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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 67 of 2019**

BETWEEN:

XI YUN QIAN Plaintiff

-and-

KINGDOM OF TONGA Defendant

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr W.C. Edwards SC for the Plaintiff
Ms R. Kautoke for the Defendant
Date of trial: 16 April 2020
Date of judgment: 13 May 2020

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15 MAY 2020

Introduction

1. The Plaintiff seeks an order for the return of NZD$9,490, USD$54,275, AUD$10,050, FJD$1,700 and TOP$2,015 ("the cash") together with interest and compensation in the sum of $50,000.

2. The Defendant opposes the claim on the ground that the cash was forfeited to the Crown by operation of s.19G(5) of the *Money Laundering and Proceeds of Crime Act* ("the Act").

3. Section 19G provides:

> **19G Forfeiture**
>
> (1) While cash is detained under section 19D, an application for the forfeiture of the whole or any part of it may be made to the Court by an authorised Customs or Police officer.
>
> (2) The Court may order the forfeiture of the cash or any part of it if satisfied that the cash or part is –
>
> (a) recoverable cash; or
>
> (b) intended by any person for use in unlawful conduct.
>
> (3) In the case of recoverable cash which belongs to joint tenants, one of whom is an exempted joint owner, the order may not apply to so much of it as the Court thinks is attributable to the exempted joint owner's share.
>
> (4) Where an application for the forfeiture of any cash is made under this section, the cash is to be seized (and may not be released under any power conferred by this Act) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

(5) Where cash has been seized under sections 19C and 19D and no notice of appeal has been received by either the seizing authority or the Court within the period of 30 days from the time of seizure, then the cash will be automatically forfeited to the Crown.

Background

4. The Plaintiff is a businessman who resides in Longolongo.

5. On 15 May 2018, he sought to board a departing flight to Fiji. He had completed a passenger departure card on which he declared that he was not carrying more than TOP$10,000 in cash, or its equivalent in foreign currency. He told an Immigration Officer that he was not carrying cash. Under further questioning, the Plaintiff gradually revealed the cash secreted in various places on his person.

6. When questioned by immigration officials, the Plaintiff was not asked about the provenance of the cash or his proposed use of it. He was not interviewed by police.

7. The Plaintiff was subsequently arrested and charged with:

   (a) one count of failure to declare currency exceeding TO$10,000 contrary to s.97 of the *Customs and Excise Management Act*;

   (b) two counts of bribery of Government civil servants contrary to s.51 of the *Criminal Offences Act*; and

   (c) one count of money laundering contrary to s.17 of the Act.

8. The cash was seized at the time of his arrest and detained under, or purportedly under, ss 19C and 19D of the Act. Those sections provide:

> **19C Seizure of Cash**
>
> (1) An authorised officer may seize any cash, if he has reasonable grounds for suspecting that -
>
> (a) it is recoverable cash;
>
> (b) intended by any person for use in unlawful conduct; or
>
> (c) it is undeclared cash intended for use in unlawful conduct.

(2) Any authorised officer may also seize cash part of which he has reasonable grounds for suspecting that it is –

(a) recoverable cash;

(b) intended by any person for use in unlawful conduct; or

(c) it is undeclared cash intended for use in unlawful conduct.

19D Detention of seized cash

(1) While the authorised officer continues to have reasonable grounds for his suspicion, or for the purposes of investigation, cash seized under section 19C may be detained for a period of 72 hours.

(2) The period for which the cash or any part of it may be detained may be extended by an order made by the Court, but the order may not authorise the detention of any of the cash –

(a) beyond the end of the period of 3 months beginning with the date of the order; or

(b) in the case of any further order under this section, beyond the end of the period of 2 years beginning with the date of the first order.

(3) An application for an order under subsection (2) may be made by the authorised officer, and the Court may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met –

(a) there are reasonable grounds for suspecting that the cash is recoverable cash and that either –

(i) its continued detention is justified while its source, ownership, use or destination is further investigated or consideration is given to bringing proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded;

(b) there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either –

(i) its continued detention is justified while its intended use is further investigated or consideration is given to bringing proceedings against any person for an offence with which the case is connected, or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(4) An application for an order under subsection (2) may also be made in respect of any cash seized under section 19D, and the Court may make the order if satisfied that –

(a) the condition under subsection (3) is met in respect of part of the cash; and

(b) it is not reasonably practicable to detain only that part.

(5) An order under subsection (2) shall provide for notice to be given to any persons affected by it."

Cato J's decision to extend the period of detention of the cash

9. On 16 May 2018, the Crown applied ex parte to Cato J for an order under s.19D(ii) of the Act to detain the cash for three months. His Honour granted that application with leave to apply to rescind the order after four days of service of the order.

Trial before Cato J

10. On 11 December 2018, the Plaintiff appeared before Cato J and pleaded guilty to the false declaration count; and not guilty to the bribery and money laundering counts.

11. The Plaintiff's trial before Cato J commenced on 18 March 2019. The Crown led evidence from the two customs officers who interviewed the Plaintiff. Cato J found there was no case to answer on the bribery or money laundering charges.

12. Mr Edwards SC, who appeared for the Plaintiff at the trial, submitted that the Crown should not have prosecuted the Plaintiff under the *Customs and Excise Management Act* and applied to have the Plaintiff's guilty plea on the s.97 charge under that Act set aside.

13. Cato J ruled that the Prosecution was entitled to proceed under the *Customs and Excise Management Act* essentially because the relevant provisions of that Act applied to a false declaration relating to the export of currency and earlier legislation such as s.19(1) of the Money Laundering legislation and relevant regulations had been impliedly repealed by s.97 of the subsequent *Customs and Excise Management Act*. He therefore found that there was no need to set aside the Plaintiff's guilty plea on the s.97 count.

14. The Plaintiff was convicted of that count and remanded for sentencing.

Sentencing on the s.97 charge

15. On 10 May 2019, the Plaintiff appeared again before Cato J for sentencing.

16. Section 97 of the *Customs and Excise Management Act* provides:

> **Failure to make declaration**
>
> Any person who fails to make declarations required under the Customs laws commits an offence and shall be liable upon conviction to a fine not exceeding $100,000 or to a term of imprisonment not exceeding ten years, or both.

17. An issue arose as to whether the cash that had been seized had been forfeited to the Crown pursuant to s.19G(5) of the Act. The Crown contended that the cash seized had been forfeited because no notice of appeal had been received by either the seizing authority or the Court within 30 days from the time of seizure.

18. The Plaintiff contended to be entitled to the return of the money.

19. Cato J considered[1] it necessary to resolve the issue prior to sentencing for if, as the Crown contended, the cash had been forfeited, a lesser sentence would be warranted, whereas, if the Plaintiff was entitled to the return of the cash, a more severe sentence would be warranted. His Honour opined:[2]

> *"... If the basis for the detention order under section 19D of [the Act] were shown not to exist, and yet the Crown was able to retain the proceeds as a consequence by operation of section 19D(1) and 19G(5) of the Act, the outcome would, in my view, be unjust. The proceedings commenced by the Crown to detain the money under section 19D leading to forfeiture under*

[1] At [11].
[2] [12].

section 19G(5), if misconceived, should not operate to prevent Mr Xiyun from obtaining restitution. ..."

20. By reference to his earlier ruling that the *Customs and Excise Management Act* had impliedly repealed the provisions of the Act as to false declarations,[3] Cato J held:[4]

> *"... The [detention] orders obtained from this Court were in retrospect obtained under a misapprehension of the relevant power to seize and forfeit undeclared currency. Following* ***Woolwich Building Society v Inland Revenue Commissioners****,[5] Mr Xiyun is entitled to have restitution of the cash seized by police and claimed to be now [forfeited] to the Crown under section 19G(5) of the Money Laundering Act. ...."*

21. On that basis, Cato J sentenced the Plaintiff to a fine of TOP$15,000, which was paid that day.

Court of Appeal decision

22. The Crown did not appeal against the sentence. However, in *Attorney General v Xi Yun Qian* [2019] TOCA 20, the Attorney General sought to raise three questions of law before the Court of Appeal from the above sentence. Relevantly, the third, was whether "legitimate cash" is immune from automatic forfeiture under s.19G(5) of the Act.

23. Although the Court disagreed with Cato J's conclusion that the relevant provisions of the Money Laundering legislation and relevant regulations had been impliedly repealed by the *Customs and Excise Management Act*, the appeal was dismissed as incompetent.

24. Notwithstanding, the Court of Appeal made the following observations which are instructive for the instant proceeding:

    (a) the question of whether the customs officers had reasonable grounds for seizing the cash under s.19C raised questions of fact that could not be determined on the sentencing of the Plaintiff;

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[3] [14].
[4] [16].
[5] No. 2 [1993] AC 70; [1992] 3 All ER 737 (HL).

(b) the undefined term "recoverable cash" arguably meant cash which is proceeds of crime or tainted property (as defined) recoverable under another provision of the Act;[6]

(c) a further question arose as to whether the officer had reasonable grounds to suspect that the cash was intended by the Plaintiff for use in unlawful conduct or was undeclared cash intended for use in unlawful conduct under s.19C(1)(c);

(d) prima facie, those questions could not be resolved without a hearing in which the customs officers in question would be expected to give evidence;

(e) s.19D(1) required not only that the authorised officer had reasonable grounds to suspect, but must have had a suspicion of any of the matters in ss 19B and 19C;

(f) the lawfulness of the detention of the cash and hence the application of the automatic forfeiture provision in s.19G(5) would in turn depend upon such evidence;

(g) merely failing to declare cash which is not less than the prescribed minimum does not mean that the cash is recoverable cash; and

(h) if there was no power to seize the cash under s.19C, there was no power to detain it under s.19D and no occasion for it to be forfeited under s.19G.

25. The Attorney General asked the Court to vary Cato J's "sentencing ruling" pursuant to s.19 of the *Court of Appeal Act*. The Court held that s.19 dealt with a different subject matter and was therefore irrelevant.

26. Further, the Court rejected the contention that the Attorney General could appeal against Cato J's finding that the cash had not been validly forfeited because the Attorney General sought no variation of the sentence.[7] The Court noted that, save perhaps in very exceptional circumstances,[8] or unless a statute granting a right of appeal provided

[6] Referring to *Police v Felipe* (CR132 of 2019).
[7] Court of Appeal Act s.17B
[8] *Arbuthnot* v *Chief Executive of the Department of Work and Income* [2008] NZLR 13 at 25 [25].

otherwise, appeals lie against orders, not reasons.[9] The Court otherwise considered that it did not have jurisdiction to entertain the point sought to be raised by the Crown.

27. However, the Court added that the issue could be raised in civil proceedings, either by the Crown seeking a declaration that the cash had been validly forfeited or by the Plaintiff here seeking its return, and that:

> *"... If the Crown now accepts that the cash seized was 'legitimate' and does not fall within s.19C then no such proceedings should be necessary."*

28. In relation to any such civil proceedings, the Court of Appeal noted that: [10]

(a) a question might also arise as to whether it is open to the Crown to contend that the cash was validly forfeited when the [Plaintiff] received a presumably more severe sentence than he would otherwise have received had [Cato J] not concluded that the [Plaintiff] was entitled to the return of the cash;

(b) no issue estoppel would arise because:

(i) whether the cash was validly forfeited to the Crown was not a legally indispensable issue that needed to be decided to determine the sentence,[11] even if issue estoppel could reasonably be applied in criminal law;[12] and

(ii) Cato J did not decide facts so as arguably to attract s.99 of the *Evidence Act;*

(c) nonetheless, there may be an issue as to whether it would be an abuse of process for the Crown to seek to relitigate the issue decided by [Cato J] upon sentencing the [Plaintiff] when there was no appeal against the severity of sentence;[13] and

(d) it was not appropriate for the Court to express any view about those potential issues.

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[9] *Commonwealth of Australia* v *Bank of New South Wales* [1950] A.C 235 at 294.
[10] [53] to [56].
[11] *Blair v Curran* (1939) 62 CLR 464 at 532.
[12] *R v Davis* [1982] 1 NZLR 584 at 589.
[13] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; *Bryant v Collector of Customs* [1984] 1 NZLR 280; *Rogers v The Queen* (1994) 181 CLR 251.

This proceeding

29. As noted, the Plaintiff here seeks an order for return of the cash. Informed, no doubt, by the Court of Appeal's decision, the Plaintiff contends that there was no basis under ss 19C or D for the seizure or detention of the cash, and therefore, notwithstanding any failure to appeal within 30 days of the seizure, the cash does not fall within the automatic forfeiture provisions of s.19G(5).

30. The Crown's pleaded defence recited the undisputed events by which the cash was gradually discovered on the Plaintiff, seized and detained, and that the Plaintiff did not file a notice of appeal before 15 June 2018, which, it says 'triggered' s.19G(5). Otherwise, the more notable aspects of the Crown's defence are that:

    (a) the 'provenance' of the cash is 'wholly irrelevant' and a 'non-issue particularly when the Plaintiff was caught with a large amount of undeclared cash strapped to his body';[14] and

    (b) because the Plaintiff initially lied about the cash, which was found on his person, resulting in the matter being referred to the Police:

    > *"... The logical inference ... suggests the Customs officers MUST have been of the view that it was recoverable cash and/or intended to be used for unlawful conduct and/or undeclared cash intended for use in unlawful conduct, because if not, why would they refer the matter to the police anyway?"*[15]

31. The Plaintiff's Reply reiterated that during the trial before Cato J, there was no evidence of suspicion or reasonable grounds to believe that the cash was:

    (a) recoverable cash;

    (b) intended by the Plaintiff for use in unlawful conduct; or

    (c) undeclared cash intended for use in unlawful conduct.

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[14] [8]
[15] [13]

32. Otherwise, the Plaintiff pointed to the dismissal of the appeal before the Court of Appeal and sought to call in aid the 'decision' by Cato J on sentence that the Plaintiff is entitled to restitution of the cash.

Evidence

33. The evidence at trial was adduced by way of affidavit. Neither party required any deponent for cross-examination.

34. The Plaintiff deposed, relevantly, that:

    (a) the cash was earned through his businesses of a trading shop and guesthouse accommodation, over a period of time;

    (b) during the course of his business, customers had paid in the various currencies comprising the cash;

    (c) he planned to travel to Korea to renew his green card and to purchase building materials and furniture for his then new guesthouse building; and

    (d) he did not have any savings or bank account overseas such that drawing a cheque in Korea would have been difficult.

35. For the Defendant, affidavits were filed from Mr T. 'Aho, Ms K. Lavaki and Ms T. Fainga.

36. Mr 'Aho, one of the Crown's senior prosecutors, deposed to the ex parte application on 16 May 2018 resulting in Cato J extending the detention of the cash for three months. He recalled the matter because he said it was the first time Police (represented by the Crown) had made such an application under s.19D of the Act, and it was successful.

37. At the relevant time, Ms Lavaki was a Customs Passport Control Officer at the Fua'amotu International Airport. She deposed, relevantly, to questioning the Plaintiff about whether he had any cash on him. After initially denying that he did, the Plaintiff gradually produced various bundles of cash and, on a partial strip search, other cash was found strapped to his person. When initially pulling cash from his trousers and jacket, the Plaintiff told Ms Lavaki that it was "to buy duty free items on his return to Tonga".

38. Ms Fainga is, and was at the relevant time, the Immigration Supervisor at the Departure Area of Fua'amotu International Airport. Ms Lavaki brought the Plaintiff to Ms Fainga's office with his travel documents, departure card and "a lot of cash". She also witnessed the Plaintiff produce various bundles of cash concealed on his person. She deposed to Ms Lavaki and other officers taking the Plaintiff and the cash to the office of her supervisor, Grace Latu.

Submissions

Plaintiff

39. Mr Edwards submitted that there was no evidence, as required by ss19C and D, that any of the customs officers had, or continued to have, reasonable grounds for suspecting that the cash was:

    (a) recoverable cash;

    (b) intended by the Plaintiff for use in unlawful conduct; or

    (c) undeclared cash intended for use in unlawful conduct.

40. Therefore, he submitted that s.19G(5) could not apply to the cash and it should therefore be returned. He further submitted that in light of Cato J's remarks on sentence that the cash should not be forfeited, it would be unjust and unfair for the cash now to be forfeited especially as the aggregate equivalent value of the cash exceeded the maximum fine prescribed by s.97.

Defendant

41. Ms Kautoke submitted that the following features of the uncontested evidence justified seizure of the cash under s.19C of the Act:

    (a) it was a significant amount of cash;

    (b) the Plaintiff failed to declare the cash;

    (c) the cash was concealed around the Plaintiff's body;

    (d) the cash was a combination of local and foreign currencies; and

(e) the Plaintiff misinformed the Customs officers as to the amount of cash he had on him.

42. Ms Kautoke further submitted that the inconsistency between the Plaintiff's initial account to the customs officials that some of the cash (at that point in their search of him) was for duty free purchases on his return from Korea and his affidavit account that the cash was for purchases of building materials and furniture amounted to a consciousness of guilt which could support an inference that the cash was actually intended for use in an (unspecified) unlawful purpose.

43. Ms Kautoke then sought to submit that the Plaintiff's possession of the various foreign currencies constituted an unlawful purpose for it contravened regulation 4(3) of the *Foreign Exchange Control Regulations*.

Plaintiff's Reply

44. Mr Edwards took issue with the Crown raising a new and unpleaded argument in relation to the alleged contravention of the *Foreign Exchange Control Regulations*. He also refuted that there was any inconsistency between the explanations given by the Plaintiff for his intended use of the cash.

Consideration

45. It was common ground that in order to determine whether the cash is susceptible to forfeiture under s.19G(5), the court must determine whether it was seized "under sections 19C and 19D". For, as the Court of Appeal observed, ibid,[16] "if there was no power to seize the cash under s.19C, there was no power to detain it under s.19D and no occasion for it to be forfeited under S.19G".

46. To determine whether it was seized "under sections 19C and 19D", the Court must be satisfied, by admissible evidence, that, on the balance of probabilities, when the cash was seized, the Customs officers had, and when the further detention order was made by Cato J, they continued to have, reasonable grounds for suspecting that the cash was:

(a) recoverable cash;

[16] At [46] of the judgment.

(b) intended for use in unlawful conduct; or

(c) undeclared cash intended for use in unlawful conduct.

47. In the ordinary case, a Plaintiff carries the legal and evidentiary onus of proving his claim. As I indicated at the trial, the Plaintiff's evidence established a prima facie case for relief such that the evidentiary burden shifted to the Defendant to prove on the balance of probabilities the existence of the above criteria for forfeiture. With that, neither counsel disagreed.

Recoverable cash?

48. As noted by the Court of Appeal,[17] although there is no definition in the Act of the phrase "recoverable cash" it is arguably cash which is 'proceeds of crime' or 'tainted property' (as defined) recoverable under the Act. Neither party in this proceeding submitted otherwise.

49. Section 2 of the Act defines "proceeds of crime" as:

> (a) any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence; and
>
> (b) includes any property used or intended to be used in the commission of any serious offence;

50. "Serious offence" is defined, relevantly, as an offence which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or more severe penalty.

51. The concept of "tainted property" appears in Part III of the Act concerning confiscation. The term is defined in s.2 as:

> (a) property used in or in connection with or intended for use or in connection with the commission of the offence, if

[17] At [18].

> it was in the person's possession at the time of, or immediately after, the commission of the offence;
>
> (b) property derived, obtained or realised as a result of or in connection with the commission of an offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the offence of which the person is about to be charged, charged or convicted; or
>
> (c) that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property; and
>
> (d) tainted property includes property of a corresponding value to property defined in (a), (b) and (c) above;

52. The preamble to the Act may be referred to for assistance in explaining its scope and object.[18] The preamble to the Act describes it as:

> An Act to enable the unlawful proceeds of all serious crime including drug trafficking to be identified, traced, frozen, seized and eventually confiscated; to establish a transaction reporting authority; and to require financial institutions and cash dealers to take prudential measures to help combat money laundering.

53. Relevantly, here, the emphasis in that purpose is on "the unlawful proceeds of all serious crime".

54. A combination of the above results in 'recoverable cash' meaning cash derived or realised directly or indirectly from an offence for which the maximum penalty is imprisonment for not less than 12 months or more severe penalty.

55. Contrary to the Defendant's pleaded position that the provenance of the cash is 'wholly irrelevant' or a 'non-issue',[19] this first limb of the criteria for forfeiture requires evidence that the cash is recoverable cash, as defined immediately above.

56. The only evidence as to the provenance of the cash was from the Plaintiff himself that he earned it from sales of goods to customers which he had saved since 2014. The Defendant

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[18] Section 8(2) of the *Interpretation Act*.

[19] [8]

did not require the Plaintiff for the cross-examination.[20] The Defendant's evidence was silent on the issue. I therefore accept the Plaintiff's evidence.

57. There being no evidence that the cash was derived from a serious offence, I find that the cash was not 'recoverable cash' for the purposes of the Act.

Intended for use in unlawful conduct?

58. As the cash here was undeclared, the second and third limbs of the criteria for forfeiture may be collapsed into a single question, namely, whether there were reasonable grounds for suspecting that the cash was intended for use in unlawful conduct?

59. The Plaintiff's evidence as to his intended purpose for the cash,[21] if accepted, must result in that question being answered in the negative for none of the purposes deposed to constitute 'unlawful conduct'.

60. Against that, the Defendant relies on the fact that the Plaintiff's evidence referred to above did not include or accord with his initial account to the customs officials that some of the cash (at that point in their search of him) was for duty free purchases on his return from Korea. That, together with the large amount of cash strapped and secreted on various parts of the Plaintiff's body, it was submitted, gives rise to an inference that the cash was actually intended for use in an (unspecified) unlawful purpose.

61. The submission must be rejected.

62. Whilst usually the province of the criminal law, submissions that evidence of lies is to be accepted as consciousness of guilt or an admission against interest must be approached with caution. The court must be satisfied, firstly, that upon consideration of the relevant circumstances and events, the impugned evidence constitutes a lie, and secondly, that the lie reveals some knowledge of the offence and that it was told because of a realisation of guilt and a fear of the truth. The court must also be mindful that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. If any reason of that kind is accepted as the explanation for

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[20] As provided by Order 27 rule 7 of the Supreme Court Rules.
[21] At [14] to [20] of his affidavit.

the lie, it cannot be regarded as an admission: *Edwards v The Queen* (1993) 178 CLR 193, 208.

63. Insofar as the submission was couched in terms of an inference to be drawn, it is to be noted that inferences are conclusions of fact rationally drawn from a combination of proved facts.

64. On the available evidence, the Plaintiff's explanation to the customs official in the early stages of their search of him, when US$4,000 and TOP$1,000 had been produced, that that money was to buy duty-free items on his return to Tonga, is not of itself proof that the Plaintiff intended to use the money for unlawful purposes. Needless to say, if what he told the officials was in fact true, then buying duty-free items would not be unlawful conduct. So far as his statement to the customs officer is not referred to in the Plaintiff's evidence for trial here, no explanation has been given, nor, as noted above, did the Defendant seek to cross examine the Plaintiff on that issue or any other.

65. Further, on the unchallenged state of the evidence, I am not satisfied, on the civil standard, that the discrepancy in the Plaintiff's evidence amounts to a lie told to the Customs officer. It is entirely possible that what the Plaintiff told the officer was true but that he forgot to include it in his affidavit evidence in his proceeding. He may also have panicked when being confronted by the officer. It is self-evident that he was intending to conceal the cash and not declare it. His actions of strapping the cash on his person and hiding some in other parts of his clothing is consistent with that intention. It does not follow, however, without more, that that conduct must lead to an inference that the Plaintiff was intending to use the cash for unlawful purposes. It does lead to an inference that he intended not to declare the cash. That inference was confirmed by the Plaintiff' plea of guilty. Again, had the Plaintiff been called for cross-examination on the point, so that he had an opportunity to address any challenges to his evidence, a different impression may have resulted.

66. However, in my view, the evidence as it stands does not permit of an inference that, by reason of the Plaintiff's conduct and what he told the customs officials at the time of his search, the cash was intended for use in unlawful conduct.

Foreign Exchange Control Regulations

67. The Defendant's third submission on this combined limb of the test for forfeiture is that by reason of the Plaintiff having possession of the cash, which included various foreign currencies, he contravened regulation 4(3) of the *Foreign Exchange Control Regulations*. That, so the submission went, amounted to using the cash for unlawful conduct. (the "Regulations argument")

68. Regulation 4 provides:

> (1) Except with the permission of the Reserve Bank –
>
> (a) No person other than an authorised dealer shall, in Tonga, buy or borrow any foreign currency from, or sell or lend any foreign currency to, any person other than an authorised dealer;
>
> (b) No person resident in Tonga, other than an authorised dealer, shall outside Tonga buy or borrow any foreign currency from or sell or lend any foreign currency to any person other than an authorised dealer.
>
> (2) Where a person buys or borrows any foreign currency in Tonga, or being a person resident in Tonga, buys or borrows foreign currency outside Tonga, he shall comply with such conditions as to the use to which it may be put or for the period for which it may be retained as may be imposed by the Reserve Bank.
>
> (3) For the purposes of this regulation, a person in Tonga who supplies goods or services in exchange for foreign currency shall not be taken to have bought such foreign currency provided that it is offered for sale within a reasonable time to an authorised dealer.

69. For the reasons which follow, this submission must also be rejected.

70. Firstly, and fatally, the issue was not pleaded. Order 8 rule 2(2) of the *Supreme Court Rules* requires that a defence state concisely the grounds of defence on which the defendant intends to rely. As Dalgety J (as his Lordship then was) said in *Seiler v Kingdom of Tonga* [1992] Tonga LR 58:

> *"The purpose of pleadings is to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree, thus enabling parties, their Counsel, and the Court to ascertain with ease the*

issues upon which a judicial decision is required. Furthermore, pleadings must -

'give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them': Esso Petroleum Company v Southport Corporation *[1956] AC 218 per Lord Norman at page 238 (House of Lords).*

... Pleadings are designed to prevent one party taking the other by surprise by introducing issues not focused in the pleadings. Lord Guthrie in Morrison's Associated Companies Limited v James Rome and Sons Limited, *[1964] SC 160 at page 190 (Scottish Appeal Case) stated that -*

'It is a fundamental rule of our pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record (i.e. in the pleadings). It follows that a (defendant) cannot be held liable upon a ground which is not included in the averments made against him by the (plaintiff)'

The converse is equally true -

'These are not mere technical rules, since their disregard would tend to create injustice ....'"

71. The only part of the Statement of Defence which sought to address the issues now under consideration was paragraph 13.

72. I should say at the outset, that had an application been made to strike out paragraph 13 as failing to comply with Order 8 rule 8 - no reasonable defence – I would have been minded to grant it. That is because not only was it unresponsive to the allegations in the corresponding paragraph of the Statement of Claim, the defence did not identify any reasonable grounds for suspecting any of the criteria for seizure, detention or forfeiture. One would have expected the Defendant to plead out the facts which for instance constituted reasonable grounds for suspecting that the cash had been derived from serious crime, or facts supporting a suspicion that it was to be used for unlawful conduct.

73. Instead, paragraph 13 presented little more than a hypothesis that because the Plaintiff initially lied about having the cash on him and that it was found strapped to his body, the customs officers *must have* concluded that the cash met the criteria, otherwise why would they have referred the Plaintiff to the police? That style and content of pleading is not to be encouraged. The task was to identify the relevant grounds by which the customs

officers *did* suspect that the cash fit the criteria, not to posit the speculative and conclusory proposition that the officers *must have* held that suspicion. As the Defendant's evidence later revealed, neither officer deposed to having reasonable grounds for suspecting that the cash met any of the criteria in ss 19C or D. The suspicion referred to by Ms Lavaki,[22] viewed in context, rose no higher than a suspicion that the Plaintiff was failing to declare the cash.

74. Returning then to the Regulations argument, Counsel for the Defendant endeavoured to submit that the argument could be inferred from what was pleaded in paragraph 13. That submission should never have been made. On no sensible reading of that paragraph, no matter how beneficial, could the Plaintiff (or the court) have anticipated this argument being raised at trial or that it would form part of the Defendant's case for trial which the Plaintiff would have to meet. Understandably, Mr Edwards was unable to deal with the issue. The prejudice was compounded by the fact, as will be seen below, that when examined closely, the argument turned out to be highly technical and presently insoluble.

75. In those circumstances, to permit the Defendant to rely on this point when it was only raised in closing submissions, and without any application to amend, would be to permit the Defendant to disregard the pleading rules and create injustice. I decline to do so. For that reason alone, the submission is rejected.

76. There are, however, a number of more substantive observations to be made about the submission, even if the Defendant were permitted to rely on it.

77. The second reason for rejection is that it is far from clear that a contravention of regulation 4(3) amounts to an offence. While most of the Regulations are drafted in proscriptive terms, regulation 4(3) is not. It in fact provides an exemption from the conduct proscribed in sub-regulations (1) and (2) which involve persons, not being authorised dealers, buying, selling, borrowing or lending foreign currency without the permission of the Reserve Bank. The exemption applies to a person who supplies goods or services in exchange for foreign currency provided that currency is offered for sale within a reasonable time to an authorised dealer.

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[22] [15] of her affidavit.

78. Further, it is equally unclear that a contravention of any part of regulation 4 would necessarily amount to an offence. Regulation 11 provides:

> 11. A person who commits an offence against these Regulations shall be liable on conviction –
>
> (a) in the case of an individual to a fine not exceeding $20,000 or imprisonment for a term not exceeding 3 years;
>
> (b) in the case of a body corporate, to a fine not exceeding $200,000.

79. The only regulation which provides that a contravention of its provisions amounts to the commission of an offence is regulation 10(2). That may be a drafting oversight. However, it is not something I need to decide.

80. For completeness, I add this observation. The Regulations are the legislative product of the *Foreign Exchange Control Act*, s. 2 of which provides:

> **2 Exchange control**
>
> Whenever Cabinet is satisfied that it is expedient so to do, for the protection of the currency or of the public credit of the Kingdom, or in order to conserve, in the national interest, the foreign exchange resources of the Kingdom, it may make regulations making provision for and in relation to the control of foreign exchange and in particular but without limiting the generality of the foregoing, for or in relation to –
>
> (a) the buying, borrowing, selling, lending or exchanging of foreign currency, including the fixing of rates for exchange;
>
> (b) any dealing or transaction having the effect of a purchase, borrowing, sale, loan or exchange of foreign currency, and requiring any person to supply full details of all foreign exchange owned by him, and any foreign exchange dealings conducted by him;
>
> (c) the taking or sending out of the Kingdom of gold, Tongan currency or foreign currency;
>
> (d) requiring any person who has power to sell, or to procure the sale of, any foreign currency to sell or procure the sale of, that foreign currency as prescribed;
>
> (e) the taking, sending, or transfer of any securities to a place outside the Kingdom, including the transfer of

securities from a register in Tonga to a register outside Tonga;

(f) the prohibition of the importation or exportation of goods unless a licence under the regulations to import or export the goods is in force;

(g) the terms and conditions to which such licences may be subject; and

(h) prescribing penalties not exceeding a fine of $200,000 or imprisonment for a period not exceeding 3 years for any offence against the regulations made under this section.

81. In my view, it is not clear that the conduct exempted by regulation 4(3), namely, supplying goods or services in exchange for foreign currency, falls within the subject matter for regulations prescribed by s.2 of the *Foreign Exchange Control Act*.

82. Thirdly, if a contravention of regulation 4(3) could amount to an offence, there was neither evidence nor submission before me:

(a) on the question of what might constitute "a reasonable time" within which the Plaintiff was required to sell (or convert) the foreign currency to an authorised dealer; or

(b) as to what part of sub-regulation (1) or (2) the Plaintiff may have contravened.

83. Fourthly, Counsel for the Defendant confirmed that the Plaintiff has not been charged with any offence under the Regulations nor was it known whether there is any intention to do so. That would seem unlikely given the approach elected by the Crown in the proceedings it brought against the Plaintiff before Cato J. Suffice to say, the Plaintiff has not been convicted of any contravention of the Regulation which could amount to proven unlawful conduct.

84. Fifthly, this argument amounts to the Plaintiff having committed an offence by having the foreign cash in his possession for longer than allowed as at the time it was seized. That conduct pertains to a past or present state of affairs. The relevant language in ss 19C and D of the Act – that the cash is *intended for use in unlawful conduct* – is in present and prospective terms. That is, there must be reasonable grounds for suspecting a present (meaning at the time of decision to seize) intention to use the cash at some point in the future in unlawful conduct. The distinction may be seen by some as semantical, but it is

yet another question which was unable to be properly addressed, considered or resolved due to the manner in which the Defendant sought to introduce the argument for the first time in closing submissions.

85. Clearly, this case is not a suitable vehicle for such issues concerning the interpretation and operation of the *Foreign Exchange Control Regulations* to be determined, even if that were possible on the state of the pleadings and the evidence and submissions presented at trial. Nor is it necessary or prudent that I express any further views on it. Suffice to say, Counsel for the Defendant was unable to provide any, or any compelling, answers to the questions raised. That is not intended as any criticism of Counsel, but rather a reflection of the technical and legal complexity of the submission she sought to advance.

Abuse of process?

86. As noted above, the Court of Appeal posed a number of questions, in relation to what has transpired to be this civil proceeding, including:[23]

    (a) whether it is open to the Crown to contend that the cash was validly forfeited when the Plaintiff received a presumably more severe sentence than he would otherwise have received had Cato J not concluded that the Plaintiff was entitled to the return of the cash; and

    (b) if it did, whether it would be an abuse of process for the Crown to seek to relitigate the issue decided by Cato J upon sentencing the Plaintiff when there was no appeal against the severity of the sentence.

87. Before me, Mr Edwards submitted that if the Court is satisfied that the cash is 'legitimate', then the Plaintiff has been punished for his failure to declare it. As such, forfeiture of the cash would be unjust because the overall sanction suffered by the Plaintiff would exceed the maximum fine provided by s.97.

88. Ms Kautoke submitted that the Defendant's position in this proceeding was not an abuse of process because, as the Court of Appeal opined, upon the Plaintiff's sentencing, Cato

[23] [53] to [56].

J could not decide the issue of whether the cash was validly seized and detained under ss 19C and D of the Act without evidence.

89. So much may be accepted although, in my view, it is not entirely to the point.

90. Relevantly, there were two decisions considered by Cato J. The first was whether the forfeiture regime under the Act could validly be exercised by the Crown in the face of the Plaintiff's guilty plea to his breach of s.97 of the *Customs and Excise Management Act*. His Honour held that the Crown could forfeit the cash because the later *Customs and Excise Management Act* impliedly repealed the Act. The Court of Appeal disagreed and held that it was open to the Crown to forfeit the cash under s.19G(5) of the Act, ***if*** it was seized and detained in accordance with ss 19C and D. That last element was something Cato J could not decide without evidence. Accordingly, the legal basis for Cato J's decision was overturned and the factual enquiry necessary for a determination on the correct legal basis was not available to him.

91. The second question was whether to calculate the sentence by reference to the additional punishment the Plaintiff would suffer if the cash was forfeited. As his Honour had found (albeit on an erroneous basis) that the Plaintiff was entitled to the return of the cash, he imposed a more severe penalty[24] than would otherwise have been the case had the cash been forfeited.

92. In my view, and strange as it may seem, for the Crown to maintain the position it has in this proceeding, it should have appealed against the severity of the sentence on the basis that, on its view of s.19G(5), the cash had been forfeited. Conversely, it is no wonder that the Plaintiff did not appeal likewise because he had the comfort of Cato J's opinion that the cash should be returned to him. Had the Court of Appeal agreed with Cato J's reasoning for his conclusion, the issue would have been finally determined and it would not have been open for the Crown to have defended this claim on the bases it has.

93. It is really then that second decision, or basis for the sentence, which attracts consideration of whether the Defendant's opposition here to the return of the cash is an abuse of process.

94. The court possesses inherent power to prevent misuse of its procedures in a way which, although not inconsistent with the literal application of its procedural rules, would

[24] $15,000 fine out of a maximum of $50,000 for a first offence.

nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied. They include proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made: *Hunter v Chief Constable of the West Midlands Police & Ors* [1981] 3 All ER 727.[25]

95. In *Hunter*, Lord Diplock stated the principle by adoption of the judgment of A. L. Smith, L.J. in *Stephenson* v. *Garnett* [1898] 1 Q.B. 677:

> *"The court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court."*

And from Lord Halsbury's speech in *Reichel v. Magrath* 14 App. Cas. 665:

> *"... it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."*

96. The principle was similarly stated in *Tu'ivai v Kingdom of Tonga* [2009] TOCA 30 as embracing the proposition that:[26]

> *"... where an issue has already been determined in criminal proceedings, it is an abuse of process to raise that issue in a civil proceeding by way of a collateral attack on the finality of the criminal proceedings."*

97. Ultimately, the question of whether the defence here is an abuse of process turns on whether the issue of forfeiture under s.19G(5) was determined by Cato J. In my opinion, it was not. A 'determination' must include the outcome of any appeals from the initial decision. The Court of Appeal held that his Honour's reasoning for his decision that the cash was not forfeited was erroneous. However, as the Attorney General's appeal was

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[25] Applied recently in *Crossley & Ors v Volkswagen Aktiengesellschaft & Ors* [2020] EWHC 783 (QB) (06 April 2020); cited in *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; *Hill v Maori Trustee* [2019] NZCA 600 (29 November 2019) and *Prescott v Police* [2019] NZCA 380.

[26] Citing *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 542. See also *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251; *D'Orta-Ekenaike v VLA* [2005] HCA 12; (2005) 214 ALR 92 at 109; and *Sea Culture v Scoles* [1991] FCA 523; (1991) 32 FCR 275 at 279.

dismissed as incompetent, no legal consequence to the Plaintiff's sentence flowed. Alternatively, although the effect of the Court of Appeal's decision in this regard was that forfeiture under the Act was legally open, Cato J could not determine whether forfeiture was available on that basis because to do so required evidence.

98. In those circumstances, I am not satisfied that the defence here is an abuse of process. While it does amount to a collateral attack on the outcome of the criminal proceeding, there are differences in the determinations made there and to be made here, including the legal basis, evidence and analysis required of each court, which take this case outside the principles expounded in *Hunter*.

99. The appropriate course is to determine the Plaintiff's claim herein so as to 'right any wrongs' which have resulted from the criminal proceedings following the decision of the Court of Appeal.

Conclusion

100. For the reasons stated, I am satisfied, on the balance of probabilities, that at the time of its seizure and detention since, there were no reasonable grounds for suspecting that the cash was:

    (a) recoverable cash;

    (b) intended by any person for use in unlawful conduct; or

    (c) undeclared cash intended for use in unlawful conduct,

    as required by ss 19C and D of the Act.

101. Consequently, as the cash was not seized under ss 19C and 19D, and notwithstanding that no notice of appeal was received by either the seizing authority or the Court within the period of 30 days from the time of seizure, the cash was not automatically forfeited under s.19G(5) of the Act and it is to be returned to the Plaintiff.

102. That outcome is also consistent with an overall assessment of the justice of the case. In circumstances where the Plaintiff has been sentenced for his failure to declare the cash, by way of a substantial fine, calculated on the basis that he was entitled to the return of the cash, it would be grossly inequitable thereafter to order the forfeiture of the cash in

the absence of a compelling case under s.19G(5) to do so. Such a result would have been out of all proportion to the seriousness of the offending under s.97.

103. I recommend that, in future, where an Accused pleads guilty to a count which attracts the operation of the Act in terms of potential forfeiture or confiscation of cash or other property related to the charge, any issue of actual forfeiture or confiscation should be decided on evidence at a preliminary hearing prior to the determination of any sentence. Where an Accused pleads not guilty to a charge such as money laundering, the issues and evidence surrounding whether the cash or other property may be subject to forfeiture or confiscation are more likely to form part of the substantive trial on that charge.

Compensation

104. The Plaintiff also pleads a claim for compensation in the sum of $50,000 for the unlawful detention of the cash. The basis for the claim is said to have been for the time, expense and costs of the Plaintiff's endeavours to have his money returned.

105. The Particulars to the pleaded claim do not provide any basis upon which one can understand how the amount claimed has been quantified. It is a 'global claim'. Further, the Plaintiff did not adduce any evidence at trial of actual loss or expense occasioned by reason of the detention of the cash, such as any lost investment or additional costs of borrowing, nor even his legal costs prior to commencement of this proceeding alluded to in the particulars to the claim.

106. Section 19E of the Act provides:

> **Interest**
>
> If cash is seized under section 19D for more than 48 hours, it shall be as soon as practicable, be paid into an interest-bearing account, and the interest accruing on it is to be added to it on its forfeiture or release.

107. Section 19J of the Act provides:

> **Compensation**
>
> (1) If no forfeiture order is made in respect of any cash seized under this Act, the person to whom the cash belongs or from whom it was seized may make an application to the Court for compensation.

> (2) If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial seizure of the cash for 48 hours, the cash was not held in an interest-bearing account while seized, the Court may order an amount of compensation to be paid to the applicant.
>
> (3) The amount of compensation to be paid under subsection (2) shall be the amount the Court thinks would have been earned in interest in the period in question if the cash had been held in an interest-bearing account.
>
> (4) If the Court is satisfied that, taking account of any interest to be paid under section 19E or any amount to be paid under subsection (2), the applicant has suffered loss as a result of the seizure of the cash and that the circumstances are exceptional, the Court may order compensation or additional compensation to be paid to him.
>
> (5) The amount of compensation to be paid under subsection (4) shall be the amount the Court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
>
> (6) Compensation shall be paid in the first instance from the general fund held by the Court.
>
> (7) A forfeiture order shall be made in respect only of a part of any cash seized under this Act and this section has effect in relation to the other part.

108. The first question then is whether, since its seizure, the cash has been held in an interest-bearing account, and if it has, what interest has been earned on the funds. There was no evidence in relation to either question adduced by either party at trial.

109. If I therefore proceed on the provisional basis that the cash has not been placed in an interest bearing account, then s.19J(2) permits an order for compensation.

110. Subsection (3) is unusual. It prescribes the amount of compensation as that which 'the Court thinks would have been earned in interest in the period in question if the cash had been held in an interest-bearing account'. It does not indicate how or by what evidence the Court is to arrive as what interest it thinks would have been earned. As noted above, no evidence was adduced on this issue. The subsection appears to permit the court to undertake its own investigations, which is antithetical to the adversarial system of justice where the onus is on the parties to adduce evidence upon which the Court is to determine disputes. Be that as it may, the legislative directive requires an answer. The publicly

available information from the Reserve Bank of Tonga indicates that the median interest rate for term deposits over the last few years has been in the order of 5%.[27]

111. Subsections (4) and (5) permit an order for additional compensation, in an amount the Court thinks reasonable, if the Court is satisfied, after taking account of any interest to be awarded, that the Plaintiff has suffered loss as a result of the seizure of the cash and that the circumstances are exceptional. As noted above, the Plaintiff did not adduce any evidence to support his pleaded claim for expense and time associated with pursuing the return of the cash, including any pre-litigation legal costs. Unlike with subsection (3), on this head, I consider the Court requires actual evidence of claimed loss. As there is none, the award of compensation is confined to interest.

Orders

112. Judgment for the Plaintiff.

113. Pursuant to s.19F and/or s.19I of the *Money Laundering and Proceeds of Crime Act*, the Defendant is directed to release the cash (being NZD$9,490, USD$54,275, AUD$10,050, FJD$1,700 and TOP$2,015 or the Tongan equivalent as at 15 May 2018) to the Plaintiff forthwith.

114. Further, if the cash has been held in an interest-bearing account in accordance with s.19E of the Act, any interest accruing on it is to be added to it.

115. Alternatively, if the cash has not been held in an interest-bearing account in accordance with s.19E of the Act, then by way of compensation pursuant to s.19J(3) of the Act, interest is to be added to the cash at the rate of 5% per annum on the Tongan pa'anga equivalent of the cash, as at 15 May 2018, from that date to the date of payment.

116. Costs should follow the event. However:

    (a) any party who wishes to apply for a different costs order shall file an application with any supporting affidavit/s and submissions within 14 days of the date hereof;

[27] http://reservebank.to/data/documents/statistics/QB/2019/NRBT_QB_Sep19.pdf

(b) in that event, and if the application is opposed, the other party shall file any notice of opposition, affidavit/s and submissions within a further 14 days; and

(c) unless either party requires a further hearing, a decision on costs will be made thereafter on the papers.

SUPREME COURT TONGA

NUKU'ALOFA
13 May 2020

M.H. Whitten QC
LORD CHIEF JUSTICE