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Brief of evidence datedIN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY CV 28 of 2020

BETWEEN:

'ANA TUPOU NISHI Plaintiff

-and-

KUMAZO NISHI Defendant

Costs following judgment

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr W.C. Edwards SC for the Plaintiff
Mrs P. Tupou KC for the Defendant
Date of trial: 28 January 2021, 4 and 5 March 2021 and 16 April 2021
Date of judgment: 17 May 2021
Date of costs hearing: 26 May 2021
Date of costs ruling: 26 May 2021

1 In this proceeding, the Plaintiff sought an order for return of nine items of koloa (or 'mats' for brevity); alternatively, damages for conversion or detinue in the sum of $21,500.

2 During the trial, following a second court-ordered inspection, three of the mats were identified, returned and accepted by the plaintiff, leaving a claim of six mats or their monetary equivalent of $15,300 to be determined.

3 On 17 May 2021, judgment was entered in favour of the plaintiff in the sum $7,300, representing two of the balance of the mats claimed. In other words, the plaintiff failed in her claim in relation to the balance of the mats. In light of the plaintiff's partial success, the parties were invited to make submissions on costs.

4 Mr Edwards SC submitted, in summary:

4.1 the power to award costs is in the discretion of the court as regards persons by whom they shall be paid: s 15 of the *Supreme Court Act*;

4.2 the general rule is that a successful party is entitled to his costs save whether there is any disentitling circumstances such as misconduct: *Fonua v MBF Bank* [1999] Tonga LR 4, where Chief Justice Ward stated:

> *"... There can be no doubt that the usual rule applies that costs follow the event...*
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> *There is no dispute that the court has the power to order costs and section 15 of the Supreme Court Act gives the court a discretion to award them subject only to the terms of the proviso which is clearly not relevant in this case. Such a discretion must be exercised judicially and the general rule is that a successful party is entitled to his costs but it must be remembered that rule is qualified. It is instructive to consider, for example, one of the early statements on the exact nature of the rule in Cooper and Whittingham (1880) 15 ChD 501 as put by the then, Master of the Rolls:*
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> > *'As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part - no omission or neglect which would induce the Court to deprive him of his costs - the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the proceedings, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs....'*
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> *The position as to the court's discretion has since been modified, see for example, Donald Campbell and Co. Ltd v Pollak [1927] 1 AC 723, but the rest of his remarks are still good law."*

4.3 here, there has been no misconduct of the part of the plaintiff in relation to instituting the proceedings, their prosecution or the obtaining of judgment;

4.4 the pleaded defence was obstructive and uncooperative;

4.5 the judgment in favour of the plaintiff is 'substantial';

4.6 the second court ordered inspection of a container at the defendant's parent's home on 10 March 2021 resulted in the recovery of items 1, 7 and 8, valued at $6,200;

4.7 the defendant was uncooperative throughout the proceeding by failing to return items 1, 7 and 8 until the inspection; and

4.8 therefore, the plaintiff is entitled to an order for the whole of her costs of the proceeding.

5 Mrs Tupou KC submitted, in summary:

5.1 the Plaintiff only recovered a portion of her pleaded claim;

5.2 the case had been prolonged, partly, due to the plaintiff's conduct including:

5.2.1 at the outset, her refusal to attend the defendant's premises or his parent's premises to inspect what mats were there and to identify what belonged to the plaintiff;

5.2.2 causing an adjournment of the trial by failing to adduce any evidence in relation to quantum. In that regard, I note that a costs order was made that day in favour of the Defendant in respect of costs thrown away by reason of the adjournment. That factor ought therefore be excised from present considerations; and

5.2.3 if the plaintiff had accepted the three mats earlier, the issues or items for trial would have been narrowed;

5.3 in '*Utu'atu & anor v Naufahu & anor* [2013] Tonga LR 64, where a claim of $132,000 resulted in judgment for only $300, the Court of Appeal substituted what had been the usual order for costs following the event with no order as to costs of the trial; and

5.4 therefore, here, there should also be no order as to costs.

6 In *Re Elgindata (No. 2)* (1993) 1 All ER 232, the UK Court of Appeal held:

> *"The principles on which costs were to be awarded were (i) that costs were in the discretion of the court, (ii) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other*

order should be made, (iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (iv) that where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs.[1] *The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs ..."*

7 More recently, in *Investec Bank (Australia) Limited v Glodale Pty Ltd & ors* [2009] VSCA 113, the Victorian Court of Appeal stated:

"[4] The position as to costs where a party has been partially successful was summarised by Eames J in Pricom Pty Ltd v Sgarioto:[2]

'As a general rule costs should follow the event, and a successful party should obtain all of the costs of the action even although it failed to establish some of the alternative heads of its claim: Ritter v Godfrey (1920) 2 KB 47. However, in the exercise of its discretion the court may decline to order costs in favour of a successful party, or may order the successful party to pay the costs of the unsuccessful party, where the plaintiff failed to establish discrete heads of claim, or failed to establish issues which it pursued in its claim, although ultimately succeeding on the basis of another discrete head of claim: Hughes v Western Australian Cricket Association Inc (1986) ATPR 40-748, per Toohey J at 48,136.'

[5] In McFadzean v Construction Forestry Mining and Energy Union,[3] *this Court said:*

'No complaint is made by the appellants about the judge's method of making a single order in apportioning the costs. It was certainly open to his Honour to do so. Under r 63.04, the judge might have awarded costs in relation to particular questions or parts of the proceeding. We think it appropriate however, with respect, to observe that the approach taken by his Honour, of fixing of a certain proportion of a party's costs which should be paid by another party, has much to commend it.

In fixing costs a superior court may treat 'heads of controversy as units of litigation' and give directions to the taxing master in relation to them, such units not being circumscribed by pleadings, causes of action or issues capable in themselves of leading to the granting of relief. But to avoid the complications of taxation resulting from making orders recognising the

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[1] The proviso to s 15 of the Tonga *Supreme Court Act* provides 'that the Court shall not order the successful party in an action to pay to the unsuccessful party the costs of the whole action but the Court may order the successful party notwithstanding his success in the action to pay the costs of any particular proceedings therein.

[2] Unreported, Supreme Court of Victoria, Eames J, 10 April 1995, 24 April 1995, BC9503266, 5, cited with approval in *Spotless Group Ltd v Premier Building & Consulting Pty Ltd* [2008] VSCA 115, [13] and in *McFadzean v Construction Mining and Energy Union* [2007] VSCA 289, [152].

[3] [2007] VSCA 289 [157]-[158].

> *entitlements to costs of a party on each action on which they were successful, the orders may be notionally set off against each other or other adjustments made so as to produce an order for a proportion of one party's costs. This approach to costs orders where an action has had mixed success has been followed in a number of cases. In Hughes v Western Australian Cricket Association (Inc), Toohey J had regard to the fact that the plaintiff had succeeded on some issues but failed on others, but concluded that: 'it would be unsatisfactory to attempt to apportion issues and leave the fixing of costs of those issues to the taxing officer. That would impose a very great burden on him and upon the parties' legal representatives.' In our view, the judge's approach to the apportionment of costs was particularly apposite in this case, having regard to the multiplicity of parties, actions, and issues, and the mixed success enjoyed by the plaintiffs. (Footnotes omitted.)'*
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> ...
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> *[7] As this Court said in Major Engineering Pty Ltd v Helios Electroheat Pty Ltd (No 2):*[4]
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> > *'... Where there is a mixed outcome in the proceeding, such as here, the apportionment of the comparative importance of the relevant claims in the proceeding – here, the claim and the counterclaim – can only be carried out on a broad basis, it being primarily a matter of impression and evaluation, rather than arithmetic precision.'"*

8 Having regard to the principles submitted and cited above, I turn to the relevant features of the present case.

9 As identified in the judgment, one of the central difficulties throughout the entire case was a proper identification by the plaintiff of each of the mats the subject of her claim. That failure or deficiency in identification was evident from the original email exchanges between the parties where the plaintiff simply identified the mats she was seeking by very basic textual descriptions. It was not until photographs were discovered and ultimately formed part of the evidence at trial that a clearer understanding could have been had, certainly by the defendant, and by the court, as to the precise nature of the mats the plaintiff claimed.

10 There were also earlier invitations by the defendant for the plaintiff to attend the defendant's parents' premises to inspect the koloa that was stored there so that the plaintiff could identify which belonged to her. She declined to do so.

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[4] [2006] VSCA 114 [5]

11 The defendant's pleaded position, in summary, was that he:

11.1 had no possession or use of the mats in question;

11.2 had insufficient knowledge as to precisely what the mats were; and

11.3 assumed his sister would have known which mats belonged to the plaintiff but that turned out not to be the case either.

12 In my view, it would have been eminently sensible and helpful had the Statement of Claim properly particularized the nature of the mats by annexing photographs of them. The photographs could also have been provided earlier to the defendant when he was endeavoring to undertake searches for the mats before proceedings commenced. By the same token, the defendant did not serve any request for further and better particulars to gain a better understanding as to the nature of the mats claimed.

13 As also recorded in the reasons for judgment, there had been previous offers by the defendant during the course of the proceedings of certain mats but which the plaintiff refused. Ultimately, as a result of the second inspection ordered by the court, three of those mats were identified and accepted by the plaintiff. In that regard, I note that one of the higher value mats claimed, item 1, a ngatu launima pepa, as depicted in photographs tendered by the plaintiff was actually quite different in design from the one which was ultimately accepted by the Plaintiff as hers. That difference in either the plaintiff's recollection or evidence in support of her claim, compared to that to which the plaintiff was entitled, had the effect of prolonging the overall proceeding, including the duration of the trial.

14 Against that, again in terms of the conduct of the parties, the first inspection ordered earlier in the case was effectively thwarted by the fact that, unbeknownst to the court at the time of making the order, the defendant was no longer residing at his parents' property where all the koloa from the wedding presentation had been stored. That was an unhelpful position taken by the defendant. Had that first inspection been carried out of the container at his parents' property, it would likely have led to a reduction in the number of mats for consideration at trial.

15 The monetary value of the outcome against the claim is also a relevant consideration. The total amount claimed was $21,500. The value of the three mats returned during the trial was $6,200, leaving a balance claimed of $15,300. The judgment for the two other mats which the court found did belong to the plaintiff, but which had not been returned by the defendant and had probably been mistakenly given away, was $7,300, which was less than half of the balance of the monetary claim. Overall, however, taking into account the value of the three mats returned plus the monetary judgment, the plaintiff has recovered a total of $13,500 on her claim of $21,500, or just over 62%.

16 Having regard to those various elements of the case, the way in which it was conducted and the mixed success enjoyed by the plaintiff, both in terms of the number of mats and their value against her overall claim, and as 'a matter of impression and evaluation, rather than arithmetic precision', I consider it appropriate to order that the defendant pay half the plaintiff's costs of the proceeding, excluding any costs the subject of an earlier order, to be taxed in default of agreement.

NUKU'ALOFA
26 May 2021

M. H. Whitten QC
LORD CHIEF JUSTICE