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20/11/18
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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY CV 16 of 2018

BETWEEN: PACIFIC GAMES COUNCIL

First Plaintiff

TONGA SPORTS ASSOCIATION AND NATIONAL OLYMPIC COMMITTEE

Second Plaintiff

AND: THE KINGDOM OF TONGA

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. W Edwards for the plaintiffs
Dr. R Harrison SC QC and Ms. S T Moa for the defendant

Hearing : 1 November 2018
Date of Ruling : 19 November 2018

RULING

This application

[1] The plaintiffs sue the defendant (the Kingdom) seeking damages for breach of a written agreement of 19 October 2012 (the Host Contract) pursuant to which the Government of Tonga agreed to support, facilitate and fund the hosting of the Pacific Games in Tonga in 2019. This ruling concerns an application by the

rec'd 20/11/18

Kingdom to strike out, or alternately stay, the plaintiffs' claims and for security for costs (the application).

[2] There is an acknowledgment from the plaintiffs that security for costs should be provided. I have been asked to adjourn that part of the application for further discussions between Counsel (assuming the action survives the application for strike out).

[3] In so far as the balance of the application is concerned, the Kingdom advances three arguments in support of strike out/stay. I summarise these as follows:

(a) That the plaintiffs' statement of claim does not disclose a reasonable cause of action against the Kingdom as the Host Contract, and specifically the fiscal and financial provisions of it requiring the Government to effectively underwrite the 2019 Pacific Games (the Games), were never binding upon the Government and/or became a 'dead letter' on 5 September 2017 upon the repeal of the legislation enacted to provide for the organization of the Games, the Pacific Games Organization Act 2013 (the Act);

(b) That the plaintiffs were not parties to the Host Contract and have no standing to sue upon it; and

(c) That the plaintiffs' heads of damages are misconceived and the damages claims should be stayed in any event until actual losses (if any) can be determined following the holding of the Games, which will now take place next year in Samoa.

The pleadings

[4] The statement of claim pleads all of the following relevant matters:

(a) The first plaintiff (PGC) is a registered entity at the Cook Islands, but at the time of execution of the Host Contract had its registered office at New Caledonia, and owns and controls the Pacific Games;

(b) The second plaintiff (TASANOC) is a registered society in Tonga and the governing body for National Sports Federations in Tonga, responsible for their participation in events sanctioned by PGC;

(c) The Government and TASANOC successfully submitted a bid to PGC to hold the Games;

(d) On 19 October 2012, PGC, the Government and the Tonga Pacific Games Association, which it was pleaded was 'for all intents and purposes' TASANOC, entered into the Host Contract which included obligations upon the Government to support, facilitate and fully underwrite the financing of the Games;

(e) On 16 May 2017, the Prime Minister of Tonga gave notice to PGC that Tonga had unilaterally withdrawn its hosting rights for the Games and thereby repudiated and brought an end to the Host Contract; and

(f) As a result of the repudiation/breach of the Host Contract the plaintiffs have suffered loss and damage, including losses associated with obtaining Samoa to host the Games, which in the case of PGC amount to TOP$4,581,901.49 and, in the case of TASANOC amount to TOP$2,612,256.59.

[5] The Kingdom has not filed a statement of defence, choosing rather to pursue the application.

Strike out application principles

[6] Order 8 Rules (1) and (2) of the Supreme Court Rules provide:

> **Striking out pleading**
>
> (1) The Court may at any time order that any pleading or part thereof be struck out if —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it is unclear, or may otherwise prejudice or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of process of the Court, and may order the action to be stayed or dismissed, or judgment to be entered accordingly.

(2) No evidence shall be heard on an application under paragraph (1)(a).

[7] The commentary in the White Book, 1998 edition, at 18/19/1 states in relation to the then equivalent Rule of the Supreme Court in England:

> This rule constitutes a wide and general provision both useful and necessary to enforce the rules of pleading. It empowers the Court
>
> (1) by summary process *i.e.* without a trial in the normal way, to stay or dismiss an action...where the pleading discloses no reasonable cause of action...or where the action...is otherwise shown to be frivolous or vexatious or otherwise an abuse of the process of the Court, and
>
> (2) to strike out any pleading...which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim...and must not therefore be, or contain any matter which is, scandalous, frivolous or vexatious or which may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court ...
>
> Not every pleading which offends against the rule will be struck out ...Still "the defendant may claim *ex debito justitiae* [as a matter of right] to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it" (per James L.J. in *Davy v Garrett* (1878) 7 Ch.D, 473, p.486).

[8] There are well settled principles that the Court applies when deciding strike out applications. The principles were stated in *Friendly Islands Satellite Communications (Tongasat) Ltd and others v Pohiva and others* [2015] Tonga LR 199, 209 and by the Court of Appeal of New Zealand in *Attorney General v Prince & Gardiner* [1998] 1 NZLR 262, 267 and *Carter Holt Harvey Ltd v Secretary for Education* [2015] NZCA 32. These principles are summarized as follows:

(a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. This 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. The case should only be precluded from proceeding where it is so certainly or clearly bad and the court must be particularly careful in areas where the law is confused or developing.

(d) The fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction.

[9] Relevant to the approach I take in this case is *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 182 where the New Zealand Court of Appeal also said:

> It is common ground that the claim is not to be struck out unless it is so clearly untenable that it could not possibly succeed even after amendment in a manner proposed by the plaintiff, and on the assumption that all facts alleged in the statement of claim can be proved true...The statement of claim must be beyond repair. It must be plain that even if it is reformulated the claim cannot succeed.

The Host Contract and the Pacific Games Organization Act

[10] It will assist in an understanding of the arguments advanced by the Kingdom if I were to summarise the most relevant terms of the Host Contract and the Act.

The Host Contract

[11] The parties to the Host Contract were stated to be:

(a) PGC with 'Offices, Noumea, New Caledonia';

(b) Tonga Pacific Games Association, referred to as the 'HOST PGA'; and

(c) Government of Tonga, referred to as the 'Host Government'.

[12] The Host Contract provided by way of background, *inter alia*:

> The HOST Government has supported the HOST PGA in its bid to host the Games and have (sic) agreed to continue to support the HOST PGA and the OC in the manner appearing in this Contract.

HOST PGA will ....with the approval of the PGC delegate the organization of the Games to the OC which, while working in partnership with the HOST PGA, shall also be directly responsible to the PGC.

[13] 'OC' referred to the Pacific Games Organizing Committee in respect of which more is said below.

[14] The expressions 'Pacific Games Council'/'PGC' and 'Tonga Pacific Games Association'/'HOST PGA' were not further defined. Clause 1.3 (8) provided, however, that a reference to a party to the Host Contract included that party's 'successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives)'.

[15] Clause 1.6 contained various joint and several warranties by the HOST PGA and/or the HOST Government. Under clause 1.6 (3) the HOST PGA was, in consultation with PGC, to constitute a Pacific Games Organizing Committee (the OC) and an Audit and Governance Authority. The OC was to be financially autonomous and independent of any Government Department and to have all the necessary legal status and powers to organize and stage the Games. The Audit and Governance Authority was to oversee the good governance, accountability and transparency of the OC. Under clause 1.6 (6), the HOST Government and the HOST PGA warranted that they had, and would have for the life of the Host Contract, authority and power to enter into the Host Contract and to perform their obligations under it. Under clause 1.6 (8) they also warranted that the Host Contract constituted a valid and binding legal obligation.

[16] Under clause 1.9 the HOST Government undertook to support, facilitate and fully underwrite the financing of the staging and organization of the Games in the respects identified.

[17] Section 6 of the Host Contract contained various provisions purporting to stipulate that the Host Contract was a binding and legally enforceable contract.

[18] Clause 1.124 (section 34) dealt with termination, and clauses 1.126 - 1.129 (section 36) with the effects of *force majeure*, which term was defined.

[19] There were provisions dealing with the governing law, dispute resolution and jurisdiction. Clause 1.137 (section 38) provided that the Host Contract was

governed by English law. Clause 1.139 provided that the parties submitted to the exclusive jurisdiction of the courts of Tonga.

[20] Under clause 1.138 the HOST Government, the HOST PGA and the OC waived the application of any legal provision under which they might claim immunity against any law suit, arbitration or other legal action initiated by PGC.

[21] Clause 1.146 (section 42) dealt with 'Third parties' and provided that 'No person who is not a party to this Contract will have any right to enforce it pursuant to the Contracts (Rights of Third Parties) Act 1999'. This is a statute of the Parliament of the United Kingdom.

The Pacific Games Organization Act 2013

[22] The Act came into force on 17 April 2013 and remained in force until the Pacific Games Reorganization (Repeal) Act 2017 (the Repeal Act) received the Royal Assent on 5 September 2017. The Repeal Act simply provided that 'The Principal Act is hereby repealed'.

[23] The long title to the Act stated that it was:

> An Act to establish a statutory authority independent of Government to organize, oversee and conduct the South Pacific Games in Tonga in 2019 and generally provide for the good organization of those games.

[24] In general terms the scheme of the Act was that the primary function of organizing and holding the Games was that of an Organizing Committee that was to be autonomous and independent of Government but subject to oversight of an Audit and Governance Authority containing a significant number of Government representatives. The funds to be provided for the Organizing Committee's function were to be drawn from various Governmental and non-Governmental sources. The Government's ultimate responsibility was to ensure that 'as a funder of last resort' the Organizing Committee received sufficient funds 'to enable it to generally organize and conduct the Games'.

[25] In s. 2 it defined the 'Authority'; the 'Host Contract' (as meaning 'the contract dated 19 October 2012 between the Pacific Games Council, Tonga Pacific Games

Association and the Government of Tonga'); the 'Organizing Committee' and "TOPGOC"; and 'TASANOC'. TASANOC was defined as:

> ...means the Tonga Sports Association and National Olympic Committee; and for the purposes of the Pacific Games Charter and Protocols, TASANOC shall be the Tonga Pacific Games Association...

[26] The Host Contract was expressly referred to in sections 5(3), 5(4), 19(1) and 19(2) and 22(1) of the Act. For present purposes it is the first two provisions that are most relevant and they provide:

> (3) The Organizing Committee shall comply with any direction given to it by the Pacific Games Council which is to retain overall control of the Games, in accordance with the Host Contract.
>
> (4) The Organizing Committee shall in the exercise of its functions comply with the Principles of Planning, Organization and Staging set out in Part II of the Host Contract and otherwise comply with the terms of the Host Contract.

[27] Part II of the Act established and empowered the Organizing Committee or TOPGOC. Under s 5(2), the Organizing Committee 'shall be financially autonomous and independent of any Government Department'.

[28] Part III of the Act established and empowered the Audit and Governance Authority, with oversight over the Organizing Committee. The composition of the Authority was set out in s. 15 and it was to have no more than eight members of which four (including the Chairperson) were to be representatives of Government, three were to be representatives of TASANOC and one was to be a representative of PGC.

[29] A key provision for present purposes was s 17, dealing with the source of the Organizing Committee's funds which provided as follows:

> **Funds of the Organizing Committee**
>
> (1) The funds available for the purpose of enabling the Organizing Committee to perform its function under the Act consist of –

(a) all moneys from time to time appropriated by the Legislative Assembly for the purpose;

(b) all moneys received by the Organizing Committee for goods or services or under any contract or agreement;

(c) all moneys received by the Organizing Committee by way of grant or donation;

(d) all moneys borrowed by the Organizing Committee; and

(e) any other moneys received by or made available to the Organizing Committee under or for the purpose of the Act.

(2) The Government of the Kingdom shall ensure that, as a funder of last resort, the Organizing Committee receives sufficient funds to enable it to generally organize and conduct the Games.

The choice of law

[30] As noted above, the Host Contract provides, at clause 1.137, that 'This Contract is governed by English Law'. Counsel did not advance any submissions as to any issues of private international law that might arise in the present case. Regardless, it appears to me that in regards to whether, and to what extent, there are limits upon the Government's power to contract, as a matter of public policy the law of Tonga is the governing law. For the purposes of this application I am proceeding accordingly.

Was the Host Contract binding on the Kingdom?

Statutory framework

[31] Relevant to this first issue are s. 5 of the Crown Proceedings Act, cl. 19 of the Constitution and certain provisions of the Public Finance Management Act (the PFMA), particularly ss. 9, 30 and 47.

[32] Section 5 of the Crown Proceedings Act provides that actions for breach of contract may be brought against the Kingdom under ordinary procedures of the Court. It states:

5 Suits against the Kingdom

(1) A person making any claim against the Kingdom of Tonga whether in contract or tort, or for any other civil remedy, may in respect of the claim bring a suit against the Kingdom of Tonga in that name and style in the appropriate Court.

(2) Subject to this Act, all suits which are taken on behalf of or brought against the Kingdom under this Act shall be instituted and proceeded with in accordance with Rules of Court of the appropriate Court.

[33] Clause 19 of the Constitution is concerned with the control of public finances and the dealing with public money. It requires that the expenditure of public funds be authorised by statute. It provides:

19 Expenditure to be voted

No money shall be paid out of the Treasury nor borrowed nor debts contracted by the Government but by the prior vote of the Legislative Assembly, except in the following cases:

(i) Where an Act duly passed by the Legislative Assembly gives power to pay out money or borrow or contract debts, then money may be paid out, or borrowing carried out or debts contracted in terms of that Act;

...

[34] The PFMA regulates the 'economic, fiscal and financial management by Government' and s. 9 provides:

9 Appropriation required

(1) No public money shall be expended unless the expenditure has been authorised by an Appropriation Act limited in accordance with subsection (2) or is statutory expenditure.

(2) The authority to expend money or incur expenses or liabilities under an Appropriation Act lapses at the end of the financial year to which that Act relates.

(3) Subject to section 10, any money appropriated under this section may be expended only in relation to that appropriation and for no other purpose.

(4) Each expenditure of public money made in respect of statutory expenditure shall be managed and accounted for in the same manner as public money is expended under an Appropriation Act.

(5) Donor funds received subsequent to the passage of the Appropriation Bill shall be made available to the respective Votes without further approval from the Legislative Assembly.

[35] Section 30 of the PFMA provides:

> **30 Liability of the Government**
>
> The Government shall not be liable to contribute towards the payment of any debt or liability unless it is liable to contribute under any Act, or under any guarantee or indemnity given under this Act.

[36] Section 47 of the PFMA provides that it prevails over any other enactment save for the Constitution.

The Kingdom's arguments

[37] The Kingdom's stance was neatly précised by way of introduction in Dr. Harrison's submissions as follows:

> The end point of this analysis will assert that the fiscal and/or financial provisions of the Host Contract (at least) were never of themselves legally binding on the Government/Kingdom of Tonga. For any legal obligation or fiscal authority to be imposed or conferred on the Government/Kingdom, independent (that is, statutory) authorization by way of a lawful appropriation of funds was required. Upon the ultimate denial and legislative removal by the present Government of authorization to continue funding the 2019 Games, those particular (purported) provisions of the Host Contract became a dead letter.

[38] Dr. Harrison presented submissions referencing a strong line of authorities which went largely unanswered by the plaintiffs who, it appears, did not appreciate the

import of paragraphs 5(b) and 10(g) of the notice of application or the difficult constitutional law issues that the claim raises. The arguments the Kingdom advanced are summarized below.

[39] For present purposes only, the Kingdom accepts that the Government generally has the power to enter into contracts without statutory authority but not in the case of contracts that involve it undertaking financial liabilities or require the expenditure of public funds. In such cases restrictions are placed on its power to contract by cl. 19 of the Constitution and the PFMA. Specifically, they require separate appropriation or must be authorized by an Act of the Legislative Assembly. Where the power to contract has been so regulated, such requirements are mandatory and a contract made in breach of them will be invalid (*Commercial Cable Company v Government of Newfoundland* [1916] 2 AC 610, 614-617). Furthermore, any term of the contract that purports to bind the Kingdom notwithstanding a failure to comply with the mandatory requirements shall be ineffective.

[40] The Kingdom argues that there was no separate appropriation of funds for the purposes of the Host Contract in accordance with the PFMA and it has not been suggested by the plaintiffs that there was. It also contends that the Act, whilst acknowledging the existence of the Host Contract, did not in its terms either affirm its legal validity or the funding obligations that it purported to impose on the Government. As a consequence, the Host Contract was never legally binding on the Government.

[41] Furthermore, the Kingdom argues, the Host Contract must be taken to be subject to an implied term requiring the expenditure of public money to be appropriated because the Crown's 'ordinary contracts only mean that it will pay out the funds which Parliament may or may not supply' (*Attorney General v Great Southern and Western Railway Co of Ireland* [1925] AC 754, 773 per Viscount Haldane). What this argument amounts to is that if the necessary funds have not been appropriated by the Legislative Assembly then Government is excused from performance.

[42] Alternatively, the Kingdom argues that pursuant to the doctrine of executive necessity the Government could not by the terms of the Host Contract bind itself so as to fetter its future exercise of executive powers in accordance with what it considered was the public interest. Dr. Harrison submitted that in this case the

Government's decision to withdraw its support for the Games was in the public good and communicated in the Prime Minister's letter of 16 May 2017. The reasons given were that to host the Games would 'financially jeopardise the Tongan economy and will derail Tonga's macroeconomic stability and its ability to deliver its national priorities'. He argued that this has not been challenged and therefore must be taken as having been accepted by the plaintiffs.

[43] On the basis of either the asserted implied term or the doctrine of executive necessity, the Kingdom contends the Government is excused from performance of the Host Contract and can have no liability to compensate the plaintiffs for any loss (*Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500, 503; *Commissioners of Crown Lands v Page* 1960] 2 QB 274; *William Cory & Sons Ltd v London Corporation* [1951] 2 KB 476 (CA) and *Shebelle Enterprises Ltd v Hampstead Gardens Suburb Trust Ltd* [2014] EWCA Civ 305).

Discussion

[44] Contrary to the Kingdom's submission, it appears to me that the Act was legislative affirmation of the Host Contract and authorized payment of the funding obligations. The Act, according to its terms, obligated the Government to ensure that the Organizing Committee had sufficient funds to hold the Games. The Legislative Assembly must be taken to have been aware and intending to conform to the requirements of the Constitution (and in particular cl. 19). It would be remarkable indeed if Parliament could pass an Act that recognized the Host Contract, put in place a structure for the organization, management and funding of the Games that conformed with it and provided for the funding of the Games (including by way of separate appropriation but also, in any event, by the Government as a funder of last resort) and yet still be taken to have not intended to affirm either the validity of the Host Contract or the funding obligations.

[45] I do not accept either the Kingdom's argument that a term must be implied into the Host Contract that it was subject to the Legislative Assembly making money available to allow payment under it to be made. I cannot see any justification for the implication of such a term given cl. 19 of the Constitution and the PFMA provisions requiring statutory authorization of the expenditure of public money.

[46] In my view *Attorney General v Great Southern and Western Railway* (supra), and the cases that were relied upon in it, should be regarded as authority only for the principle that appropriation by Parliament is necessary to allow public funds to be disbursed. (see in this regard, *New South Wales v Bardolph* (1934) 52 C.L.R. 455 per Dixon J, 508 - 510).

[47] I note also the force of the point made in P W Hogg, *Liability of the Crown*, 1st Ed at page 123, that if the absence of appropriation by Parliament was to be regarded as sufficient excuse for non-performance it would provide too easy a means for Government to escape contractual obligations, even after the other party had performed his/her part. The author says:

> If there was a disputed claim to money said to be due from the Crown under a contract, the court could not adjudicate on the merits of the dispute until Parliament had authorized the very payment which was in dispute; such a result is at odds with the general purpose of Crown proceedings legislation, for it means in effect that a plaintiff has to obtain the fiat of the legislature before he can sue the Crown for breach of contract.

[48] I am also not satisfied that relying upon the doctrine of executive necessity the Government can effectively repudiate its contractual obligations without paying damages whenever it considers that the public good demands. Cogent reasons exist as a matter of principle why this is not the case but at the heart of the matter is the recognition that whilst Government must occasionally break contracts in the public interest there is no justification for a rule immunizing it from an obligation to pay damages. (Hogg (supra) at pages 129-140 and see also in the 2nd Ed at 171-172 and *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia and others* [1977] 139 C.L.R. 54, 74 and the authorities referred to). As Hogg says at page 130 (1st Ed):

> The liability to pay damages would not prevent the Crown from taking action which was required in the public interest, it would simply require the Crown to pay the true cost of the action taken.

[49] There is English authority that supports the view that the Crown cannot escape liability to pay damages under a contract it considers disadvantageous simply 'by saying that it never promised to act otherwise than in the public good' (*Commissioners*

of Crown Lands v Page (supra) per Lord Devlin at 293 - 294; *Board of Trade v Temperley Steam Shipping Co Ltd* (1926) 26 L1. L.R. 76, 78 and *Robertson v Minister of Pensions* [1949] 1 K.B.227, 231). In *Page* (supra), Lord Devlin, relying on *Temperley* (supra) and *Robertson* (supra), drew the distinction between a case where an act done by the Crown was in the exercise of its general powers under a statute or under the prerogative on the one hand, and a case of 'an act done for the purposes of achieving a particular result under the contract in question' on the other. In the latter case the Crown could not 'escape from the contract' (see in this regard also *NSW Rifle Association Inc v Commonwealth of Australia* [2012] NZWSC 818 per White J at [97], [100]-[101], [105]-[106]). There is clearly an argument to be made that this case falls into the latter category.

[50] In Canada the Supreme Court has held that the Crown has an undisputed right to legislatively avoid a contract but it will not escape its liability to pay the other contracting party damages unless it legislates to expropriate that party's rights. *Wells v Newfoundland* [1999] 3 SCR 199, is such a case.

[51] The facts of *Wells* were that the respondent had been employed as a member of a Public Utilities Board and was entitled to hold office till he was 70 years old. An Act was passed to restructure the Board and his position was abolished. He brought a claim for damages. He was met with the arguments that the Crown's relationship with its servants was not contractual but that even if it was it was entitled to legislate to dismiss him. It was held that the Crown had breached its obligations to the respondent when it cut off his remuneration for which he was entitled to seek damages. Major J said at page 216 and at page 218:

> ... there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party...
>
> ...

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

[52] It must be remembered that in a Tongan context the Constitution protects against the expropriation of existing rights in cl. 20 which provides:

> **20 Retrospective laws**
>
> It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws. .

[53] The present state of the law in my view is summarized in De Smith's Judicial Review 8th Ed at 532-533 where the learned authors write:

> Assertions such as that the Crown is incapable of so contracting as to fetter its future executive action in any way, or that in all contracts entered into by the Crown there is an implied term that the Crown may repudiate its obligations whenever in its opinion executive necessity so demands, must be viewed with reserve today. The Crown cannot not be allowed to tie its hands completely by prior undertakings, but the courts will not allow the Crown to evade compliance with ostensibly binding obligations whenever it thinks fit. How and where the line is to be drawn is anything but clear.

[54] The law is uncertain and is developing and approaches vary between jurisdictions where courts are sensitive to their own constitutional arrangements and circumstances. It would not be right for me on an interlocutory application of this kind and on limited information to 'draw the line' on a matter such as this. The plaintiffs' claim should not be struck out as disclosing no arguable cause of action on this basis.

The identity of the plaintiffs as contracting parties

[55] The thrust of this ground is that it is not clear who the named plaintiffs are or if they even exist and, if they do exist, on what basis they are entitled to sue on the Host Contract.

[56] I have before me two affidavits made by the Hon. Minister of Finance, Pohiva Tu'i'onetoa, on behalf of the Kingdom, an affidavit of Andrew Minogue, who identified himself as the Chief Executive of the Pacific Games Council, for the first named plaintiff, and an affidavit of Lord Sevele 'O Vailahi, who identified himself as the Vice President (Finance) of the Tonga Sports Association and National Olympic Committee, for the second named plaintiff.

[57] No objection was taken by any party to the filing of evidence but in any event it is only in relation to applications under O. 8 Rule 8(1)(a) that the Court cannot receive evidence. I consider that this ground falls to be determined under O. 8 Rule 8(1)(c).

The position of the first plaintiff.

[58] In the Host Contract the first named party is described as 'Pacific Games Council ("PGC") Offices Noumea, New Caledonia'. In the statement of claim the first plaintiff is the Pacific Games Council and it is described in paragraph [1] as being a registered entity at Rarotonga, Cook Islands that at the time of the execution of the Host Contract had it registered office at Noumea.

[59] In paragraph [5] of his first affidavit, the Minister raised the concern that given the pleaded change of registered office from one jurisdiction to another, there was a strong likelihood that the first plaintiff was in fact a different entity from the one that signed the Host Contract.

[60] In his affidavit, Mr. Minogue said that 'PGC' was registered as a 'social association' in New Caledonia in 2007 but that since that time PGC has registered as an international company in the Cook Islands in order to present itself as a more professional organization to its members and stakeholder partners. Mr. Minogue went on to say that 'the entity PGC had its former office in New Caledonia and then moved its registered office to Cook Islands'.

[61] In support of his evidence, there is attached as exhibit A to Mr. Minogue's affidavit a Certificate of Current Status for an entity called 'Pacific Games Council Ltd' (not Pacific Games Council) which recites that that company was duly incorporated in the Cook Islands as an international company pursuant to the International Companies Act 1981-82 on 20 January 2015. The certificate further states that the company's registration expires on 19 January 2016.

[62] Furthermore, when referring to the former registration of 'PGC' in New Caledonia in 2007, Mr. Minogue produces as exhibit B a document recognizing an association in New Caledonia entitled 'Conseil des Jeux du Pacifique' (again not Pacific Games Council).

[63] Whilst Mr. Minogue's evidence may make sense from a non-lawyers perspective, as Dr. Harrison points out, even if one were to assume that the entity called Pacific Games Council Ltd, which it appears is the intended first plaintiff, has continued in existence to the present time it is not the party named as the first plaintiff and manifestly was not in existence when the Host Contract was executed.

[64] Furthermore, if the entity suing as the first plaintiff is, as Mr. Minogue contends, the Cook Islands registered company Pacific Games Council Ltd, it is not only incorrectly described but cannot have been a contracting party to the Host Contract its incorporation (that is, its existence) postdated the execution of the Host Contract by a period of more than 2 years.

[65] If that were not enough, there does not appear to have been an entity in existence at the time the Host Contract was signed by the name of the Pacific Games Council capable of entering into the contract under that name or having standing to sue in the courts of Tonga.

The position of the second plaintiff

[66] In the Host Contract the second named party is Tonga Pacific Games Association (not TASANOC). In the statement of claim the second plaintiff is the Tonga Sports Association and National Olympic Committee. It is described in paragraph [2] as being a society registered in Tonga.

[67] Apparently to establish a link between the named second plaintiff and the Host Contract there is the vague pleading in paragraph [8] of the statement of claim that the Tonga

Pacific Games Association 'for all intent and purposes is the Tonga Sports Association and National Olympic Committee'. It is not at all clear what that means.

[68] In paragraphs [6] and [7] of the Minister's affidavit, he stated (and it is not disputed) that there is an incorporated society registered in Tonga under the name Tonga Sports Association and National Olympic Committee Incorporated but that entity was only incorporated on 22 November 2017 and was not in existence at the time the Host Contract was entered into.

[69] In his affidavit in reply, Lord Sevele was unnecessarily dismissive of the suggestion that the second plaintiff was not a party to Host Contract and referred to it as an embarrassment. Lord Sevele noted the Act contained, in s 2, a definition of TASANOC as meaning the Tonga Sports Association and National Olympic Committee and stated that 'for the purposes of the Pacific Games Charter and Protocols, TASANOC shall be the Tonga Pacific Games Association'. Lord Sevele is correct about that, but the provisions of the Act did not identify or deem the Tonga Sports Association and National Olympic Committee as the HOST PGA contracting party to the Host Contract.

[70] Lord Sevele also said that at various times, the Government of the day has recognized the second plaintiff as the representative for all sports federations in Tonga. Assuming that to be so, the Government's recognition says nothing about the identity of the HOST PGA party to the Host Contract.

[71] It is surprising to me that no attempt has been made to explain why in the Host Contract the HOST PGA was named as the Tonga Pacific Games Association (and not TASANOC) and if TASANOC was the intended contracting party to the Host Contract it was not named as such.

[72] On what is before the Court the intended second plaintiff is the Tonga Sports Association and National Olympic Committee Incorporated which is presently incorrectly described in the statement of claim and more importantly was not in existence and could not have been a contracting party to the Host Contract.

Discussion

[73] It is trite that a plaintiff suing for breach of contract must plead, inter alia, that they are a party to the contract sued upon or otherwise have a right in law to sue upon the contract. Doubt on the plaintiffs' standings to sue on the Host Contract are evident in the

statement of claim and made manifest in the affidavits of Mr. Minogue and Lord Sevele. It appears that the plaintiffs do not exist or are at best misdescribed and, if the latter, have no standing.

[74] These are fundamental matters. They are not matters that can be resolved by the provision of further particulars. The statement of claim is not only unclear but it seriously prejudices the Kingdom within the meaning of O. 8 Rule 8(1)(c). The Kingdom cannot be expected to plead to the statement of claim when it cannot be sure of the identity of the plaintiffs or of the basis upon which they sue.

The damages claims

[75] The Kingdom argues that the plaintiffs' claims for damages are misconceived. Although Dr. Harrison spent a good deal of time on these matters I do not need to address the points he made as Mr. Edwards concedes that the damages claim must be repleaded to provide both details of the basis of the claims in damages as well as particulars of the amounts sought.

[76] The Kingdom also contends that the claims for damages should be stayed until actual financial losses can be ascertained and pleaded with full credit given for income and additional expenditure derived or incurred from the hosting of the Games in Samoa. In circumstances where it is not clear how the damages claims will now be formulated, when the case is likely to be heard in relation to the conduct of the Games or whether there is in fact going to be any prejudice to the Kingdom, I consider this submission premature.

My assessment

[77] For the reasons I have given the statement of claim is defective in that it:

(a) Fails to identify the plaintiffs (or misdescribes them) and fails also to provide a basis upon which they have standing to sue upon the Host Contract; and

(b) Fails to adequately plead the basis and particulars of the damages claims.

[78] Whilst I accept that the damages claims can be reformulated in an amended pleading it is not at all clear to me that the matters in paragraph 77(a) are capable of repair justifying me striking out the pleading and dismissing the action.

[79] The plaintiffs did not submit an amended pleading in response to the Kingdom's application to advance an argument that repair was possible. If the defects are capable of repair the plaintiffs may need to apply for the joinder or substitution of parties.

[80] However, on balance and having regard to the statement of principle in *Van Soest* (at para [9] above), I have decided to stay rather than dismiss the action subject to conditions.

Result

[81] This Kingdom's application is successful in part and this action is stayed.

[82] The plaintiffs (or either of them) are reserved leave to apply on notice no later than 18 January 2019 to lift the stay subject to them providing a draft amended statement of claim for the Court's approval adequately addressing the matters in paragraphs 77(a) and (b) above.

[83] The Kingdom's application for security for cost is adjourned and leave is reserved for that application to be brought on should the plaintiffs apply to lift the stay.

[84] Costs are reserved pending the receipt of memoranda from Counsel which should be filed within 14 days.

SUPREME COURT TONGA

O.G. Paulsen

NUKU'ALOFA: 19 November 2018. **LORD CHIEF JUSTICE**