerations including but not limited to (as Mr. Waalkens correctly submitted) the prudential supervision of banks, the public confidence in the banking industry but also the interests of depositors with PICB.
- [27] It has been held that in so far as a plaintiff's complaint is that a decision maker has made a mistake as to the extent of the power causing the plaintiff to suffer loss his only cause of action is in misfeasance not negligence. Rationales for this principle include that a duty to take care to act within power 'might act as a disincentive to efficient decision making and tend to lead to intractable difficulties in determining how such a duty might be discharged' (Todd at 6.6.02 (4))

page 367) and that such a duty would undercut the requirements for the cause of action in misfeasance. In *Northern Territory of Australia and Ors v Mengel and Ors* (1995) 185 CLR 307, 359 Brennan J said:

Where a public officer takes action that causes loss to a plaintiff ...and the sole irregularity consists of an error as to the extent of the power to support the action, liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in a public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability – namely, liability in negligence – where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss.

[28] As Mr. McBride acknowledges (see paragraph 47 of his submissions) PICB's complaint is the failure of the Reserve Bank to give notice of its intention to revoke its licence. The Reserve Bank failed, PICB says, to appreciate the true extent of its power causing PICB purely economic loss. In such a case PICB' only cause of action in tort is for misfeasance not negligence and no duty of care exists.

[29] I note also in this context the words of Lord Keith of Kinkel in the Privy Council case of *Takaro Properties v Rowling* [1987] 2 NZLR 700 where it was said:

As is well known anybody, even a Judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs

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can be severely criticised without attracting the epithet "negligent". Obviously, this simple fact points rather to the extreme unlikelihood of a breach of duty being established in these cases, a point to which their Lordships will be return; but it is nevertheless a relevant factor to be taken into account when considering whether liability in negligence should properly be imposed.

[30] Mr. McBride argues that this claim is a novel one because there are no authorities addressing a claim against a bank for negligently revoking a licence, publicly without the benefit of a statutory period of notice. Whilst that may be so, there are a number of authorities where the Courts have refused to impose a duty of care on a public body undertaking a financial regulatory role (*Minories Finance Limited v Arthur Young* [1989] 2 ALL ER 105 (CA), *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 (PC), *Davis v Radcliffe* [1990] 1 WLR 821 (PC), *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) and see also *Stovin v Wise* [1996] AC 923). This also tells against the imposition of a duty of care.

[31] It is trite that whether a common law duty of care will be imposed in a case such as this is strongly influenced by the statutory framework under which an impugned decision is made. The relevant legislation is the Act. It is impossible to see how the imposition of the duty of care for which PICB contends can ever be considered consistent with the Act. In determining whether it is fair, just or reasonable to impose a duty of care the Court ought to look at the statutory purpose of the statutory duty that the defendant is said to have negligently performed. In revoking a banking licence the Reserve Bank is concerned with the prudential supervision and public confidence in the operation and stability of the financial system and to protect the

interests of client's, investors and general public depositors' (section 15 and see also section 36 and 37).

- [32] To impose on the Reserve Bank a common law duty of care as alleged in this case would be inconsistent with the performance by the Reserve Bank's of its supervisory functions and its duty to protect 'clients, investors and general public depositors'. It might well also have a chilling effect and discourage the performance of the Reserve Bank's duties for fear of civil liability. I agree with Mr. Waalkens that this is a powerful factor pointing against the imposition of a common law duty of care.
- [33] Mr. McBride argued that PICB was vulnerable and dependant in that it had no way of protecting itself from the negligent decision of the Reserve Bank to revoke its licence and that this supports the imposition of a duty of care. He also submits that there was a special relationship between the Reserve Bank and PICB. I do not accept that PICB was vulnerable, at least not in the way that concept is understood in the present context (*Minories Finance* (supra) at 110).
- [34] PICB was a substantial commercial enterprise concerned with making profits from providing banking services. It was well able to protect itself by conducting its operations prudently and carefully in accordance with the requirements of the Act and its licence. In so far as it contends it was vulnerable to a negligent decision to revoke its licence it was able and had the means to seek judicial review and obtain urgent interim relief. It is notable that PICB did indeed seek interim relief in CV 40/2016 but abandoned the application.
- [35] The argument that there existed a special relationship between PICB and the Reserve Bank is most curious. First, no such special

relationship is pleaded. It is for PICB to assert in its pleading all the facts that it relies upon to support the imposition of a duty of care. More importantly, I cannot see how a 'protracted dialogue' (see Mr. McBride's submissions at [55]) between the Reserve Bank and PICB can possibly give rise to the imposition of duty to protect PICB when the subject matter of the dialogue was PICB's alleged failure to comply with the Act, the terms of its licence and directives of the Reserve Bank.

[36] It follows that despite all that Mr. McBride impressed upon me in his able submissions I can see no tenable argument that the Reserve Bank owed PICB a duty of care as alleged. The sixth cause of action is therefore struck out.

Security for costs

[37] In seeking security for costs the Reserve Bank relies upon O.17 Rule 1(b) that PICB may be unable to pay its costs if ordered to do so. Mr. McBride accepts that the Reserve Bank has satisfied the onus upon it to persuade the Court that PICB may not be able to pay costs but says other factors point against making the order sought.

[38] I drew to Counsels' attention the principles in *Public Service Association Incorporated v Kingdom of Tonga* [2015] Tonga LR 439 (CA) at paragraphs [22] to [27]. The Court of Appeal set out a four step enquiry in assessing applications of this sort. The Court must assess:

- a) The approximate level of costs likely to be awarded to the defendant if successful.
- b) Whether the plaintiff will be good for such an award.

- c) Whether, in the light of the circumstances of the case, justice requires that the plaintiff should be required to give some security for those costs.
- d) In those circumstances, the amount of the security that should be ordered and the means by which it should be satisfied.

[39] At each step of its consideration of the application the onus of persuading the Court to make an order for security is borne by the applicant (in this case the Reserve Bank). I deal with each of the four matters I must consider below.

[40] The Reserve Bank seeks security for costs in a sum of \$100,000. There is no evidence to support that figure and PICB argues that it is manifestly excessive. It argues that an amount of \$20,000 is a more appropriate amount if security is to be required. I will return to this.

[41] Mr. McBride's concedes that PICB may not be good for an award of costs and I do not need to consider the evidence in relation to this.

[42] Mr. McBride refers to a number of factors which he says point against ordering security. He argues that the plaintiff is not nominal and has suffered a real loss as a consequence of the revocation of its license. This is strongly disputed by the Reserve Bank who says that PICB was losing large sums of money from the day it commenced business. It appears to me that the Reserve Bank is correct about that. I also therefore do not accept the submission that PICB's impecuniosity has been caused by the Reserve Bank's decision to revoke its licence without prior notice.

[43] It is said that PICB has not disposed of assets to avoid paying costs and has difficulty accessing third party funding. It appears to me that

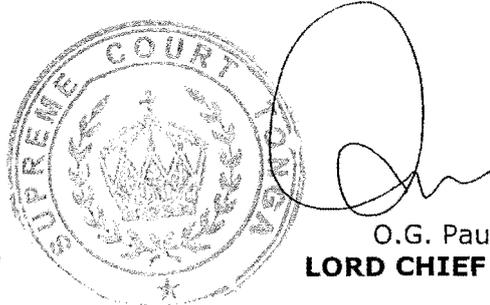
the disposal of assets is a reason to grant security but not a compelling factor to refuse an application where there is clear evidence of a plaintiff's impecuniosity. There is insufficient evidence that PICB is not able to draw on third party funds (such as shareholders or others interested in the proceeding) to raise a sum which in the context of a commercial banking dispute will be relatively modest.

- [44] A further matter relied upon is that PICB's claim is meritorious. As Kós J noted in *Highgate on Broadway Ltd v Devine* [2012] NZAR 1017, 1024 the Court is not to predetermine the merits or form more than an impression. Similarly the Court of Appeal in *Public Service Commission* (supra) noted that any assessment of the merits can only be broad brushstroke. My assessment of the merits is that PICB's claim is arguable but not strong.
- [45] Finally it is argued that ordering security would be oppressive and 'likely to lead to a denial of justice'. There is certainly insufficient evidence before me to suggest that is the case.
- [46] Neither party contends that security should be provided other than by payment into court.
- [47] Balancing the relevant factors I am of the clear view that the interests of justice require that an order be made that PICB provide security for costs. However, as I have noted the Reserve Bank has failed to put before me any evidence of the likely costs of the action. I expect any assessment it has made will have to be reviewed now that the sixth cause of action has been struck out.
- [48] Counsel agree that if I find security should be provided the best course is to adjourn this application so that they may confer about the

amount of security to be provided by PICB. If they cannot do so the matter can be adjudicated I will deal with this in the orders below.

Result

- [49] The sixth cause of action in the statement of claim is struck out.
- [50] I am satisfied that PICB should provide security for costs but adjourn the application to allow Counsel to confer in the hope that some agreement can be reached as to quantum.
- [51] This action shall be called for mention at **9am on 29 September 2017** at which time I shall if necessary hear further from Counsel on the quantum of security and make timetabling orders
- [52] The Reserve Bank is entitled to cost to be fixed by the Registrar if not agreed.



NUKU'ALOFA: 28 July 2017

O.G. Paulsen
LORD CHIEF JUSTICE