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

CV 45 of 2016

BETWEEN:

FRANZ STRAUSS & GUDRUN STRAUSS — Plaintiffs

-and-

DIANE WARNER — Defendant

PLAINTIFF'S APPLICATION TO VARY AMOUNT OF SECURITY FOR COSTS

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN

Counsel: Mr D. Corbett for the Plaintiffs
Mr W. Edwards for the Defendant

Date of hearing: 18 November 2019

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The application

1. On 22 June 2017, Lord Chief Justice Paulsen ordered the Plaintiffs to provide security for the Defendant's costs in the sum of TOP$30,000 within 21 days, failing which, the action would be stayed.

2. The Plaintiffs have not paid the security or any part thereof.

3. On 25 February 2019, in respect of an application by the Defendant pursuant to Order 8 rule 8(3)(b) of the Supreme Court Rules, namely that the case had not been set down for trial within two years of service of the writ, Paulsen LCJ ordered that unless by no later than 26 July 2019 the plaintiff provided security as ordered, the action shall be struck out.

4. On 6 June 2019, the Plaintiffs filed the current application seeking a variation of the order for security by reduction of the sum of $30,000 to $5,000. The application is opposed.

Background

5. In 2006, the Plaintiffs acquired the Seaview Lodge and Restaurant on Vuna Road. They became heavily indebted to Juergen and Brigitta Wolf who obtained a judgment against them in the Supreme Court. On 24 October 2012, the Wolfs obtained an order appointing the Defendant herein, Dianne Warner, as receiver of the Plaintiffs' business assets, including their shares in Seaview Lodge Ltd and the restaurant business operating in the company's premises.

6. The receiver was empowered by court order to sell those assets. In the course of the receivership, she consolidated all the business assets into the company and, on 15 April 2014, sold the shares to an arm's length purchaser conditional upon Court approval of the sale. After payment of the receiver's fees and disbursements, including real estate commission and lawyer's fees, and repayment of a secured loan to Westpac Bank of Tonga, the resulting balance was insufficient to repay the Wolfs in full. They are still owed nearly $400,000 plus accruing interest.

7. On 13 May 2014, Lord Chief Justice Scott approved the sale and directed the transfer of the shares to the purchaser. The Court then terminated the receivership and released the receiver from all obligations relating to the receivership.

8. The Plaintiffs appealed those orders. That appeal was unsuccessful: *Strauss v Warner* [2014] TOCA 15.

This proceeding

9. On 22 August 2016, the Plaintiffs issued these proceedings against Ms Warner claiming damages for, inter alia, various breaches in her conduct of the receivership, including:

   (a) that the shares alone were worth more than $1.2 million, yet they and the business were sold together for $907,000;

   (b) that the sale of the restaurant business was unlawful as it was not subject to the receivership;

   (c) overpayment of various fees charged and disbursements by the receiver; and

   (d) loss of income for the rest of their lives.

   At one stage, the Plaintiffs' total damages claim exceeded $25,000,000.

10. The Defendant has denied the claim in its entirety.

11. As well as suing Ms Warner, the Plaintiffs also originally sued the real estate agents and lawyers instructed by her. Those claims against the Second to Fourth Defendants were discontinued in January 2017.

12. The Statement of Claim was first amended on 31 March 2017. Apart from deleting the pleaded claims against the Second to Fourth Defendants, the Plaintiffs introduced (at [45]) an allegation of negligence against Ms Warner. They allege that she breached a duty of care to them by, inter alia, not providing timely reports, receipts of payments made to third parties, disbursements or information on how the businesses of the lodge and restaurant were sold, selling the businesses at an undervalue and selling the restaurant which was not part of the receivership and without the Plaintiffs' consent. As a result, it was then pleaded that the Plaintiffs had suffered, inter alia, the loss of the businesses valued at $1.2 million, loss of income of $193,500 and $96,750 respectively, loss of private items valued at $100,000, overpayments and disbursements of $79,000 to the Defendant, overpayments of legal fees in the sum of $82,089.14, wrongful payments of $67,500 to Remax real estate agent and wrongful payments of $104,086.50 to Ladbrook Law Limited. The prayer for relief was amended at that time to add claims for damages in the sum of $1.2 million (presumably in relation to the alleged undervalued sale of the shares),[1] and $15 million for loss of reputation, character assassination, defamation and disparagement (in addition to one of the original claims of $10 million for loss of future income).

Application for security for costs – 22 June 2017

13. On 2 June 2017, Ms Warner applied for security for costs, quantified at $58,000. She provided a detailed affidavit in support in which she refuted the Strausses' claims, and to which they then did not respond.

14. On 22 June 2017, Paulsen LCJ ordered the Plaintiffs to provide security for costs in the sum of $30,000 within 21 days to the satisfaction of the Registrar of the Supreme Court, failing which, the action was to be stayed.

15. In considering the respective strengths and weaknesses of the parties' positions, his Honour noted:

> *[14] ... My starting point is that the Plaintiffs' pleading is confused and requires substantial amendment. The amended statement of claim proceeds on the clearly incorrect basis that all of the Plaintiffs' claims are founded upon an undefined duty of care. There are aspects of the claim that I am*

[1] Which I note is the total value asserted by the Plaintiffs rather than the difference between that sum and what was realised on the sale by the receiver.

unable to assess as I have insufficient information to do so. An example is the complaint that the Defendant had no right to sell the restaurant. However, overwhelmingly the claims appear weak and/or unrealistic even making full allowance for the fact that matters can take on a different complexion at trial. For instance, it is difficult to see how the Plaintiffs can realistically hope to challenge the Defendant's fees if, as she says, they were approved by the Court and I can see no basis at all for a claim for the very large sum of $10 million for loss of future income.

...

[16] ... In addition to the issue of oppression, the point must be made because the pleadings are not focused and some of the claims do not appear sound it is inevitable that the parties (but particularly the Defendant) will incur unnecessary costs. I note that the Plaintiffs have, even at this early stage, already removed three parties and amended the statement of claim but it is still substantially inadequate."

16. In seeking to balance the Defendant's interests to be protected for her costs against the Plaintiffs' right to have access to the court and have their case heard, and the risk that the overall effect of making the order may prevent them from doing so, his Honour arrived at the amount of $30,000 as being appropriate.

17. That decision was not appealed.

Application to set aside the order for security – 3 August 2017

18. In July 2017, the Plaintiffs applied to have the security order set aside. On 3 August 2017, Paulsen LCJ dismissed that application saying that no basis had been shown for doing so. In his reasons,[2] his Honour noted that in relation to the Plaintiffs' submission that the order would prevent them from pursuing their action, the potential for hardship to the plaintiff must be weighed against the absence of any merit in the claims that they advance. He recalled that when he made the order, he had a clear impression that the claim lacked merit. He added:

"... Not only do the claims as they are formulated appear to lack merit but the case has been pursued in a manner that has and will continue to add unnecessary costs for the parties."

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[2] Paragraphs 11 to 14.

Application for leave to appeal – 7 September 2018

19. The Plaintiffs applied for leave to appeal the refusal to set aside the order for security. On 21 September 2017, leave was refused by a single Judge of the Court of Appeal (Tupou J).

20. Some six months later, the Plaintiffs sought to renew their application under Order 7 Rule 3 of the Court of Appeal Rules. By that time, it was too late for it to be heard at the next sitting.

21. On 7 September 2018, almost a full year after Tupou J's decision, the Court of Appeal dismissed the application for leave on the papers: *Strauss v Warner* [2018] TOCA 21. Their Honours recorded, relevantly, and in summary, that:

    (a) in their counsel's submissions, the Strausses complained that they have been unable to complete discovery and they raised a large number of questions about "missing" documents and matters relating to the receiver's conduct they say require explanations. They made allegations of concealment of documents said to be done to thwart their efforts to make their case. Those complaints were not made in the Supreme Court and they were in any event only of 'tangential relevance to the question of security for costs';

    (b) they agreed with Paulsen LCJ's assessment of the Plaintiff's case as appearing 'weak' and (at [17]) that the amounts claimed were 'extravagant, indeed fanciful' with the 'appearance of claims made in terrorem'. They added that Counsel have a duty to the Court not to associate themselves with claims of that character;

    (c) the Plaintiffs face the considerable obstacle that the Court has approved the sale and the receiver's accounts and ordered the release of the receiver's obligations in the receivership;

    (d) if the Strausses are unsuccessful at trial, there could well be an award of costs to Ms Warner in excess of the security;

    (e) Ms Warner should be protected against that risk; and

(f) the security ordered of $30,000 is in the circumstances far from excessive.

Defendant's strike out application – 25 February 2019

22. On 14 December 2018, the Defendant applied to strike out the action pursuant to Order 8 Rule 8(3)(b) of the Supreme Court Rules. The application was heard on 22 February 2019 and Paulsen LCJ delivered his ruling on 25 February 2019. His Honour observed,[3] inter alia, that:

    (a) the Plaintiffs' claim, as then formulated, remained weak;

    (b) the action had not progressed because the Plaintiffs had failed to comply with the order for security and they could not give any indication as to when they might do so;

    (c) if the stay was lifted, the pleadings are clearly not adequate for trial, discovery issues are unresolved and there are likely to be further interlocutory applications;

    (d) on any view, the case will not be ready for hearing for a considerable period of time; and

    (e) there is also unfairness to the Defendant in having the claim hanging over her with no idea of when it might be resolved;

    (f) the Plaintiffs feel strongly that their claim has merit and are genuine in their desire to have it heard;

    (g) they have been unable to advance the claim because they are impecunious and not because they have been idle;

    (h) they now intend to apply to vary the Order and put before the Court more information as to their financial circumstances that might be relevant to such an application; and

    (i) there is the possibility that should the claim be struck out the Plaintiffs would have no opportunity to bring it again due to the limitation period in s. 16 of the *Supreme Court Act*.

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[3] [26], [27].

23. His Honour[4] balanced all those matters and considered that "a line must be drawn" but that justice required that the Plaintiffs be given more time within which to either comply with the Order or obtain a variation of it and advance the action.

24. He therefore ordered that subject to any further Order of the Court, unless by no later than 26 July 2019, the Plaintiffs provide security for the Defendant's costs as ordered on 22 June 2017, the action shall be struck out.

Application to vary amount of security

25. On 6 June 2019, the Plaintiffs filed the present application for variation of the order for security for costs. The application is supported by affidavits from each of the Plaintiffs sworn 18 March 2019.

26. The grounds for the application are stated, relevantly and in summary, as:

    (a) order 17, rule 2 of the Supreme Court Rules provides that an order for security for costs may, upon application, be revoked, decreased, or increased at any time;

    (b) due to their poor financial position, the Plaintiffs have been unable to pay the security;

    (c) the reason for the high security for costs was for airfares for witnesses from New Zealand to attend for the Defendant's case. However, the actions against those other Defendants in New Zealand have been discontinued;

    (d) the Plaintiffs are able to pay $5,000 into court, but would need time to do so; and

    (e) in *Friendly Islands Satellite Communications Ltd the Public service Association Incorporated* [2019] TOCA 1, a case involving claims of tens of millions of dollars, the Court of Appeal upheld an order for security for costs against the appellants in the sum of only $15,000.

27. The Plaintiffs' affidavits explain their parlous financial condition. They otherwise assert that their case has merit, that the receiver is hiding information from them as seen during an inspection of documents and has kept them in the dark all these years. They say they have never been provided with a statement of assets and liabilities of the

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[4] [28]

company which was required by the order in proceedings CV 277/2009 dated 24 October 2012 appointing the Defendant as receiver of the Seaview Lodge. They assert that that order requiring reports to be furnished to them was 'deleted' by a later court ruling on 18 December 2012. They assert that they have seen a financial report from the sale of the shares of the business showing a balance available to them of $349,113.68. None of those documents have been exhibited.

28. In her affidavit in opposition, sworn 11 July 2019, the Defendant (effectively) submits, inter alia, that:

    (a) the costs the subject of the order for security were only in respect of her costs and not the costs of any then overseas Defendants;

    (b) the statement of claim includes claims or allegations of defamation, special damages for overpayment of legal fees, special damages for overpayment of receivership fees, loss of income for each of the plaintiff and a number of other claims sought in the prayer for relief;

    (c) a number of those claims are bereft of any particulars or of any basis pleaded which might provide a proper cause of action;

    (d) there is a serious amount of work to be done in relation to the claim if it is to proceed and therefore the amount of security ordered by Paulsen LCJ is appropriate;

    (e) there are no new grounds raised since the original order was made; and

    (f) the claim should be struck out.

29. On 12 July 2019, Paulsen LCJ directed that the application be called before me on 6 September 2019 to allocate a fixture date.[5] He also stayed the operation of his order in paragraph 29(a) of his ruling dated 25 February 2019 pending further order of the court.

30. When the matter first came before me, Mr Corbett indicated that his clients wished to file a Further Amended Statement of Claim, which, he said, would be relevant to consideration of their application to vary the security. I directed that the plaintiff file

[5] I commenced office on 2 September 2019.

any proposed Further Amended Statement of Claim by 13 September 2019 and listed the application for hearing on 16 October 2019.

31. On 14 October 2019, Mr Corbett emailed the Registrar and asked for more time within which to file a Further Amended Statement of Claim due to his other practice commitments. As a result, the hearing of the application was relisted, ultimately, for 18 November 2019.

Further Amended Statement of Claim

32. On 28 October 2019, the Plaintiffs filed an "Amended Statement of Claim". It should of course have been intituled "Further Amended Statement of Claim". In any event, by reference to the colour coding used to differentiate between the amendments in March 2017 and the most recent amendments, the significant proposed 'changes' to the Plaintiffs' claim may be summarised as:

    (a) adding that the court order of 26 October 2012, whereby the shares were transferred to the receiver thereby making her the sole shareholder, director and manager of the company, placed her in a position of conflict of interest [13];

    (b) deleting the claim for damages of $10 million for loss of future income from the business [37];[6]

    (c) deleting claims in relation to payments of consultancy fees [39];

    (d) deleting claims in relation to the receiver's hourly rate [40]; and

    (e) additional allegations in relation to the asserted duty of care [45].

33. The current prayer for relief therefore seeks, inter alia:

    (a) a detailed financial report of the receivership;

    (b) damages in the sum of $1.2 million;

    (c) damages of $193,500 for Franz Strauss's loss of income;

[6] Although it appears that claim was previously deleted at least in part in the prayer for relief in the March 2017 amendments.

(d) damages of $96,750 for Gudrun Strauss's loss of income;

(e) damages in the sum of $100,000 (unspecified);

(f) damages of $79,000 for overpayment of receivership fees and disbursements;

(g) damages of $82,089.14 for overpayment of receivership legal fees;

(h) damages of $67,500 for wrongful payments to Remax Pinnacle brokers;

(i) damages of $104,086.50 for wrongful payments to Ladbrook Law Limited;

(j) interest at 10% p.a. from 26 October 2012;[7] and

(k) costs.

Approach

34. Neither counsel referred me to any decisions, in Tonga or elsewhere, relevant to applications of this kind.

35. In *Waters v Commonwealth of Australia (Australian Taxation Office)* [2017] FCA 312, Griffith J described the relevant test as follows:[8]

> "*... Hence the ordinary practice is that an application to set aside, vary or discharge an order of a substantive nature made after a contested hearing in contemplation that it would operate until a final disposition of the proceedings,* ***must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application****. That principle was applied by a Full Court of this Court in Darling Harbourside (Sydney) Pty Ltd v Sanirise Pty Ltd (unreported, Beaumont, Carr, Sackville JJ, 17 May 1996) to an order for the provision of security for costs. The Full Court set aside an order varying an order for the provision of security upon the basis that there had been no material change in circumstances established so as to warrant a variation of the original order.*"

[7] While para (o) of the prayer for relief now deletes all words after "Interest", paragraph 48 of the body of the pleading still retains the reference to 10% from 26 October 2012.

[8] Following *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2001] FCA 1603 at [11] and *Brimaud v Honeysett Instant Print Pty Ltd* (1998) 217 ALR 44 at 46-47. See also *Tasman Charters Incorporated (in liquidation in New Zealand) & Ors v Kamphuis & Ors* [2006] NZHC 64.

36. The approach I therefore take is to consider whether there have been any material changes in the Plaintiffs' circumstances or in the nature and merits of their pleaded case which might reasonably be expected to alter any of the considerations relevant to any application for security, and which resulted in the extant order here, or which might reduce the scope or volume of work and therefore legal costs to be incurred by the Defendant in preparation and presentation of her case for and at trial. The Plaintiffs bear the onus of establishing the above matters.

Submissions

Plaintiffs

37. During the course of oral submissions, Mr Corbett submitted that, as is evident from their affidavits on this application, the Plaintiffs are unable to provide the security ordered in the sum of $30,000. They can only afford $5,000 but need time to pay that. In response to my question, Mr Corbett confirmed that there have been no material changes to the Plaintiffs' financial position between when the former Chief Justice made the original order for security in June 2017 and now.

38. In relation to the Further Amended Statement of Claim and whether any amendments therein might support the instant application, Mr Corbett pointed to the fact that the Second to Fourth Defendants were no longer parties and that therefore costs should be reduced.

39. Mr Corbett also pointed to the deletion of the very large damages claims of $15 million for loss of reputation etc., and $10 million for loss of future income. Again, the claim for $15 million, which appeared only in the prayer for relief at paragraph (f), had already been deleted as part of the first amendments. He was unable to describe or quantify any possible reduction in costs associated with the deletion of the loss of future income claim.

40. Mr Corbett sought to explain that the cause of his clients' difficulties with their Statement of Claim is that they have been "left in the dark" about the conduct of the receivership. He said that a previous discovery order was cancelled by the former Chief Justice and replaced with an inspection order after Mr Niu SC (as he then was), who was then appearing for the Defendant, indicated to the court that the volume of

documents to be discovered was significant, which, I interpolate, was intended to mean that the task of discovering all such documents would have been oppressive. When he inspected the documents that were presented pursuant to that order, Mr Corbett gestured from the bar table that the height of the pile was far less than that gestured by Mr Niu. Therefore, he said, the Plaintiffs consider that many documents were missing and that some are apparently held at the Seaview Restaurant. When I asked whether, since the start of the proceedings, the Plaintiffs had ever made an application for non-party discovery (pursuant to order 18, rule 8 of the Supreme Court Rules), Mr Corbett said they had not. Mr Corbett added that in order to obtain access to all the documents he and his clients consider the Defendant ought to have in relation to the receivership, and which might be relevant to their pleaded case, he plans to seek to apply to have the original discovery order reinstated.

41. When I asked Mr Corbett for any form of objective comparative assessment of the costs considered by Paulsen LCJ, and the costs which are likely to be incurred by reason of any material change in the Plaintiffs' presently pleaded case, so as to substantiate any reduction in the security ordered, including to the level of $5,000 which the Plaintiffs say they are able to pay, he was unable to assist.

Defendant

42. Mr Edwards indicated at the outset that he had recently communicated to Mr Corbett concerns about various deficiencies or problems that remain with the Further Amended Statement of Claim, to which, he said, Mr Corbett had not yet responded. Those complaints form part of the Defendant's opposition to the variation application. On 14 November 2019, the Defendant filed a request for further and better particulars of the (Further) Amended Statement of Claim. The requests therein serve to highlight what the Defendant considers are deficiencies in the Plaintiffs' pleading, many of which have endured since its first iteration in August 2016.

43. Mr Edwards submitted that there will be no significant reduction in the work required to further investigate, prepare and present the case for trial even if it is permitted to proceed on the most recent (Further) Amended Statement of Claim. He identified, for instance, that any reinstated order for discovery would likely add significantly to the scope of work required to advance the proceedings, in addition to the further work

necessarily required to get the Statement of Claim in order, if, as a matter of legal competence, the pleaded claims can be properly formulated and particularised.

Discussion

44. Bearing in mind the approach I have described in paragraph 36 above, I turn to consider the grounds stated in support of the application. In doing so, I will also address other issues which arose during the course of the hearing as referred to in the submissions section above.

45. It should be noted that the Plaintiffs did not raise any other of the considerations discussed in *Public Service Association Incorporated v Kingdom of Tonga* [2015] TOCA 19 which might arise for review due to any material change in circumstance since the original order for security was made.

Plaintiffs' impecuniosity

46. The Plaintiffs' parlous financial position was a matter considered by Paulsen LCJ. Nothing has changed. Issues concerning the Plaintiffs' impecuniosity and the prospect and impact of any oppression, in the sense that their inability to provide the security might result in stultification of the proceeding, as has happened, was canvassed and considered by the former Chief Justice when he made the original orders for security. At paragraph 15 his reasons, Paulsen LCJ noted that he did not then have before him any evidence that an order for security would stifle the Plaintiffs' ability to advance a reasonably arguable claim. While the current affidavit material from the Plaintiffs provides further information about their financial position, it does not extend to a positive averment that the current order for security will stifle their ability to advance what they consider to be arguable claims. Notwithstanding, it is sufficiently clear, given the passage of time since the original order was made, and despite other applications and appeals by them in the meantime, that the Plaintiffs have not been able, and are unlikely to be able, to pay the security as ordered.

47. That prospect necessarily directs close attention to the merits of the Plaintiffs' claim. Where a plaintiff, particularly an individual, is impecunious but has a demonstrably strong or even arguable claim, security will be rarely ordered. These matters again were considered by Paulsen LCJ. His Honour balanced the risk of stultification against the

requirements of justice to protect the Defendant from having to incur further costs and not be able to recover them should the Plaintiffs be unsuccessful and an adverse costs orders made against them. The decision turned on the former Chief Justice's assessment of the merits or strength of the Plaintiffs' pleaded claims. No basis has been demonstrated to warrant any review of that aspect of the orders.

Merits of the currently pleaded case

48. Nonetheless, I make the following 'broad brush'[9] observations about, and assessment of, the currently pleaded claims.

49. Apart from the deletion of a number of claims, the Plaintiffs' current pleading still comprises some nine heads of claim. I do not consider that the deletion of the claims for $15 million and $10 million described above, by virtue simply of the reduction in the overall quantum of the Plaintiffs' claims, is likely to significantly reduce the overall work required to advance the rest of the case to trial. As noted, the original claims for loss of reputation, etc., only first appeared in the prayer for relief. There is nothing in the body of the pleading to support them. The deletion of the claim for $10 million for loss of future income might of itself represent a reduction in the total work the case presents, but that has to be balanced by the likely increase in work required by the discovery process the Plaintiffs wish to embark upon if the case goes forward.

50. Other than that, the body of the pleading continues to attempt to convey essentially two parts to the Plaintiffs' case:

    (a) complaints or challenges in relation to various payments made or received by the receiver; and

    (b) claims in negligence arising out of the Defendants' conduct of the receivership including allegations of wrongful dismissal, sale at an undervalue, wrongful sale of the restaurant business and failure to provide the Plaintiffs with reports on the receivership.

51. The most recent amendments have not materially altered the substance of those claims.

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[9] *Pacific International Commercial Bank Ltd v National Reserve Bank of Tonga* [2017] TOSC 20.

52. The fate of the first seems to be dependent on further discovery. That is, the Plaintiffs have not been able to independently articulate any basis for challenging those payments. Otherwise, as observed by the Court of Appeal, such attacks on matters which have been approved by or the subject of court orders face very great obstacles.

53. The second, the claim in negligence, is founded upon the asserted existence of a duty of care owed by the Defendant to the Plaintiffs. Paragraph 45 of the pleading was inserted as part of the first amendments. Subparagraph 45.1 merely asserts that a duty of care was owed by the Defendant to the Plaintiffs in that the Plaintiffs were the owners of the business and the Defendant was appointed by the court as receiver. No basis in law or fact is pleaded or particularised to establish the asserted duty of care, whether by statute or at common law. Elsewhere, a receiver may be under a statutory duty when selling secured assets to take all reasonable steps to obtain the best available price.[10] Neither the Tongan *Companies Act* nor the Supreme Court Rules, which provide for the appointment of receivers, expressly impose such duties. Mr Corbett did not refer to any authority which might support the plea.

54. The repeated failure to plead any or any proper basis for the asserted existence of a duty of care owed by the Defendant in the circumstances relied upon, is telling of the poor prospects of that aspect of the claims, which itself also underpins many of the damages claims. If the basis is thought to be at common law, it has not been revealed. For instance, if it be a novel duty to prevent pure economic loss, no salient features are identified.[11] No attempt has been made to define the scope or content of any such duty. It is unclear as to whether any such duty could only be owed to the company, and if so, the capacity in which the Plaintiffs therefore sue.[12] Without those matters, and more, being soundly pleaded, the allegations of breach are, as a matter of legal analysis, baseless; and the negligence claim as a whole has no real prospects of success.

55. The Plaintiffs' affidavits in support do not assist or improve any appreciation of the merits or otherwise of the pleaded 'claims'.

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[10] Compare e.g. the Australian Commonwealth *Corporations Act* 2001, s.420A

[11] *Greenway & Ors v Johnson Matthey Plc* [2016] EWCA Civ 408; *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258; *Carter Holt Harvey Limited v Secretary for Education* [2015] NZCA 321.

[12] Cf *Faingata'a v Westpac Bank of Tonga* [2010] TOSC 8 referring to the decision of the House of Lords in *Johnson v Gore Wood & Co* [2000] UKHL 65; [2001] 1 All ER 481.

56. Overall, even with the most recent amendments, the Plaintiffs' case remains weak.

Travel costs of NZ Defendants

57. As Ms Warner stated in her affidavit, the security ordered was in respect of her costs, not any other Defendant. In any event, the discontinuance of the claims against the New Zealand Defendants had already occurred by the first amendments on 31 March 2017, before Paulsen LCJ's order for security on 22 June 2017. It may well be, that any one or more witnesses from what were the Second and Third Defendant companies and Mr Appleby, the former Fourth Defendant, will still have to be called to give evidence at trial. In that event, travel costs associated with their attendance may well still be added to the overall costs should the Plaintiffs be unsuccessful.

$5,000 offered

58. The Plaintiffs say they are able to pay $5,000 into court but would need time to do so. However, the Plaintiffs do not aver to actually having those funds at present. They do not say where, from whom or how long it might take to produce even that sum. The bank statement exhibited to their affidavit material shows that, between 1 January 2018 and 11 February 2019, the balance in that account never exceeded $1,000, and ended that period at $73.23.

59. No attempt has been made by the Plaintiffs to demonstrate that a reduction in security from $30,000 to $5,000 would be reasonable or justified by some material change in their circumstances or their case since the original order for security. It is to be recalled that the Defendant's original costs estimate was $58,000, which Paulsen LCJ almost halved.

60. In fact, the Plaintiffs have not offered any objective basis for any reduction in security. They have not sought to quantify any significant alteration in the scope of work to be performed in further investigating, drafting, preparing and presenting respective cases for trial. They have not sought to place before the court, even by the roughest of estimates, some comparative analysis of the likely costs to be incurred by the Defendant if the matter were to proceed to trial on the current pleading, or to demonstrate how the existing order for $30,000 in security for costs should reasonably be reduced, and if so, to what sum? The Plaintiffs have simply not placed any evidence, or even submissions,

before the court by which an objective assessment of any reduction in security could or should be made.

61. In my view, the $5,000 offered is wholly inadequate to serve as any meaningful security for the Defendant's costs given the number and nature of remaining claims sought to be advanced by the Plaintiffs. It would not protect the efficacy of the exercise of the court's jurisdiction to award costs, and would permit an undesirable situation to arise where, if the Plaintiffs were unsuccessful at trial, the Defendant's success would be pyrrhic because an order for costs cannot be met: *Public Service Association Incorporated v Kingdom of Tonga* [2015] TOCA 19 at [22].

62. Further, even if security were to be reduced, to say $20,000, there is no evidence before me that the Plaintiffs will be able to pay that reduced sum, and if so, when. Every indication is to the contrary.

Security in the 'Tongasat' appeal

63. The Plaintiffs' reliance on the decision in *Friendly Islands Satellite Communications Ltd the Public service Association Incorporated* [2019] TOCA 1 ("Tongasat appeal") as a comparative example of a lesser amount of security being ordered, is misconceived.

64. Firstly, the security ordered there was in respect of the conduct of an appeal. The costs associated with running an appeal, particularly a single-issue appeal, will ordinarily always be far less than preparing and conducting a trial at first instance, involving many issues, much evidence, numbers of witnesses and a duration of some weeks. The quantum of the financial claims or judgment on appeal rarely has much bearing on the amount of work required to conduct commercial litigation of any significant scale.

65. Secondly, on 31 July 2019, Paulsen LCJ ordered that a further TOP$35,000 be provided as security for costs of the Tongasat appeal. The combined security therefore of TOP$50,000 in that matter, if anything, tends to bolster rather than diminish confidence in the view that Paulsen LCJ's order for security in the instant case was conservative.

Discovery

66. The Plaintiffs' intention to apply to have the original discovery order reinstated raises two issues relevant to this application.

67. Firstly, the discovery course described by Mr Corbett in the face of what presently appear to be a number of seemingly insurmountable defects in the Further Amended Statement of Claim, smacks of a "fishing expedition" to see if documents might be unearthed which might elucidate whether the Plaintiffs actually have a case or help cure problems with their pleading. Such an approach has been consistently disapproved of by courts dealing with discovery applications: e.g. *Mulley v Manifold* (1959) 103 CLR 341 at [7]; *British Aerospace Plc v Green & Ors* [1995] EWCA Civ 26; *Banks v Farmer* [2019] NZHC 53.

68. Secondly, if such application were made and granted, then further work will be required for both parties in relation to making discovery, inspecting and considering any documents which were produced as a result of that process. That additional work becomes a relevant consideration of the current application. It does not suggest of any decrease in legal costs.

Result

69. In my view, for the reasons given, the Plaintiffs have failed to discharge their onus of demonstrating any material change or other sound basis for a reduction in the quantum of security ordered.

70. While the recent amendments to their pleaded case have reduced the overall quantum of their claims, they have not:

    (a) improved the merits of their case;

    (b) rectified foundational deficiencies in their pleading; or

    (c) demonstrated any material reduction in the likely work required and legal costs associated with meeting the remaining claims.

71. Accordingly, the Plaintiffs' application for a variation of the security for costs order is refused.

Whether to strike out the action?

72. Therefore, as matters presently stand, the orders made by Paulsen LCJ on 25 February 2019 have not been varied or otherwise disturbed.

73. In making that order, his Honour effectively gave the Plaintiffs approximately 18 months to provide the security. They have failed to do so. The only event which arguably precluded his Honour's order from having immediate effect as at 26 July 2017 was the present interceding application filed on 6 June 2019, following which he stayed the operation of his "unless" order pending this ruling.

74. The question now, in light of the operation of the 25 February 2019 orders, is what ought be done with the proceeding.

75. Order 17 of the Supreme Court Rules does not contain any provision dealing with a failure to provide security when ordered, save for a stay of the action until the security is paid. Compare, for example, Order 18, Rule 6, where default in relation to discovery within a specified period, can result in a claim being dismissed and judgment entered accordingly. The Rules do not appear to contain any other general provision by which the court can dismiss a claim for failure to comply with orders, including as to provision of security for costs. By comparison again, the rules of the Supreme Courts of New South Wales[13] and Victoria[14] expressly confer on the court a discretion, in those circumstances, to dismiss a claim. Similarly, rule 3.4 of the UK White Book permits the court to strike out a claim where, inter alia, there has been a failure to comply with a court order.

76. It may have been intended by the Tongan Parliament that in circumstances as have transpired in this case, where a failure to provide security resulting in a stay of the proceeding, amounts to a failure to advance the proceeding for a period of two years or more, Order 8 Rule 8(3) may be employed to strike out an action. That avenue was taken by the Defendant resulting in Paulsen LCJ's orders on 25 February 2019.

77. All of the issues identified by Paulsen LCJ set out in paragraph 22(a) to (e) above continue to apply some nine months later.

78. In light of the time this proceeding has been on foot without significant progress, the Plaintiffs' inability to provide the security ordered, the failure of the instant application, the persistent deficiencies in the Plaintiffs' pleaded claims and their general lack of

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[13] Rule 42.21(3).
[14] Rule 62.04.

merit, my preliminary view is that it is appropriate to give effect to the orders made on 25 February 2019 and strike out the action.

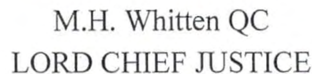
79. However, as the orders of 25 February 2019 were the product of the Defendant's application pursuant to Order 8 Rule 8, sub rule (4) provides that no action shall be struck out under that rule unless the parties have been given not less than 28 days notice of the court's intention to do so. I am also mindful of the statement in *Hoeller v Knab* [2001] TOLawRp 10 to the effect that even where there has been a failure to comply with an "unless" order, the Court always has a discretion to allow more time.

80. Therefore, I make the following directions:

    (a) Any submissions in relation to whether the action should be struck out for the reasons stated above, and in relation to costs both of the application by the plaintiff's for a variation of the security order and/or of the proceedings as a whole, if they are struck out, are to be filed by 20 December 2019.

    (b) Any such submissions are to include whether the respective party is content for the remaining issues of whether to strike out the action, and costs, to be determined on the papers or whether they require a further oral hearing.

    (c) The matter will otherwise be listed for a review by me on 13 January 2020.



NUKU'ALOFA
20 November 2019

M.H. Whitten QC
LORD CHIEF JUSTICE