

25/09/17

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

CV 42 of 2015

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BETWEEN: RUDRA PRASAD

First Plaintiff

PRATITA PRASAD

Second Plaintiff

AND : LUNA'EVA ENTERPRISES LTD

First Defendant

**MOAPA ENTERPRISES LIMITED
(IN LIQUIDATION)**

Second Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. W. Edwards for the plaintiffs
Mr. L. Niu SC for the first defendant
Mr. W. C. Edwards Snr SC for the second defendant**

**On the papers: Submissions for the first defendant dated 15
August 2017
Submissions for the plaintiffs dated 22 August
2017**

RULING ON COSTS

1. In a written ruling of 10 August 2017 I dismissed the plaintiffs' claim against the first defendant. I granted leave for the parties to seek costs whilst expressing a tentative view that there might be reasons why costs should lie where they fall. The first defendant has now

applied for costs. The plaintiffs oppose the application for costs and argue that costs should lie where they fall.

2. There is no application for costs from or against the second defendant.

The first defendant's submissions

3. Mr. Niu notes that the claim was originally commenced, not by the plaintiffs, but by Rampra Investments Limited and Rulesh Prasad and the plaintiffs took over the case and had themselves substituted as plaintiffs. The plaintiffs elected to pursue this action in their own names and this has been proven to be misguided putting the first defendant to considerable costs.
4. Mr. Niu argues that the general rule is that costs follow the event and the first defendant has been successful.
5. In relation to the fact that the first defendant pursued defences that were considered unmeritorious Mr. Niu argues that does not matter and the fact remains that the costs of the first defendant would not have been incurred at all but for the plaintiffs' decision to bring the action.
6. Mr. Niu seeks an order that there be costs to the first defendant to be taxed if not agreed.

The plaintiffs' submissions

7. For the plaintiffs Mr. Edwards noted that in my ruling I had referred to some unsatisfactory aspects of the case for the first defendant.

These were its failure to call evidence on matters upon which its Counsel sought to rely in closing and its unmeritorious defences.

8. Mr. Edwards submitted that the Court has a discretion whether to award costs and that it could refuse to award costs to a successful party in the exercise of its discretion based on some reason connected with the case (*Bayliss Baxter, Ltd v Sabath* [1958] 2 All ER 209).
9. Mr. Edwards argues that the first defendant should not be awarded costs because it had caused the proceeding by breaching its agreement with Rampra and refusing to meet its obligation to pay for the stock and other assets it had acquired from it. Mr. Edwards submitted that costs should lie where they fall.

Discussion

10. Mr. Niu is correct that the general rule is that the party who is successful in an action can expect to be awarded costs but this is always subject to the Court exercising its discretion, which must be exercised judicially, to make some other award. Ultimately the object of the Court in each case is to achieve an outcome which is consonant with the justice of the case (Dal Pont, *Law of Costs*, 2003 at page 240).
11. Having considered the parties' submissions I have had cause to re-examine the tentative view I expressed in my ruling that costs should lie where they fall.
12. The argument that Mr. Edwards advances, that the action was only necessary because the first defendant refused to meet its obligation

to Rampra, is not a valid reason to deprive the first defendant of costs. It is no excuse for the action having been brought in the name of the wrong party. It is also based on an assumption, that may yet prove to be incorrect, that Rampra is entitled to recover 'the debt' from the first defendant.

13. The Court may find that there is good cause for a successful party to be deprived of some portion or all of its costs. Whether good cause exists is a question of law for the trial judge to determine. I take as the relevant test whether it would be more fair as between the parties that some exception should be made to the general rule. In *Jones v Curling* (1884) 13 QBD 564, 567 Bowen LJ said:

..'good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make. Now, to ascertain the existence of such facts the judge should look in the first place at the result of the action itself ...and he should look also at the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of the litigation, and beyond that he should consider all the facts of the case so far as no particular fact was concluded by the [result of the action]; and if upon the whole he reasonably thought there were facts which justified him in thinking that justice would be better arrived at by an exceptional order it would be his duty to make such an order.

14. The facts upon which a judge could exercise his discretion to deprive a successful party of costs must be facts which are relevantly connected to the litigation (*Edmund v Martell* (1907) 24 TLR 25, 26).

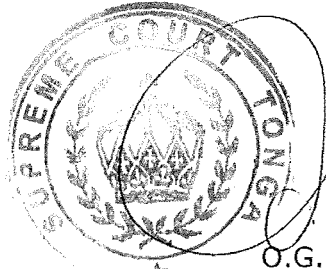
15. Whilst I do not think the first defendant should be deprived of its costs entirely there are factors which warrant a reduction in the award made in its favour.
16. First, the defences which were advanced by the first defendant were not meritorious, were substantially rejected by the Court and unnecessarily added to the costs of the litigation. Additionally, the first defendant filed briefs of evidence which caused the hearing to be directed towards an analysis of issues that were ultimately of no significance given the first defendant's election to call no evidence. Finally, in closing Mr. Niu advanced an argument that was based upon the evidence the first defendant had chosen not to call. Ultimately the Court relied upon the fairness of the plaintiffs' Counsel to acknowledge the issue [para 51 of the ruling].
17. In making a reduced award of costs in a case such as this the authorities identify the competing considerations that the Court should not take such a rigid approach that would dissuade a party from raising issues that may be material and the Court's legitimate interest in encouraging parties to consider carefully the matters that they put in issue. In this case the latter factor must prevail in my assessment, particularly given the obvious weakness of the defences advanced by the first defendant.
18. Weighing all the factors I have mentioned into account I have decided that justice will be served by reducing the first defendant's award of costs by 20 per cent.

Result

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19. The first defendant is awarded 80 per cent of its costs of this action against the plaintiffs to be taxed by the Registrar if not agreed.
20. There shall be no order as to costs for or against the second defendant.



O.G. Paulsen

NUKU'ALOFA: 22 September 2017 LORD CHIEF JUSTICE