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

CV 68 of 2019

BETWEEN:

DS VENTURE LIMITED Plaintiff

-and-

TONGA CABLE LIMITED Defendant

-and-

All persons claiming, or being entitled to claim, for any loss and/or damage arising in any way from damage to the Tongan- Fiji and Tongan domestic cables alleged to have been caused by the anchor of the DUZGIT VENTURE on its entry into the port of Nuku'alofa, Tonga on 20 January 2019.

Defendant's application pursuant to O.47 r.5 for certification of costs at a higher rate

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC

Counsel: Messrs P. David QC, M. McCarthy and W. Edwards for the Plaintiff.
Messrs J. McBride and P. Bloomfield for the Defendant.

Date of hearing: 26 May 2021
Date of ruling: 31 May 2021

The application

1 On 22 December 2020, the Plaintiff ("**DSV**") was ordered to pay the Defendant's ("**TCL**") costs of and incidental to the limitation proceedings up to and including 10 July 2020.

2 In late April 2021, TCL filed a bill of costs totalling the equivalent of just under TOP$300,000 and applied, pursuant to Order 47 rule 5 of the Supreme Court Rules, for certification of its costs at higher rates than those provided for in Practice Direction No. 1 of 2009.

3 Order 47 rule 5 provides:

0.47 Rule 5. Additional costs to be certified for

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(1) Any party seeking to recover costs at a higher rate than those provided for in the relevant practice direction shall make application to a Judge to have the higher rate certified for.

(2) Application for certification under this rule may be made orally at a directions hearing or informally by letter to the Registrar.

(3) In the absence of exceptional circumstances, application under this rule must be made prior to the hearing in respect of which the costs are to be incurred.

(4) Additional costs may be certified as appropriate under paragraph (1) upon special cause being shown.

Background

4 On 20 January 2019, the anchor of a vessel owned by DSV caused damage to communications cables owned by TCL ("**the incident**").

5 On 15 September 2019, TCL served a demand on DSV for payment of damages in the sum of US$1,237,890.06.

6 On 20 December 2019, DSV commenced these proceedings in which it sought:

6.1 a declaration that its liability and damages for any claim arising from the incident are limited to TOP$859,403.82 under the *Shipping (Limitation of Liability) Act* 1980 ("**SLLA**"); alternatively, TOP$3,348,496.00 under the Convention on Limitation of Liability for Maritime Claims 1976 and Protocol of 1996 ("**LLMC**") ("**limitation decree**");

6.2 an order for the establishment of a limitation fund for up to whichever limit applied; and

6.3 consequential directions for determining valid claims against the fund.

7 On 20 January 2020, TCL filed a Statement of Defence (dated 17 January 2020) in which it:

7.1 denied DSV's claim for a limitation decree;

7.2 alleged that the damage to its cables was caused by DSV's actual fault or negligence; and

7.3 pleaded that, if DSV's liability was to be limited, the LLMC (with its higher limit) does not apply in Tonga.

8 TCL also filed a counterclaim for then unliquidated damages for repair costs, loss of revenue and consequential losses said to have been caused by the incident.

9 Following the first directions hearing on 31 January 2020, orders were made which included the establishment of the limitation fund and a stay of TCL's counterclaim pending the hearing and determination of DSV's application for a limitation decree. During submissions that day, and notwithstanding TCL's pleaded position that the LLMC did not apply, Mr Bloomfield raised issue with whether it did and sought time for TCL to (re)consider the matter further. Directions were also made for the parties to file, between April and August 2020, affidavits and submissions in respect of the application for limitation, and, subject to compliance with those directions, that at the next directions hearing on 4 September 2020, a hearing date would be listed.

10 On 14 February 2020, TCL conceded that the lower limit pursuant to the SLLA applied. On 21 February 2020, orders were made to that effect and DSV subsequently established a fund for that amount plus interest by letter of undertaking from its insurers.

11 On 6 April 2020, at DSV's request, the directions timetable was extended by approximately two months.

12 Between 5 and 9 June 2020, DSV filed seven affidavits of lay and expert evidence in relation to the cause/s of the incident. TCL's affidavits were then due to be filed by 14 August 2020.

13 On 28 August 2020, TCL requested a further extension to the extant directions timetable. The application was filed some two weeks after TCL's affidavits were due and without any supporting affidavit/s. The stated grounds for the extension sought were that:

13.1 prior to receiving DSV's affidavit material, TCL had been unaware of the particular basis on which the claim was brought;

13.2 TCL had been examining the evidence and attempting to obtain a critique of it, to enable it to respond meaningfully with its own evidence;

13.3 due to the ongoing effects of Covid-19 and the consequent border

closures, TCL had encountered difficulties in preparing its evidence;

13.4 it foreshadowed having to liaise with factual witnesses in Tonga as well as shipping experts in various jurisdictions; and

13.5 it had, to that date, been unable to do so.

14 Mr McBride proposed modifications to the timetable which amounted to a four-month extension. He concluded that the parties were "*now engaged in serious settlement negotiations*" and that the extension to the directions timetable would "*provide the parties with time hopefully to conclude those negotiations and resolve the proceeding*".

15 DSV opposed TCL's requested extension and submitted that, if any extension were to be granted, it should not exceed two months.

16 In light of the parties' disagreement, a further directions hearing was held on 18 September 2020. Mr McBride candidly stated that TCL had in fact not started any work in preparation of its affidavit material in opposition to the limitation decree.

17 In the result, the date for filing of TCL's affidavits was extended to 14 November 2020 and submissions in opposition were to be filed by 22 January 2021. The matter was then to be mentioned again on 29 January 2021, at which time, it was envisaged that, subject to compliance with the extended directions, a trial date would be set.

18 An order was also made for TCL to pay DSV's costs of and incidental to TCL's application for extensions to the interlocutory timetable and the appearance that day.

DSV's application for higher costs

19 On 30 October 2020, DSV applied for an order, pursuant to Order 47 rule 5, that its costs in respect of the 18 September 2021 order be allowed at a higher rate for counsels' fees than that provided by the applicable Practice Direction.

20 For the purposes of the instant application, it is useful to recount the submissions made by the parties on the earlier application by DSV for a similar order.

21 DSV submitted that:

21.1 "the time to make [the] application is appropriate...": *Lali Media Case – Taili o Tonga Ruling on Costs* [2004] TOSC 22 at 24;

21.2 the "nature of the pleadings, together with the approach in the context of the rules and the complexity of the case is novel to the Supreme Court of Tonga and it is reasonable and necessary in the circumstances for the attainment of justice and for defending the rights of the plaintiff that very highly qualified and senior counsel from overseas were engaged to act for the plaintiff";

21.3 it was necessary for counsel responsible for the conduct of the case to attend the directions hearing;

21.4 in the circumstances of an "11th hour" application by TCL which was very quickly heard by the Court so that the proceedings could advance, it was appropriate to accept the application for higher rates as the Court thinks fit notwithstanding that the application was made after the hearing; and

21.5 "as the costs of dealing with the extension of time could become disproportionate", DSV was content for costs to be assessed on the basis of three hours for senior counsel and three hours for Mr McCarthy as instructing solicitor/counsel.

22 TCL opposed that application on the grounds that:

22.1 DSV's assertion that the novelty of the nature of the pleadings and complexity of the case meant that it is "reasonable and necessary for the attainment of justice and defending the rights of the plaintiff for very highly qualified and senior counsel from overseas to be engaged" should be rejected;

22.2 the hearing on 18 September 2020 was not complex; it concerned timetabling issues which were resolved by the Court by way of compromise between the competing positions;

22.3 it is settled practice in Tonga (and New Zealand) that the complexity of

proceedings, for costs purposes, is not to be altered retrospectively;[1] and

22.4 TCL is not a wrongdoer in any conventional sense and had been joined to the proceedings as a defendant for the very reason that it suffered loss and damage as a result of the conduct of the plaintiff, and it had no prior knowledge of the circumstances in which the plaintiff damaged its cables.

23 By ruling dated 22 December 2020, DSV's application was refused for the following reasons, in summary: [2]

23.1 subrule (3) required, that in the absence of exceptional circumstances, the application must be made prior to the hearing in respect of which the costs are to be incurred;

23.2 as Ward CJ stated in *Lali Media Case – Taili o Tonga Ruling on Costs*:[3]

> *"... Such application should normally be made before the case is heard and failure to do so may result in the costs being awarded on a normal scale for Tonga."*

23.3 it may well not have occurred to DSV to apply for an uplift in counsel's rates either at the commencement of the proceeding or before the mention, the subject of the application, because it expected to be a payer of costs in accordance with the usual approach to costs in limitation proceedings. Nonetheless, given the seniority and expertise of the practitioners engaged, it may be expected that contingencies in respect of possible costs orders in favour DSV (especially upon the filing of the Defence and Counterclaim in which TCL positively alleged fault and negligence on the part of DSV) should have been considered at the appropriate, much earlier, time; and

23.4 further, no exceptional circumstances were advanced to warrant departure from the rule and echoed statement of principle referred to above. "Adherence to the rule is important. Any application for certification of

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[1] *JL Tindall & ors v Far North District Council* HC, Auckland, CIV 2003-488-000135, 25 May 2007.
[2] DS Venture Ltd v Tonga Cable Ltd [2020] TOSC 118.
[3] [2004] TOSC 22; C 0124 2003 (24 May 2004).

higher counsel's fees, if granted, is a significant consideration for any opposite party in terms of its costs exposure, which in turn may bear upon its assessment of its case and commercial considerations of the risks of steps to be taken (or not taken) in the case, including any possible settlement."

TCL abandons its opposition to the limitation decree

24 On 13 November 2020, TCL advised that it:

24.1 had determined not to file any evidence in opposition to the limitation decree;

24.2 discontinued its defence to DSV's claim;

24.3 intended not to take any further steps in the proceeding except in relation to its Counterclaim (which was then stayed) and as to costs;

24.4 "knew nothing ... as to the basis upon which the Plaintiff contended that the submarine cable had been damaged without actual fault or privity on the part of the owners. It knew nothing of the owners or the management structure, or indeed of the precise circumstances in which the cable was damaged by the ship";

24.5 observed that DSV's "affidavits also disclosed that:

24.5.1 the ship was managed by 'MTM Ship Management Pty Ltd';

24.5.2 it was difficult to identify exactly how and when the anchor and chain came loose;

24.5.3 that they potentially came loose in heavy seas as a result of the failure of the crew to carry out operator procedures properly"; and

24.6 urged the Court "to give careful consideration to [DSV's] evidence, in the absence of any contradictor to the application, before determining whether [DSV had satisfied] the relevant onus and should, or should not, be granted the relief it seeks".

Limitation decree made and limited costs ordered in favour of TCL

25 Also on 22 December 2020, after having carefully considered the evidence filed

by DSV, I granted the limitation decree.[4] Further, and for the reasons explained at length in that ruling, I ordered DSV to pay TCL's costs of and incidental to the limitation proceedings up to and including 10 July 2020, and that thereafter, with the exception of the costs order made on 18 September 2020, the parties were to bear their own costs.

26 Since then, and following the publication of directed notices throughout Tonga informing the public of the terms of the limitation decree and calling for any claims against the fund to be filed, the case has proceeded in respect of what has been referred to as the 'claims phase'. Apart from TCL, only one other claim has been filed. Most recently, directions were made for what are effectively pleadings in relation to those claims.

TCL's grounds for higher costs

27 On 9 April 2021, at DSV's request, I directed TCL to file and serve a bill of costs in taxable form in respect of the costs order made on 22 December 2021.

28 On 21 April 2021, Mr Frawley of Macpherson Kelley, the Australian solicitors for TCL, wrote to the Registrar of the Supreme Court in relation to TCL's costs of the limitation proceedings, relevantly, in the following terms:

> "For the purpose of taxing the defendant's bill of costs, we note that under Order 47, Rule 5 of the *Supreme Court Rules*, our client is able to seek to recover costs at a higher rate than those provided for in the relevant practice direction, by application to a Judge to have the higher rate certified for. Such application can be made informally by letter to the Registrar. The onus on our client is [to] show "*special cause*" (Order 47 Rule 5(4)). We also note that "*In the absence of exceptional circumstances, application under this rule must be made prior to the hearing in respect of which the costs are to be incurred*" (Order 47 Rule 5(3)).
>
> The rate prescribed by the relevant practice direction is TOP $300.00 for Senior Counsel, TOP $200.00 for Counsel and TOP $130.00 for a locally qualified lawyer, in respect of legal work which is carried out but not covered by attendances in the conduct of trials, appeals and other substantial hearings. However, in the present case the defendant's solicitors and counsel charged the following rates:
>
> a) Mr J.D. McBride, counsel for the defendant, charged NZ $650 per hour.

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[4] DS Venture Ltd v Tonga Cable - Ruling [2020] TOSC 119.

b) Mr J Ridgway, solicitor for the defendant, charged AUD $780 per hour.

c) Ms S Cook, solicitor for the defendant, charged AUD $640 per hour.

d) Mr C Frawley, solicitor for the defendant, charged AUD $610 per hour.

e) Mr K Kidu, solicitor for the defendant, charged AUD $600 per hour.

f) Mr D Kelly, solicitor for the defendant, charged AUD $380 per hour.

g) Ms J Lee, solicitor for the defendant, charged AUD $440 per hour between 28/08/19 to 30/06/20 and AUD $460 between 01/07/20 to 10/07/20.

h) Ms E Walters, law graduate for the defendant, charged AUD $250 per hour.

i) Ms A Phan, legal secretary for the defendant, charged AUD $190 per hour.

Plainly, "*special cause*" for recovery of costs at these rates, being higher rates than those specified in the relevant practice direction, is made out in this case. His Honour the Lord Chief Justice M. H. Whitten QC noted in paragraph C of his Minute of Mention – Orders and Directions, dated 31 January 2020, that this is a *"relatively rare and novel type of case in Tonga"*. To that end, the plaintiff has been represented by experienced senior counsel and practitioners from overseas, namely Mr P. David QC and Mr M. McCarthy from New Zealand, both of whom are experts in the field of admiralty law. The defendant responded by engaging New Zealand counsel and was represented throughout by Australian solicitors. In the defendant's submission, this is clearly a case suitable for the Court to exercise its discretion and to certify the higher rate of recovery of costs.

Further, the authorities are unequivocal: the plaintiff in a limitation action, being a wrongdoer, should pay the ordinary costs of obtaining a limitation decree: *The Capitan San Luis* [1994] 1 All ER 1016 (HC), *Halsbury's Laws of England* (2nd ed, 1938) vol 30 Shipping and Navigation at [1309]. The costs of overseas counsel and solicitors are "*ordinary costs*", in a case of this nature.

Finally, in terms of the defendant's request for a higher rate being made "*prior to the hearing in respect of which the costs are to be incurred*", absent "*special circumstances*", we note:

a) No hearing took place for the application for a limitation decree, and the request for "*higher rate*" costs relates to the costs generally occasioned by the plaintiff wrongdoer's application for a limitation decree.

b) "*Special circumstances*" are made out in any event, as the defendant was forced to incur "*higher rate*" costs as a consequence of the plaintiff wrongdoer's invocation of the limitation fund procedure, including engaging overseas counsel and solicitors to respond to the plaintiff wrongdoer's engagement of Mr David QC and Mr McCarthy.

For the purpose of TCL's costs now being taxed and recovered in accordance with the orders made on 22 December 2020 and 9 April 2021, we accordingly ask informally by this letter that the Court certify that costs are to be recovered at the higher rate in accordance with Order 47, Rule 5."

29 Neither Mr Frawley's letter nor his email attaching it bore any reference to the application being copied to any representative of DSV.

30 On 23 April 2021, the solicitors for TCL filed a bill of costs for professional services provided between 31 March 2019 and 10 July 2020. The bill comprised some 443 items of work by the solicitors, totalling AUD$153,943.73. In addition, disbursements included Mr McBride's fees of AUD$12,469.10 and what appears to be Mr Bloomfield's fees of the equivalent of AUD$3,847.36,[5] producing a grand total for fees and disbursements of AUD$171,283.06. On current exchange rates, that equates to just under TOP$300,000.

31 That same day, directions were issued requiring DSV to file a response to TCL's application and for any party who required a hearing of the matter to advise accordingly.

DSV's submissions in opposition

32 On 30 April 2021, DSV filed submissions in opposition to TCL's application which may be summarised as follows:

32.1 TCL's letter and bill of costs raised several issues in relation to the taxation of costs. The first "threshold issue ... is whether the defendant can establish the requirements for certification of costs at a higher rate than in the relevant practice direction". If those requirements can be established, the further issues to be addressed in the taxation process under rule 46 include:

32.1.1 what an appropriate higher rate would be;

32.1.2 the lawyers to which any such rates should apply; and

32.1.3 then, more generally, to what extent the costs claimed are costs 'of and incidental to the limitation proceedings' in accordance with the costs order in the limitation decree, and 'reasonably necessary or proper for the attainment of justice or for maintaining or defending

[5] The attached invoices from Mr Bloomfield included, notably, numerous items of work for which no charge was applied and work that was charged was charged at TOP$200 per hour in accordance with the current Practice Direction.

the rights of any party' and allowable under order 47 rule 2.

32.2 the application should be dismissed because it has been made after the grant of the limitation decree on 22 December 2020, that is, after the conclusion of the procedure in the limitation action for deciding whether the plaintiff was entitled to a decree, and long after when the costs were incurred;

32.3 in response to TCL's submission that there was 'no hearing' and that therefore subrule (3) does not apply:

32.3.1 the limitation proceedings were determined in a manner which reflected the procedure in U.K. Order 75 rules 37-44 for a "limitation action";

32.3.2 the procedure directed by the Court sought to bring the limitation action to a conclusion by the Court deciding whether to grant a decree;

32.3.3 the procedure led, after some delay, to a hearing of the application for a decree which the Court carried out on the written submissions made in the limitation action;

32.3.4 the fact that TCL decided, ultimately, not to oppose the application for a decree (while requesting that the Court scrutinise the affidavit evidence) does not mean that there was no hearing of the application for a decree;

32.3.5 the Ruling made clear that the Court did conduct a hearing on the written submissions and evidence in order to determine whether, on the balance of probabilities, the limitation decree should be granted;

32.3.6 therefore, there 'plainly was a hearing' for the purpose of the application of Order 47 rule 5(3); and

32.3.7 all the costs incurred by the parties from the commencement of the limitation action involved work in relation to that hearing;

32.4 at no stage in the limitation action (of some 12 months duration) did those representing TCL make any application for certification for additional costs under Order 47 rule 5;

32.5 during the course of the proceedings, TCL made submissions on costs, including in opposition to DSV's application for certification of increased costs under Order 47 rule 5;

32.6 TCL cannot show exceptional circumstances or special cause as required by Order 47 rule 5;

32.7 that a party has brought limitation proceedings in accordance with its rights to do so, and has engaged experienced counsel in relation to the proceedings, cannot amount to special cause or exceptional circumstances justifying departure from the rule that an application for higher costs must be made prior to the costs being incurred;

32.8 to say that a party is a 'wrongdoer' is not an exceptional circumstance. Such a description could be applied to any party who may be liable to another whether in tort or otherwise and liable in costs;

32.9 nor can the approach to costs in limitation proceedings, which provides for the payment of ordinary costs on the principles set out in *The Alletta*, in some way avoid or bypass the application of Order 47 rule 5;

32.10 as the Court held in its earlier ruling on 22 December 2020 dismissing DSV's application for increased costs, Order 47 rule 5 has the important purpose of allowing parties to know where they stand as regards cost exposure in proceedings;

32.11 consistent with that purpose, the rule requires an applicant to establish special cause and that there are exceptional circumstances justifying a departure from the rule that the application should be made before costs are to be incurred;

32.12 where TCL has been represented throughout by experienced overseas lawyers and local counsel (and has made submissions directed to costs issues in the action), there are no exceptional circumstances which could support any departure from the rule and allow certification costs at higher rates some four months after the grant of the limitation decree;

32.13 any contingencies as to costs should have been addressed at the time when TCL and its lawyers took steps in the proceedings;

32.14 the reasoning of this Court in its earlier ruling on DSV's application for increased costs applies, and with greater force, to TCL's application; and

32.15 therefore, the application should be dismissed and TCL should be directed to resubmit its bill of costs in accordance with the relevant Practice Direction.

TCL's submissions

33 By memorandum filed 25 May 2021 (dated 24 May 2021), TCL submitted, in summary:

33.1 The court retains a discretion under Order 47 rule 5 to 'ensure that justice is done between the parties'. This ensures that - while costs orders should be predictable, and a party should have some sense of what costs they might be exposed to if unsuccessful - the Court can nevertheless certify a higher rate in circumstances that are unusual or where the higher rate is plainly justified.

33.2 In the present case, there was never a "hearing" of DSV's application, in the sense that there was a hearing in which TCL participated and which was contested. At the outset of the proceeding, TCL required DSV to explain why it contended that TCL's cable was damaged without the fault of the shipowner, being information to which TCL was not privy. Having considered that evidence, TCL determined (responsibly) it would not oppose the orders sought.

33.3 On that basis, Order 47 rule 5(3) is not engaged.

33.4 Further, the policy behind the rule is not engaged either as DSV committed to an application by which it would - contrary to the usual rule that the unsuccessful party pays costs to the successful party - pay costs to TCL, even if it was successful. That is of itself the sort of "special circumstance" envisaged by the rule.

33.5 In those circumstances, it is 'axiomatic that DSV must now meet TCL's costs, being the costs actually and reasonably incurred by TCL considering and responding to the application for limitation'.

33.6 Despite the well-settled rule that the plaintiff wrongdoer must meet the defendant's costs of responding to an application for limitation, DSV endeavoured to resist any costs order being made against it at all.[6]

33.7 The fact that the application for higher costs was not made at the very outset is unsurprising; TCL was concerned to understand the nature of the claim against it (a "relatively rare and novel type of case in Tonga") and to then take advice from overseas solicitors and counsel (as the plaintiff had done), to determine whether a defended hearing was necessary. Having decided not to seek a hearing, it should not be prejudiced, and the Court should exercise its discretion in favour of TCL.

33.8 TCL's earlier and successful opposition to the same application by DSV only concerned of brief mention hearing concerning timetabling. There was nothing complex about that mention which warranted a higher rate application.

Further submissions on hearing

34 At TCL's request,[7] a hearing of the application was conducted on 25 May 2021.

35 Further to his written submissions summarised above, Mr McBride submitted:

35.1 By reason of TCL's costs incurred being between five and six times the scale costs provided by the relevant Practice Direction, TCL calls on the general scheme of the relevant procedural rules to be "properly compensated".

35.2 As DSV sought an indulgence in the form of the limitation decree and the establishment of the limitation fund, it must pay TCL's reasonable costs of defending the application for limitation.

35.3 It is otherwise in the interests of justice for the application to be granted.

35.4 The "exceptional circumstances" referred to in subrule (3) which prevented

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[6] Memorandum dated 27 November 2021 at [12].
[7] On 7 May 2021, TCL gave notice that it required a hearing on the application.

TCL from applying earlier in the limitation proceedings were:

35.4.1 firstly, TCL had to review the merits of the application in what was a highly unusual case and had it determined to take no steps in the proceeding, it would have been entitled to an indemnity for its costs; and

35.4.2 secondly, the rule has not properly been engaged because there was no hearing in the traditional sense.

35.5 In response to a question from the Bench in which was posited that if TCL's submission that there was no hearing be accepted, then rule 5 would have no application at all, Mr McBride submitted that the Court still retained a discretion.

35.6 The relevant rule is not clear as to when TCL should have made the application and that 'lacuna' in the Rules constitutes an exceptional circumstance.

35.7 On that interpretation of the rule, TCL could only have been expected to make an application for higher costs in advance if the matter was proceeding to a hearing. Therefore, if costs are incurred which do not relate to a specific hearing, a party in TCL's position does not need to make an application at some earlier time.

35.8 Here, TCL is not seeking costs in respect of any particular hearing but its "costs of the cause".

35.9 When asked how his interpretation of the rule could serve the purpose of giving notice to an opposite party of an increased costs exposure, Mr McBride described that as a "good question" and otherwise referred to the procedure in New Zealand where, at a first hearing, the applicable cost category for a proceeding is usually agreed.

35.10 It was conceded that there was no reason TCL could not have applied for a higher costs at the start of the proceeding. However, Mr McBride added rhetorically: "what would [TCL] have applied for?".

35.11 An interpretation of the word "hearing" in subrule (3) as "the proceeding" may be open. A ruling to that effect would align with the procedure in New

Zealand and be of assistance. However, as that approach is not yet settled practice in Tonga, TCL should not be penalised by any ambiguity in the rule.

36 Further to DSV's written submissions, Mr David QC responded:

36.1 The issue called for a consistent and principled application of the Rules in Tonga.

36.2 It was incumbent on TCL to make an application for higher rates much earlier in the proceeding, for example, when it filed its Defence and Counterclaim in January 2020. The reference in subrule (2) to an application being made orally at a directions hearing supports that interpretation. TCL could have made the application at the first directions hearing for certification of all its costs in defending the limitation proceedings at higher rates. It did not do so.

36.3 That DSV was responsible for the incident is irrelevant to the instant issue and has already been dealt with by the Court in the primary decision to grant the limitation decree.

36.4 The procedure prescribed by Order 73 rule 38 of the U.K. Supreme Court Rules always contemplated a hearing being conducted whether opposed or unopposed, which is what occurred in the instant proceeding.

36.5 TCL had failed to demonstrate any basis in principle as to why it did not make the application earlier.

36.6 All other issues as to the quantum of any higher rates, and the reasonableness, etc. of the costs claimed are matters for taxation and not for this application which is only concerned with whether TCL can bring itself within Order 47 rule 5.

Consideration

37 The order for TCL's costs was made on a party/party or ordinary basis. No higher or enhanced basis was submitted at the time and no issue in relation to that aspect of the order has been raised since.

38 In Tonga, Practice Direction No. 1 of 2009 prescribes the maximum amounts

allowable as party/party costs or costs on an ordinary basis, as a series of specified daily and hourly rates for senior counsel, counsel and locally qualified lawyers (as referred to in Mr Frawley's letter). While the Practice Direction does not have the full force of a statute, it does have authority as being issued by the Court pursuant to its inherit jurisdiction to regulate and control its own process: *Fakafanua v Nishi Trading Ltd* [2020] TOLC 5 at [25].[8] Order 47 rule 4 provides for the Lord Chief Justice to issue further practice directions from time to time.

39 Those rates multiplied by the periods of time that legal services are reasonably and necessarily performed constitute 'ordinary costs' in civil litigation in Tonga. Order 47 rule 2(2)(c) reinforces the position by providing that, unless there are exceptional circumstances, 'any unusual expense' shall not be allowed. Prima facie then, it is those ordinary costs which, according to the authorities on limitation proceedings, DSV, as a wrongdoer, is liable to pay.

40 Part Four of the Practice Direction provides:

> "In any case where it is reasonable for a litigant to instruct counsel from abroad, additional costs and expenses may be certified for pursuant to O.47 Rule 5 of the Supreme Court Rules provided that the Court is satisfied that such costs, charges or expenses are reasonably necessary or proper for the attainment of justice or for the maintaining or defending the rights of the client."

41 I do not accept that TCL was "forced to incur higher rate costs" as a consequence of DSV's invocation of the limitation procedure or because DSV engaged overseas lawyers or that TCL's costs of engaging overseas lawyers are 'ordinary costs' in a case of this nature. TCL chose to engage overseas lawyers from Australia and New Zealand as well as Mr Bloomfield here in Tonga. Whether that was a decision by TCL's insurer, if any, has not been revealed. In any event, TCL's ability to recover the higher costs of engaging those overseas lawyers was always available pursuant to, and governed by, the Practice Direction and Order 47 rule 5.

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[8] Citing *Polynesian Airlines v Kingdom of Tonga* [2000] Tonga LR 145.

42 Conversely, I do accept that the unusual nature of the proceedings, the relief sought and the quantum involved, constitute 'special cause' for the purposes of sub rule (4) such as to fall within the exercise of the court's discretion to certify additional costs, as appropriate, in determining an application pursuant to sub rule (1). However, the court's discretion is conditioned and informed by the other requirements of Order 47 rule 5.

43 Prior to the introduction of the 2007 Supreme Court Rules, this issue was regulated by former Order 29 rule 4, which was maintained, in its general form, in the current version of Order 47 rules 2 and 3. Order 29 did not contain any provision equivalent to the current Order 47 rule 5, and in particular, the requirement of sub rule (3) that, in the absence of exceptional circumstances, applications under the rule *must* be made prior to the hearing in respect of which the costs are to be incurred. Similarly, the earlier Practice Direction No. 2 of 1992 only referred to allowing a Judge "on special cause shown" to increase the scale rates to such amount as he sees fit, which may now be seen as the predecessor to Order 47 rule 5(4).

44 Hence, earlier decisions such as:

44.1 *Taimi o Tonga - Ruling on Costs*, ibid, where Ward CJ said that applications for other than 'the usual rates in Tonga', including for instructing counsel from abroad, 'should *normally* be made before the case is heard and failure to do so may result in the costs being awarded on the normal scale for Tonga'; and

44.2 *Kingdom of Tonga v Allianz Australia Insurance Ltd* [2006] Tonga LR 69, where Ford J allowed an application, after judgment, for TOP$400 per hour for the fees of New Zealand counsel (which was still only a fraction of what counsel charged), as 'there was no element of surprise or prejudice' associated with the claim,

all predated the more certain and mandatory terms of Order 47 rule 5(3).[9]

45 In more recent times, in *Taxpayer A v Minister of Revenue* [2015] TOSC 21,

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[9] See also *Taione v Pohiva* [2006] TOSC 23, referred to in *Fakafanua v Nishi Trading Ltd* [2020] TOLC 5 at [16].

Paulsen LCJ observed that:

> *"[8] ... Order 47 Rule 5 provides a right to apply for certification of higher costs but the right exists only because of the Rule and must be limited by its terms."*

46 Further, His Honour described the objects of Order 47 rule 5 as:

> *"[9] ... First, to ensure that costs awards are limited to what is reasonable and sensible for Tongan conditions and, secondly, to ensure that parties to litigation are forewarned as soon as it is apparent that costs are to be claimed at a higher than normal rate (which is an important factor against which parties assess their risk)..."*

47 The first may be said to have less relevance in a case such as the instant where both parties have engaged overseas lawyers. However, the proceedings have been conducted in Tonga and thus both parties are and have been subject to the operation of the Tongan rules of civil procedure.

48 Consistent with the observation in paragraph 23.4 above, the second object referred to by Paulsen LCJ was also discussed in *Fakafanua v Nishi Trading Ltd*, ibid, at [41], in the following terms:

> *" ... the evident purpose of O.47 r.5 is to require a party who, if successful in the proceeding and is awarded costs in the ordinary way (i.e. on the basis that costs follow the event and on a party/party basis), wishes to recover specified costs at a higher level than provided for in the Practice Direction, to apply in advance for certification of those higher costs. In the absence of any such certification, and in the ordinary case described above, the losing party has the relative comfort and certainty of knowing that its costs exposure will be limited to, among other things, the rates set out in the Practice Direction. It must follow that a party who (turns out to be successful and) does not avail itself of O.47 r.5, must be taken to accept that, in the absence of any other costs protection measures (such as an effective offer of compromise), it will only be entitled to costs on a party/party or scale basis. To the extent that party's solicitor/client costs exceed scale, that party will bear the excess."*

49 Turning then to TCL's principal arguments:

49.1 firstly, that Order 47 rule 5(3) is not engaged or does not apply because there was no hearing; and

49.2 secondly, that if the rule is engaged, there are exceptional circumstances for the failure to make the application before any such hearing.

50 For the reasons which follow, TCL's submission that there was no hearing cannot be accepted.

51 Firstly, a hearing, in the context of legal proceedings, is a process by which the parties *are heard* through adducing (and testing) evidence and making submissions in relation to issues for determination. Here, DSV adduced evidence and made submissions during the course of the limitation proceedings in support of its application for a limitation decree. After some delay, and consideration of DSV's evidence and submissions, TCL ultimately determined to abandon its opposition to the application. From that it may be inferred that TCL was simply unable to adduce any or any sufficient contradictory evidence. In the face of that 'reality', it will be recalled that DSV's pleaded position was that the incident and consequent damage to its cables had been caused by actual fault or negligence on the part of DSV. Therefore, from its original Statement of Defence through to the issue as to which Convention applied through to its ultimate position of no longer opposing DSV's application, TCL was heard.

52 Moreover, and as referred to in paragraph 24.6 above, even in the face of that capitulation, TCL still urged the Court "to give careful consideration to DSV's evidence, in the absence of any contradictor to the application, before determining whether DSV had satisfied the relevant onus and should, or should not, be granted a limitation decree". With that, TCL did not consent to the decree being granted but rather continued to not oppose it, or in other words, it continued to put DSV to proof. On that note too, TCL was heard, and the Court did give careful consideration to the (uncontradicted) evidence before determining the application.

53 Accordingly, and consistent with the procedure contemplated by the UK rules referred to by DSV in its submissions, I am satisfied that there was a hearing, albeit an ultimately unopposed one, so as to engage the operation and requirements of Order 47 rule 5(3).

54 Secondly, and further to last, the logical effect of suggesting that a hearing never took place is that the Court determined the limitation proceedings without *hearing* from or considering any evidence or submissions made by the relevant parties.

For the reasons already outlined, that was obviously not the case.

55 Thirdly, if sub rule (3) is to be interpreted literally and narrowly, as TCL submitted, applying only to "a hearing in the traditional sense", then TCL's application must fail. By that approach, an application can only apply in respect of costs to be incurred in respect of such a hearing. If there is no such hearing, there can be no costs which could be the subject of an application. Therefore, in this case, where TCL has not claimed for any costs of any ultimate hearing or trial but has claimed for all costs incurred well prior to the commencement of proceedings and up to the directed date of 10 July 2020 (being 28 days after the last filing of DSV's evidence), such costs could not fall within the narrow ambit of Order 47 rule 5.

56 Fourthly, in my opinion, any such strict grammatical (literal and narrow) interpretation of the sub rule has the potential to produce absurdity (as illustrated above) and must yield to sufficiently obvious purpose*: 'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2019] TOSC 45.[10] The possibility that parties could conduct full blown civil litigation over a long period of time, and at considerable expense, only to then have their dispute either resolved or otherwise determined prior to or without a final hearing or trial (in the traditional sense), resulting in Order 47 rule 5 not being available, is not an outcome I consider was contemplated or intended by its author. Similarly, TCL's submission that if costs are incurred which do not relate to a specific hearing, a party in TCL's position does not need to make an application at some earlier time, runs contrary to the obvious purpose of the rule and exacerbates the vice inherent in not complying with it. The unattractiveness of the submission could hardly be more colourfully illustrated by TCL now applying for certification of all its costs of the limitation proceedings (and prior thereto), some four months after the order for costs was made, and without ever having given DSV any notice during the limitation proceeding of its intention to seek (much) higher costs than scale.

57 The objects or purpose of the rule canvassed above make plain that it is intended to apply to any costs to be incurred at higher than the Practice Direction scale rates. The rule also creates (and thereby ameliorates any uncertainty in its

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[10] Citing *Crown v Schaumkel* [2012] TOCA 10.

predecessor) an obvious and important temporal relationship between the costs the subject of any such application and the bringing of the application. Mandatory language has been employed in both sub rules (1) and (3). In the latter, an application *must* be made before the higher costs, the subject of the certification applied for, are incurred. That, pursuant to sub rule (2), an application may be made orally at a directions hearing or informally by letter to the Registrar supports that interpretation of sub rule (3). In that sense, the rule may be sensibly read as 'in the absence of exceptional circumstances, application under this rule must be made prior to the costs, the subject of the application, being incurred'.

58 In practical terms, an applicant for a higher costs order ought first seek the consent of the opposite party. In a case such as the present, DSV may well have been hard pressed to refuse such consent in circumstances where it had elected to engage overseas lawyers. If consent is not forthcoming, an application should then promptly be made, preferably immediately prior to taking a first step such as filing a Defence or at the first directions hearing or at the earliest opportunity following any decision by the applicant to engage overseas lawyers or its intention to otherwise incur legal costs in excess of the Practice Direction rates. In this case, TCL's bill of costs shows that it decided to engage Australian solicitors from March 2019, that is, prior to the commencement of proceedings by DSV, and thereafter, to engage a New Zealand practitioner in Mr McBride and a local practitioner in Mr Bloomfield.

59 Being satisfied then that, on its proper interpretation, Order 47 rule 5(3) applies, I turn to consider whether TCL has demonstrated any 'exceptional circumstances' which might negate the requirement of the sub rule.

60 The meaning of a related phrase – 'exceptional reason' – was recently considered in *Re Sam (a pseudonym)* [2021] TOSC 73:

> *41. The term "exceptional reason" is not defined. It has been described as a term of "uncertain, nebulous and elastic contours given the vicissitudes of human experience" and "inherently incapable of exhaustive statement": Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 264 CLR 217 at 229 [30]. Like the words "special reasons" or "special circumstances", words such as "exceptional reasons" are used where "it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are*

> *so various as to defy precise definition": Baker v The Queen [2004] HCA 45; (2004) 223 CLR 513 at 523 [13].*
>
> *42. At a more granular level, the word "exceptional" is an ordinary, familiar, English adjective, and denotes that the thing to which it is applied (in the Adoption Act, the reason) is unusual, or out of the ordinary, in some way special, or an exception to the general run of things. But, to be "exceptional", a reason need not be unique, or unprecedented, or even very rare: R v Kelly (Edward) [2000] QB 198 at 208. It can include a single exceptional reason, a combination of exceptional reasons, or a combination of ordinary reasons, which, although individually of no particular significance, when taken together are seen as exceptional: Ho v Professional Services Review Committee No 295 [2007] FCA 388 at [26] (Rares J).*

61 In sub rule (3), the exceptional circumstances must logically relate to, explain or be a reason for the application required by sub rule (1) not having been made prior to the hearing in respect of which the costs are to be incurred or, as opined above, prior to the costs the subject of the application being incurred.

62 Why then did TCL not apply much earlier in the proceeding?

63 DSV's application for a limitation decree was not the seeking of an indulgence; it was a statutory right. The mere institution and/or nature of the limitation proceedings therefore cannot be an exceptional circumstance for the purposes of subrule (3).

64 TCL's purported explanation for not applying for higher costs earlier because it 'was concerned to understand the nature of the claim against it and to then take advice from overseas solicitors and counsel to determine whether a defended hearing was necessary' is, with respect, misplaced, circular and self-defeating. The submission does not answer the relevant question. Further, upon deciding to engage any of the overseas lawyers to act in the proceedings, one of the obvious and earliest tasks required of those lawyers would be to research and advise TCL in relation to all costs and other relevant procedural issues germane to proceedings in Tonga generally and the limitation proceedings more specifically. To say that all the lawyers engaged were busy considering the nature of DSV's claim and whether to defend the proceedings as the reason for not making the current application much sooner assumes that those involved were aware of Order 47 rule 5 but overlooked the requirement of sub rule (3) until the time of DSV's similar application (30 October 2020); or, they were not aware of

the existence and requirements of the rule until then. As confirmed during the hearing, it was the latter. Therefore, it appears more likely than not, that until DSV's application, TCL and those advising it were not aware of Order 47 rule 5. In my view, that is the simple reason for TCL not making the application earlier. It is also not an 'exceptional circumstance' which could obviate the mandatory requirement of sub rule (3).

65 *A fortiori*, any potential 'ambiguity' or 'lacuna' in the rule, as submitted by Mr McBride, also assumes cognizance of the rule at an earlier time when the application should have been made but which was not because of any such ambiguity. Here, there is no suggestion that TCL or those advising it were aware of any potential ambiguity in the rule before raising it in the context of this application. There therefore cannot be any prejudice in the interpretation posited above.

66 Similarly, TCL's submission that "DSV committed to an application by which it would - contrary to the usual rule that the unsuccessful party pays costs to the successful party - pay costs to TCL, even if it was successful" and that "is of itself the sort of 'special circumstance' envisaged by the rule", is not to the point. Further, and passing over the erroneous conflation of 'special cause' in sub rule (4) and 'exceptional circumstances' in sub rule (3), the fact that DSV was likely to be required to pay TCL's ordinary costs even if DSV was successful in obtaining the limitation decree,[11] only serves to reinforce the fact that it was incumbent on TCL to avail itself of Order 47 rule 5 at the earliest opportunity to protect its position and secure its prospects of recovering as much of its costs as possible. It failed to do so.

67 For those reasons, I am not satisfied that TCL has demonstrated any exceptional circumstances for the purposes of sub rule (3).

68 The next question which follows from those findings is whether, as a result of TCL's failure to have made the application prior to incurring the costs the subject

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[11] Save where a Defendant who opposes, and does not succeed, may be required to pay costs in the usual way from the point in time from which it should have accepted the limitation decree: *The Alletta (No. 2)* [1972] 2 All ER 414.

of its application, the Court's discretion in sub rule (4) must or should be exercised against granting the application.

69 In this regard, I have considered TCL's rear-guard submissions that the Court retains a discretion 'to ensure that justice is done between the parties' and that the 'general scheme of the relevant procedural rules' requires TCL to be 'properly compensated'. Against that, DSV submits that the issue calls for a consistent and principled application of the relevant rule.

70 DSV's application was refused specifically for the reason that it had failed to comply with sub rule (3), which naturally, TCL embraced and advanced at the time. It is somewhat staggering that, at that time, and having been prompted about the relevant rule by DSV's application, TCL did not make its own application until almost six months later.

71 Ultimately, I am persuaded that the interests of justice require a consistent application of the rule, particularly between the same parties in a proceeding. While the permissive language in sub rule (4) and the other terms of rule 5 do not expressly preclude the exercise of discretion in an applicant's favour where the applicant has failed to comply with sub rule (3), I tend to the view that the mandatory language in sub rules (1) and (3) provide a sufficiently clear indication that the exercise of the Court's discretion is dependent upon compliance with those requirements. That, together with the interpretive exercise essayed above, provides a principled approach to the issue and greater certainty in the exercise of the discretion, subject only to the existence of truly exceptional circumstances for an application not having been made prior to incurring the costs the subject of the application.

72 Further, refusal of the application does not deny TCL from being 'properly compensated' for its costs. It is TCL's failure to have been aware of and invoke the rule at the appropriate time which has resulted in it recovering only a fraction of its actual costs. I am fortified in that view by counsel's concession during the hearing, quite rightly with respect, that there was no reason TCL could not have applied for a higher costs order at the start of the proceeding.

Conclusion

73 For those reasons, the application is refused.

74 TCL is to resubmit its bill of costs in taxable form in accordance with the rates provided by Practice Direction No. 1 of 2009 within 14 days of the issuing of this ruling.

75 I certify that Mr McBride's fees are to be allowed at the rate provided for senior counsel in the said Practice Direction.

76 Any objections to the resubmitted bill of costs and taxation thereof are to be carried out in accordance with Order 46 of the Rules.

77 TCL is to pay DSV's costs of and incidental to this application to be taxed in default of agreement.

NUKU'ALOFA

31 May 2021

SUPREME COURT TONGA

M. H. Whitten QC

LORD CHIEF JUSTICE