

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

Solicitor General
20/08/19
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CV 1 & CV 2 of 2018

CV 1 of 2018

BETWEEN: LORD SEVELE-'O-VAILAHI

- Plaintiff

AND: THE KINGDOM OF TONGA

- Defendant

CV 2 of 2018

BETWEEN: SAKOPO LOLOHEA *and eight others*

Plaintiffs

AND: THE KINGDOM OF TONGA

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

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

Date of Hearing: 16 July 2019

Date of Ruling: 31 July 2019

RULING

The applications

1. The defendant ("the Kingdom") applies to strike out the plaintiffs' claims in CVs 1 and 2 of 2018. This is the second time that the Kingdom has made such applications in these proceedings. On the first occasion the Kingdom was successful, for reasons

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set out in my ruling of 15 March 2019 (the earlier ruling). I gave the plaintiffs the opportunity to amend their pleadings. They are now contained in further amended statements of claim (“further amended SOC”).

2. As was the case when the Kingdom last applied to strike out, the plaintiffs’ claims follow a similar format and the allegations made by all of them are in substance the same. Such differences as exist are not material for present purposes.
3. Counsel again focused their arguments on the application to strike out in CV 1 of 2018, and the fate of that application shall determine the other.

Strike out principles

4. The Kingdom’s applications are made in reliance upon O. 8 Rule 8(1) of the Supreme Court Rules. They allege that the plaintiffs’ claims disclose no reasonable cause of action or are otherwise an abuse of the process of the Court.
5. I have previously set out the principles that apply to strike out applications in the earlier ruling, at [18]-[21], with which Mr. Edwards did not take issue. Dr. Harrison accepted that those paragraphs stated (overall) the correct approach. I have proceeded on the basis of those principles.

The facts

6. The facts were also set out in my earlier ruling, which relevantly, in relation to the plaintiff in CV 1, were stated to be:

[5] Tonga agreed to hold the 2019 South Pacific Games (the Games). In 2013 the Pacific Games Organization Act was passed (**the Act**). The long title of 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.

[6] The statutory authority referred to was the Tonga Pacific Games Organizing Committee (**the Committee**). It was established under s. 3 of the Act. The purpose

and function of the Committee included being responsible for the preparation, management and conduct of the Games (s. 5(1)(a)).

[7] Lord Sevele (the plaintiff) was appointed by the Committee as its Chief Executive Officer and Chairperson under s. 9 of the Act. He was engaged pursuant to a written contract dated 9 May 2014. It is said that the contract was varied on two occasions but, as I shall relate, most relevantly on 27 July 2017.

[8] On or about 17 May 2017, the Government of Tonga made a decision to withdraw from hosting the Games. On 29 June 2017, the Legislative Assembly passed the Pacific Games Organization (Repeal) Act 2017 (**the Repeal Act**). Section 2 of the Repeal Act repealed the Act (subject to Royal Assent).

[9] The Repeal Act's only operative provision states 'The Principal Act is hereby repealed'. The Repeal Act says nothing about what will become of the Committee or its assets or the manner (if at all) in which the incurred or accrued liabilities of the Committee, such as might be owed to its employees, would be satisfied.

[10] At a meeting of 27 July 2017, the Committee decided to wind up its affairs and agreed to terms upon which the plaintiff's employment would be terminated. The Committee agreed to make payment of a sum (said to be \$TOP105,869.89) in consideration for the early termination of the plaintiff's contract of employment (**the settlement sum**).

[11] On around 3 August 2017, the Committee notified the Government of the terms of the settlement. The Government did not respond.

[12] On 5 September 2017, the Repeal Act received Royal Assent and became law.

[13] On or about 27 September 2017, the plaintiff's counsel wrote to the Minister of Finance asserting that the Government was responsible for payment of the settlement sum. Again the Government did not respond.

[14] The plaintiff commenced this action on 9 January 2018. Originally, the Committee was named as a defendant....

The further amended statement of claim

- 7 In the earlier ruling, I held that claims advanced by the plaintiffs in contract and in tort for breach of statutory duty, disclosed no reasonable cause of action and were to be struck out. I reasoned that it was arguable that the Repeal Act had retrospective effect and that a tenable cause of action for breach of the plaintiffs' constitutional rights could not be confidently excluded. I therefore gave the plaintiffs the opportunity to re-plead.
- 8 The further amended statements of claim advance causes of action for declarations and compensation based on alleged breaches of cls. 18 and 20 of the Constitution. I now set out the basis of those causes of action with reference to the further statement of claim of the plaintiff in CV 1.
- 9 At [26] and [27], the plaintiff asserts a "right of property" in the settlement sum. He alleges that such right of property existed "prior to and at the time of the enactment and receipt of the Royal Assent to the Repeal Act."
- 10 At [28], the plaintiff asserts that the Repeal Act "extinguished his right to receive the settlement sum."
- 11 At [29], the plaintiff pleads that by cl. 18 of the Constitution, Parliament was constrained to ensure all laws it enacted did not deprive the people of their rights to property without payment of fair value.
- 12 At [30], the plaintiff pleads that by cl. 20, Parliament was constrained to not enact laws which were retrospective insofar as those laws "may curtail or take away or affect rights or privileges existing at the time of the passing of the laws."
- 13 At [31], the plaintiff alleges that the enactment of the Repeal Act breached cls. 18 and 20 of the Constitution rendering it "unconstitutional and invalid" in the following respects:
- (a) In breach of cl. 18, the Kingdom failed to protect the plaintiffs' right of property, namely his contractual right to payment of the settlement sum, of which he was deprived by the enactment of the Repeal Act; and

(b) In breach of cl. 20 the Repeal Act had the effect of curtailing or taking away or affecting his right to the settlement sum which was negotiated and agreed prior to the enactment of the Repeal Act.

14 The plaintiff seeks declaratory relief that the Repeal Act is invalid and does not apply to the settlement sum, as well as payment of damages in the amount of the settlement sum and interest.

The Constitution

15 The relevant provisions in the Constitution are cls. 18, 20, 79, 82 and 103A, which I set out below:

18 Taxation - Compensation to be paid for property taken

All the people have the right to expect that the Government will protect their life liberty and property and therefore it is right for all the people to support and contribute to the Government according to law. And if at any time there should be a war in the land and the Government should take the property of anyone the Government shall pay the fair value of such property to the owner. And if the Legislature shall resolve to take from any person or persons their premises or a part of their premises or their houses for the purpose of making Government roads or other work of benefit to the Government the Government shall pay the fair value.

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.

79 Amendments to Constitution

It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles. And if the Legislative Assembly wish to amend any clause of the Constitution such amendment shall after it has passed the Legislative Assembly three times be submitted to the King and if His Majesty and the Cabinet are unanimously in favour of the amendment it shall be lawful for the King to assent and when signed by the King it shall become law.

82 Constitution is supreme law

This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

103A Relief for breach of Constitution

The remedy for breach of any provisions of the Constitution shall be declaratory relief and shall not affect any award of damages under any other law.

Summary of the arguments

- 16 Dr. Harrison characterised the settlement sum as a “golden handshake,” that the Committee could not reasonably, as a matter of fact or law, have expected to be funded by way of any remnant of the Government’s obligation as a “funder of last resort,” under s. 17 of the Act “to enable it to generally organise and conduct the Games.”
- 17 In relation to the plaintiff’s causes of action, Dr. Harrison argued that they were untenable because:
- (i) In relation to cl. 20, the Repeal Act had already been duly passed by the Legislative Assembly before the purported settlement with the plaintiff occurred and was not retrospective in relation to the plaintiff’s alleged rights;
 - (ii) Clauses 18 and 20 operate only as constitutional fetters on the power of the Legislative Assembly (and the King) to enact laws, and the only legal consequences of the purported enactment of a law which offends those provisions is, under cl. 82, that the purported law is “void” and the outcome in law is that the Act remained in full force and effect;
 - (iii) Given their constitutional nature and effects, contravention of cls 18 and 20 cannot support a remedy of compensation or damages; and
 - (iv) Clause 103A of the Constitution, precludes any claim for compensation or damages for contravention or breach of cls 18 and 20.

The plaintiff’s response

- 18 Mr. Edwards placed reliance upon the earlier ruling and the reasons that I provided for allowing the plaintiff to re-plead his claim, and submitted that the causes of action are tenable.
- 19 He argued that there is a “matrix of facts, acts and circumstances” surrounding the settlement between the Committee and the plaintiff which made it inappropriate to summarily dismiss the plaintiff’s claims.

- 20 He referred me to Australian case law that has held that an existing common law right of action for damages is a right to property, and that under the Constitution of Australia, such rights cannot be extinguished (and thereby appropriated) by the Government, except on just terms. He commended this approach to the application of cls. 18 and 20.
- 21 Mr. Edwards analysed cl. 18 of the Constitution, which he said gives rise to “a private right.” The Committee was, he said, an “emanation of the Government” and the Repeal Act represented an acquisition of the plaintiff’s property rights, namely the right to be paid for his labour and his right to the settlement sum. He referred me to *Touliki Trading Enterprises Ltd v Fakafanua* [1996] Tonga LR 145, which he said was “clear recognition” of what the Constitution requires in relation to the preservation of property rights and the enforcement of those rights where a citizen is aggrieved.
- 22 Mr. Edwards then argued that cl. 103A does not preclude an action for compensatory relief as that provision has been interpreted in *Taione anor v Kingdom of Tonga* [2005] Tonga LR 67.
- 23 Finally, Mr. Edwards submitted that if a declaration that the Repeal Act was unconstitutional was made “there is no doubt” that it would follow that the Repeal Act was void *ab initio*.

Discussion

My earlier ruling

- 24 My earlier ruling is not binding, either for or against the present application. Mr. Edwards did not contend otherwise. Simply because I gave the plaintiff the opportunity to re-plead his claim alleging breach of the Constitution, does not mean that any pleading presented on that basis necessarily discloses an arguable cause of action. I must consider the matter afresh.

The existence of factual disputes and wider implications

- 25 Mr. Edwards raised an argument that the factual matrix did not lend itself to summary dismissal of the plaintiff’s claim. A strike out application proceeds (generally speaking)

on the assumption that the facts pleaded in the statement of claim are correct, and the Court will not attempt to resolve disputed questions of fact. The Court may refuse to strike out if it considers it may need closer argument and consideration of wider implications of any decision. The plaintiff has not identified disputed questions of fact that require resolution, nor possible implications that have not been considered. I therefore reject this argument.

The golden handshake

- 26 There is no evidence before me from which I could make findings that the plaintiff “quite calculatedly” negotiated a “golden handshake,” or that the Committee could not have expected the Government to fund the settlement in such circumstances.
- 27 I do not accept Dr. Harrison’s submission that the Repeal Act did not offend against the prohibition on retrospectivity in cl. 20 because “the Legislative Assembly had, before the alleged settlement, already enacted the Repeal Act, subject only to the Royal Assent, required before the Repeal Act could “become law upon publication.”
- 28 This argument could only be valid if the words in cl, 20, “at the time of the passing of such laws,” referred to a time other than the date of enactment. It is plain, from the use of the words “such laws,” that it does not. Those words can only refer back to the words “enact any retrospective laws” that appear earlier in the clause. Furthermore, it is self-evident that until “a law” has been enacted it is not a law. It is wrong to suggest that “a law” should be regarded as enacted when it is still subject to both Royal Assent and publication.
- 29 The interpretation I adopt is consistent with cl. 80 of the Constitution, which sets out the enactment formula and refers to Acts being enacted by the King and the Legislative Assembly. It is consistent, also, with s. 23 of the Interpretation Act, which distinguishes between the time of passing, and the time of commencement, of an Act.

Interpretation of cl. 18

- 30 Mr. Edwards relied upon the first and third sentences of cl. 18 as creating guarantees of the plaintiff's right to property. The plaintiff's reliance upon cl. 18 is misconceived. Its arguments are based on a misreading of the clause.
- 31 When read as a whole, and in the light of the Court of Appeal's decision in *Touliki* (see for instance at pg. 154), the first sentence of cl. 18 is concerned with the right of the people to support and contribute to the government by the payment of tax "according to law." It has no application to the facts of this case.
- 32 Dr. Harrison made the further compelling argument that as cl. 20 already protects against existing rights and privileges being curtailed or taken away by retrospective legislation, it is hard to see any justification for "the vague and aspirational language" of the first sentence of cl. 18 as creating a separate broad individual right or guarantee in relation to "property."
- 33 The third sentence of cl. 18 is concerned with the taking by the Legislature from any person or persons of "their premises or a part of their premises or their houses." It does not create a general guarantee in relation to rights of property. The words upon which Mr. Edwards placed particular reliance in the third sentence, "or other work of benefit to the Government," do not describe property, but the purpose for which premises or houses may be taken by the Government, giving rise to the obligation on the Government to pay fair value.
- 34 The Australian cases relied upon by the plaintiff do not assist me. They reflect the particular wording of the Australian Constitution and shed no light on the meaning of cl. 18.
- 35 The plaintiff's cause of action based on cl. 18 is not arguable and must be struck out, but, had that not been the case, the findings that I make below in relation to the remaining cause of action would apply equally to it.

Does breach of clause 20 give rise to a right to compensation/damages?

- 36 The Kingdom does not contend that breaches of constitutional rights or freedoms can never give rise to a right to claim damages or compensation. Rather, it argues that whether this is so must depend upon the nature of the constitutional provision and the right or freedom it creates. Clause 20, it contends, plainly does not recognise any such individual constitutional right or freedom. Furthermore, before a right to compensation can be found to exist, consideration must be given to cl. 103A, which imposes a constitutional prohibition on the grant of a remedy by way of compensation/damages.
- 37 The kernel of Dr. Harrison's submission on this aspect of the case is that written constitutions are multi-purpose documents which may provide for fundamental individual rights and freedoms, but will also establish the structure of government, including imposing limits on judicial, executive and legislative power. He draws a distinction between provisions in a constitution that confer or affirm fundamental rights and freedoms and those that do not. There can be no principled argument, he contends, that every constitutional provision carries with it the right to compensation or damages if contravened.
- 38 Turning to cl. 20, Dr. Harrison submits that it does not recognise any individual right or freedom; rather, it is simply a fetter on the scope of the power of the Legislative Assembly and the King to enact laws which offend against the prohibition on retrospectivity. It cannot, in those circumstances, confer on an individual a right to compensation and the only remedy for breach is contained in cl. 82, which provides that if any law is inconsistent with the Constitution, to the extent of the inconsistency it shall be void.
- 39 I find these submissions to be compelling. They are supported by the distinction in cl. 79 between the "laws of liberty" and other Constitutional provisions. They find further support in *Touliki*, where the Court, at pg. 154, analysed and drew distinctions between the earliest clauses in Part 1 of the Constitution concerned with "implications of the constitutional entrenchment of human liberty" and later clauses in Part 1 and elsewhere in the Constitution concerned with questions of property.

- 40 Mr. Edwards argued that Dr. Harrison’s submissions were wrong, and that this was clear from jurisprudence in Tonga and other jurisdictions where constitutions “in writing similar to the Tongan Constitution” have considered such matters. He referred particularly to the Australian case of *Smith v ANL* [2000] 204 CLR 493, which he said “clearly recognised a private law action with respect to the invalidity of legislation which was contrary to the Constitution of Australia...” I am unable to take a great deal from these submissions as Mr. Edwards did not refer me to the Tongan jurisprudence he relied upon or to any constitutional provision from another country which was “similar” to cl. 18. Also, none of the Australian cases I was referred to involved the Court both declaring legislation void and granting compensatory damages, which is what the plaintiff contends for in this case.
- 41 In a memorandum filed after the hearing, Mr. Edwards submitted that if the Repeal Act is declared invalid, then it must follow that the Act will remain in force and the plaintiff would “be at liberty to enforce that right by suing on the [settlement]”.
- 42 As Dr. Harrison pointed out in a reply memorandum, the Kingdom concedes that a declaration of invalidity is an available and appropriate method of challenging constitutional validity, but in so far as the plaintiff contends that he will be, upon obtaining such a declaration, at liberty to enforce his rights under the settlement, he fails to identify against whom the settlement could be enforced. Logically (and, I would add, as a matter of law) that could only be against the Committee, and not the Kingdom.
- 43 Dr. Harrison is correct in his submission that the assertion that the plaintiff is entitled to compensation upon obtaining a declaration of invalidity (or perhaps enforce the settlement against the Kingdom) is purely conclusory.
- 44 In any event, the plaintiff’s claim for compensation is precluded by cl.103A of the Constitution. The meaning of cl. 103A is, first, that the only remedy for breach of any provision of the Constitution shall be declaratory relief, and second, that the limitation on the available remedies shall not affect any award of damages under any law other than the Constitution.

- 45 The leading case on the meaning and constitutional status of cl. 103A is *Taione anor v Kingdom of Tonga* [2005] Tonga LR 67.
- 46 In *Taione*, Webster CJ concluded, at pg 126, that the words “declaratory relief” in cl 103A “means exactly what it says ie a declaration and nothing more.”
- 47 He relied upon the express limit on amendments to the Constitution in cl. 79, to conclude that cl. 103A was void, but only to the extent that it was inconsistent with the law of liberty in the Constitution and any consequent right to constitutional damages. I was wrong, in my earlier ruling, at [66], when I said that in *Taione*, the Judge held cl 103A of the Constitution to be invalid.
- 48 At pg. 129, he made the following remarks:
- ...while accepting the supremacy of the legislature and its ability to make provision under the Constitution for breach of any provision of the Constitution, the effect of Clause 103A may simply be to restrict the remedies such as constitutional damages which might otherwise be available for breaches of its provisions. But even if that is so, I consider that that significantly affects and restricts the law of liberty, which is not sanctioned by the Constitution as it stands, particularly in relation to the subject matter of this case, Clause 7 and the additional words there “and no law shall ever be enacted to restrict this liberty.
- I therefore find in terms of Clause 82 that Clause 103A is void to the extent that it is inconsistent with the law of liberty in the Constitution (ie the relevant provisions of the declaration of rights in Part I of the Constitution, in particular Clause 7, which was the subject of this case) and any consequent right to constitutional damages under the Constitution.
- 49 Webster CJ did not go on and identify what provisions of the Constitution conferred rights comprising the law of liberty but, as recognised in *Touliki*, the Constitution is both the peoples’ guarantee of fundamental rights (which one can infer form part of the law of liberty) and a practical instrument of Government (which do not).
- 50 *Taione* does not support the plaintiff’s claim for redress by way of compensation or damages because, quite plainly, cl. 20, when properly analysed, is a fetter on legislative

power and does not create, confer or recognise individual fundamental rights and does not form part of the law of liberty.

- 51 Clause 103A operates to limit the remedy available to the plaintiff for breach of cl. 20 of the Constitution to declaratory relief and the claim for compensation/damages must be struck out.

The effect of constitutional invalidity

- 52 In his written submissions, and in his memorandum filed after the hearing, Mr. Edwards emphasised the effect of the making of a declaration of invalidity. He quoted from Australian cases that are authority that a law made in excess of power may be wholly disregarded and is of no force or validity. Dr. Harrison conceded that if the Repeal Act was to be declared invalid the consequence would be that the Act would remain in force and the plaintiff would be at liberty to enforce his settlement against the Committee. There is therefore an inherent contradiction in the plaintiff's pleaded contention that the Act is valid and he is entitled, in addition, to compensatory damages; at least to the extent that they are sought on the basis that he was been deprived of the right to enforce payment of the settlement sum.

Result

- 53 The orders that I make in relation to both CV1 and CV2 are as follows:
- (a) The plaintiffs' causes of action alleging breach of cl. 18 of the Constitution are untenable and are struck out in their entirety.
 - (b) The plaintiffs' causes of action alleging breach of cl. 20 are not struck out but the plaintiffs' remedy is limited to declaratory relief only.
- 54 Counsel should confer and within 28 days (by no later than 28 August 2019) submit memoranda for consideration by the new Lord Chief Justice of appropriate timetabling orders, which should include provision for the filing of further amended statements of claim (prepared in accordance with this ruling) and defence. The Registrar shall refer the file to the Lord Chief Justice for consideration on 2 September 2019.

55 I have not heard any meaningful argument as to costs and, as my tenure as Lord Chief Justice ends today, I cannot call for memoranda. In those circumstances, I consider it prudent to simply reserve costs.



A handwritten signature in blue ink, appearing to read "O.G. Paulsen".

O.G. Paulsen

NUKU'ALOFA: 31 July 2019.

LORD CHIEF JUSTICE