Solicitor General
06/09/22

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

CV 67 of 2021

BETWEEN:

NORMA LAVEMAI Plaintiff

-and-

KINGDOM OF TONGA (Director of Civil Aviation) Defendant

Costs

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
To: Mrs D. Stephenson KC for the Plaintiff
The Attorney General for the Defendant
Judgment: 9 August 2022
Costs ruling: 5 September 2022

1. On 9 August 2022, I gave judgment for the Plaintiff in the substantive proceeding and ordered that the Plaintiff is entitled to her costs.

2. In closing submissions at the trial, counsel for the Plaintiff sought an order for indemnity costs on the following grounds, in summary:

   2.1 a judicial review claim such as the present proceeding where a private individual litigates against the Government necessarily involves a power differential due to the fact that the Government is a highly resourced litigant;[1]

   2.2 the obligation on the Government to act as a model litigant and the failure to act in that way can be a relevant factor in considering the appropriate order as to costs;[2]

   2.3 in the conduct of the proceeding, the Defendant failed to observe the

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[1] *Kacific Broadband Satellites International Ltd v Registrar of Companies* [2021] TOSC 93 at [112], citing *Hausia v Fatongiatau* [2002] TOCA 11 at [13].
[2] *Nelipa v Robertson and Commonwealth of Australia* [2009] ATSC 16 at [97].

standards of a model litigant;

2.4 the pleaded defence was unmeritorious and had no basis in fact;

2.5 Order 15 rule 1 of the *Supreme Court Rules* 2007 precludes applications for summary judgment in judicial review actions, thereby requiring the claim to proceed to a full hearing regardless of the merits of the defence and forcing a Plaintiff to incur significant legal costs;

2.6 initial representations by the Solicitor General to the Plaintiff's counsel that the Defendant wished to negotiate a resolution of the matter, to which the Plaintiff agreed including an extension of time for filing of any defence, resulted in neither the Defendant nor its counsel making any attempt thereafter to contact or negotiate a resolution with the Plaintiff;

2.7 the indications of the Defendant's willingness to negotiate a settlement lacked good faith, and appeared to have been conveyed solely for the purpose of obtaining additional time for the Defendant to prepare and file its defence;

2.8 the Defendant unreasonably refused to consent to a preliminary determination of the question whether s. 57 applied;

2.9 following the conclusion of the evidence on 6 July 2022, the Defendant belatedly discovered Mr Tohi's SPA Summary, despite a hard copy having been provided to the Defendant in December 2021. It clearly ought to have been discovered in the early stages of the proceeding. The SPA Summary was damaging to the Defendant's case because it fundamentally undermined the Defendant's core defence that ss 56 and 57 did not apply to the Plaintiff. Had the SPA Summary been discovered to the Plaintiff in a timely manner, then it may well have provided the Plaintiff with sufficient grounds to have the defence struck out in its entirety at an early stage of the proceeding, which would have substantially reduced the costs which the Plaintiff has incurred in this litigation. The explanation given by the Attorney General for not discovering the document before 6 July 2022 was simply that it was "a failure" on their side; and

2.10 the Defendant's knowledge of the SPA Summary having been prepared in accordance with s. 56 suggests that the defence must have been known by

the Defendant to be fundamentally untrue and was inconsistent with the principle of honesty and truth in pleadings.

3. The Defendant opposes the Plaintiff's application for indemnity costs for the following reasons, in summary:

   3.1 the general rule is that costs follow the event unless it appears that some other order should be made;

   3.2 provided the discretion is exercised having regard to the applicable principles and the particular circumstances of the case, its exercise will not be found to have miscarried unless it appears that the order made involves a manifest error or injustice.[3]

   3.3 'there were far from a number of unsatisfactory aspects of the Defendant's case which justify the making of a special costs order';

   3.4 the Defendant conducted itself as a model litigant, acting with complete propriety, fairness and in accordance with the highest professional standards, as evidenced by 'the timely filing of all of its pleadings, timely appearances in Court, appearing for every direction hearing and mention, complying with requests and directions from Court and dealing in a respectful and courteous manner with both Court and counsel for the Plaintiff via email, telephone and in person';

   3.5 the two joint memoranda filed confirming the parties' agreement to an extension for filing of the defence to 21 January 2022, were filed according to instructions received from the CEO for the Ministry of Infrastracture (which oversees the Civil Aviation Division) to proceed with settlement negotiations;

   3.6 however, on 12 January 2022, the Director for Civil Aviation, Inspector David Tohi and the CEO provided counsel with 'further information surrounding the case' which resulted in the decision to defend the claim instead of negotiating settlement;

   3.7 the Defendant did respond to Plaintiff's counsel with reasons as to why the

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[3] *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic (No 3)* [2017] NSWCA 109

Defendant declined the Court's suggestion of a preliminary determination on the question of whether s 57 applied to the Director's decision that the Plaintiff was no longer a fit and proper person;

3.8 the Defendant's case was always premised on the fact that:

3.8.1 TAL was the certificate holder and not the Plaintiff;

3.8.2 once the revocation letter was issued, TAL and its employees were outside the Tonga aviation system;

3.8.3 therefore, s 57 was not relevant to the decision made by the Defendant to TAL on 1 September 2021;

3.9 although Mr. Tohi's SPA Summary was 'belatedly discovered':

3.9.1 the Defendant's counsel was not aware of the existence of the document prior to Mr Tohi referring to it during the trial;

3.9.2 had counsel been aware, an application to amend the defence would have been made;

3.9.3 it is impossible to know whether both Mr Tohi and the Director were "well aware" of the SPA Summary, or when;

3.9.4 there was no wilful failure to discover the SPA Summary;

3.9.5 its late discovery was 'merely an honest mistake'; and

3.9.6 the late discovery 'is not enough to justify costs on an indemnity basis';

3.10 even though an application for summary judgment under Order 15 was not available to the Plaintiff on judicial review proceedings, the Plaintiff still failed to bring a strike out application under Order 8 rule 8;

3.11 costs on the ordinary party-party basis is the more appropriate outcome because:

3.11.1 there was no conduct by the Defendant that amounted to a deliberate attempt to "buy more time";

3.11.2 there was no conduct by the Defendant that caused a loss of time to

the Court or the Plaintiff;

3.11.3 there was no conduct by the Defendant that amounted to an abuse of process; and

3.11.4 the late discovery was explained.

4. In reply, counsel for the Plaintiff submitted, in summary:

4.1 the CEO was the person responsible for instructing the Defendant's counsel;

4.2 despite having been in receipt of instructions to negotiate settlement since 29 December 2021, and having obtained the Plaintiff's agreement to the extension of time for filing any defence to 14 January, between 3 and 12 January 2022, neither the Defendant nor its counsel made any contact with the Plaintiff or her counsel or attempt to negotiate settlement;

4.3 on 12 January 2022, the Defendant's counsel sought the Plaintiff's consent to a second extension for filing of the defence, to 21 January 2022, again for the purpose of negotiating settlement;

4.4 the Defendant's submission in relation to receiving further information on 12 January 2022 from the CEO, Mr Tohi and Mr Havea, does not disclose whether their meeting took place before or after the telephone call from the Defendant's counsel to the Plaintiff's counsel around 3pm that day;

4.5 not only was there no attempt by the Defendant to negotiate settlement during that period, the only contact from the Defendant's counsel after the second joint memorandum was filed was when the statement of defence was filed on 21 January 2022;

4.6 therefore, the second extension was obtained not for the stated purpose of negotiating settlement but for the purpose of "buying time" to prepare and file the defence;

4.7 as such, the actions of the Defendant and its counsel were disingenuous and lacked good faith;

4.8 the Defendant's submissions on the substantive issues which have already been determined by the Court appear to be a belated and defiant attempt

to justify elements of the defence which were rejected by the Court, and which were untenable;[4]

4.9 the Defendant's description of the failure to discover the SPA Summary as a *"genuine honest mistake"* lacks merit and credibility;

4.10 Mr Tohi knew of the existence of the SPA Summary because, as he deposed:

4.10.1 he filled it in by hand on or by 31 August 2021;

4.10.2 he typed up his handwritten notes on 20 September 2021;

4.10.3 he last modified that file on 27 September 2021; and

4.10.4 he submitted all his working files to the Ministry of Infrastructure, Civil Aviation Division, on 6 December 2021;

4.11 Mr Havea was also clearly aware of the existence of the SPA Summary because that was the document which formed the basis for his decision that the Plaintiff was not a(n) FPP;

4.12 it is to be assumed that by the meeting on 12 January 2022, at which Mr Tohi attended, he had also been informed of the nature and details of the Plaintiff's claim;

4.13 given the clearly identified elements of the Plaintiff's claim, and Mr. Tohi's sworn statement that he last modified the FPP Assessment less than 4 months prior to that meeting, it beggars belief that the failure to disclose the SPA Summary was a *"genuine honest mistake"* by either Mr Tohi and/or Mr Havea;

4.14 notwithstanding the Defendant's asserted case that *"section 57 was not relevant"*, its discovery obligations were not limited to documents that were relevant only to its case, but of *every* document relevant to any matter in issue, whether helpful or harmful to its case;

4.15 the Defendant's submitted explanation for its failure to discover the SPA Summary is dismissive of the gravity of the failure and the timesaving effect

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[4] The obvious example being the reiteration of the claim that the revocation letter brought TAL *"outside the Tonga aviation system"*.

that discovery of the document could have had on the proceeding;

4.16 the Defendant, as a well-resourced litigant, ought be held to high standards; and

4.17 in those circumstances, an award of costs on an indemnity basis is amply justified.

5. The principles applicable to special costs orders were discussed in *Jurangpathy v Tonga Communications Corporation* [2020] TOSC 2. In relation to costs on an indemnity basis, it was observed that:

> *[67] Courts in the United Kingdom, Australia and New Zealand have long accepted the general principle that the usual award of party/party costs to the successful party should be made unless 'there is some special or unusual feature in the case to justify the court exercising its discretion in that way'.*[5]
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> *[68] It is not possible to define the exact circumstances in which indemnity costs might be ordered. The categories for the award of indemnity costs are not rigid. It is a matter, in each case, of the judge exercising his discretion on the facts before him.*[6]
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> *[69] The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party/party basis. However, the existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. Subject to the discussion on the jurisdiction of this Court above, costs are usually always in the discretion of the trial judge. Provided that discretion is exercised having regard to the applicable principles and the particular circumstances of the instant case, its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error or injustice: Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic (No 3) [2017] NSWCA 109.*
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> *[70] Examples of conduct for which indemnity costs have been ordered include:*
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> *(a) where a party to litigation acts in a way that could be described as disgraceful or deserving of moral condemnation;*[7]

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[5] *Bellamy's Australia Limited v Basil (No 2)* [2019] FCAFC 169 citing *Colgate-Palmolive v Cussons* (1993) 46 FCR 225, *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 71 ALR 287 at 288, *Trade Practices Commission v Nicholas Enterprises* (1979) 28 ALR 201 at 207 and *Preston v Preston* (1982) 1 All ER 41 at 58. See also *Slater v Blomfield* [2019] NZCA 664.

[6] *Munkenbeck and Marshall v McAlpine* 44 Con. L.R. 30, CA. *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177 at 178; 71 ALR 287 at 288; *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; 118 ALR 248; *Bass Coast Shire Council v King* [1997] 2 VR 5 at 29.

[7] *Wailes v Stapleton Construction & Commercial Services Ltd* [1997] 2 Lloyds' Rep. 112; *Glyne Investments Ltd v Hill Samuel Life Assurance Ltd*, UK June 17, 1997, unreported, Moses J.

(b) where a party has acted unreasonably in connection with the litigation in breach of the direction of the court;[8]

(c) where the losing party has engaged in unmeritorious, or deliberate or high-handed or other improper conduct such as to warrant the court showing its disapproval and at the same time preventing the successful party being left out-of-pocket;[9]

(d) where a party appealed and did not make out any ground of appeal and should have known that an appeal was hopeless;[10]

(e) whenever it appears that an action had been commenced or continued in circumstances where the Plaintiff, properly advised, should have known that he had no chance of success. In such cases, which are fortunately rare, the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law;[11]

(f) misconduct in the litigation may be grounds for awarding costs on a more generous basis than standard. As a rule, it is the conduct of the party as litigant, not conduct prior to the commencement of the litigation that is relevant.[12] *However, there may be circumstances justifying departure from the ordinary rule;*[13]

(g) the making of an allegation, known to be false or irrelevant, that the opposite party is guilty of fraud;[14]

(h) conduct which causes loss of time to the court and to other parties;[15]

(i) conduct which amounts to a contempt of court;[16]

(j) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which, would have considerably shortened, and very possibly avoided, the trial;[17]

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[8] *Baron v Lovell, The Times*, September 14, 1999, CA. referred to in the White Book, 2001 [44.4.2]. See also *R.T. Group Ltd v Belbes* [2015] TOSC 52 at [17], where Scott J held that awards of indemnity costs are rather unusual and are generally awarded only in cases of contumelious default.

[9] *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483 at 502; *Re Smith; Ex parte Rundle (No 2)* (1991) 6 WAR 299; *New South Wales Medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406 at 428 (NSWSC).

[10] *Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd* [2013] VSCA 265.

[11] *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401; *Colgate-Palmolive v Cussons* (1993) 46 FCR 225; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd* [2015] FCA 277. See also *Slater v Blomfield* [2019] NZCA 664 applying *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400 at [29] which adopted Goddard J's approach to indemnity costs in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC) at [11] who adopted the categories of Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*, supra. See also Niu J in *ANZ Banking Group Ltd v Koto* [2019] TOSC 51 at [15].

[12] *NMFM Property Pty Ltd v Citibank Ltd (No 2)* (2001) 187 ALR 654.

[13] *Ali v Hartley Poynton Pty Ltd (No 3)* [2002] VSC 292; *Velissaris v Fitzgerald* [2008] VSCA 152 at [20]; *Sitzler Savage Pty Ltd v Northern Mining Holdings Pty Ltd* [2012] VSC 104; *Slater v Blomfield*, supra.

[14] *Forester v Read* (1870) 6 LR Ch App 40; *Christie v Christie* (1873) 8 LR Ch App 99; *Degman Pty Ltd (in liq) v. Wright (No. 2)* (1983) 2 NSWLR 354; *Andrews v Barnes* (1988) 39 Ch D 133; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at [7]; cf *Harrison v Schipp; Cameron v Schipp* [2001] NSWCA 13; *Hypec Electronics Pty Ltd (in liq) v Mead* (2004) 61 NSWLR 169 at [45]–[46] ; *Moyes v J & L Developments Pty Ltd (No 3)* [2007] SASC 268; *Slater v Blomfield*, supra.

[15] *Ugly Tribe Co Pty Ltd v Sikola*; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra. See also Ford J in *Salvation Army (Tonga) Trust v Nau* [2001] Tonga LR 66 referring to *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [67].

[16] *Ugly Tribe Co Pty Ltd v Sikola*; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra.

[17] *Ugly Tribe Co Pty Ltd v Sikola*, supra.

> *(k) an imprudent refusal of an offer of compromise – where a party who has rejected an offer ultimately fails to achieve a better outcome than provided for in the offer may lead to a presumptive entitlement to indemnity costs with respect to the period subsequent to the offer. It is necessary for the party seeking indemnity costs to demonstrate that the other party's refusal of the offer was unreasonable;*[18]
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> *(l) where a late substantial amendment was sought during trial which could lead to the adjournment of the trial;*[19]
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> *(m) conduct in the litigation amounting to an abuse of process;*[20]
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> *(n) on strike out applications, where a Plaintiff with an arguably good cause of action persistently fails to properly plead the case;*[21] *and*
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> *(o) where a Plaintiff persists in prosecuting a proceeding without regard to the evidentiary difficulties in the case.*[22]

6. In my view, and for the purposes of this issue, the Defendant's conduct of its case falls within categories (e), (f), (h) and (j).

7. Firstly, the Defendant's conduct in relation to the periods during which settlement negotiations were supposed to take place was unsatisfactory. The Defendant's submissions in relation to the further information obtained on 12 January 2022 did not describe the nature of that information or how any factual matters could have influenced the proper interpretation of s 57 which was at the heart of the proceeding. I suspect from the evidence that was adduced that the further information related to the Plaintiff allegedly taking documents with her, which was ventilated peripherally in the evidence but went nowhere at trial. Otherwise, the failure by the Defendant and its counsel to communicate to the Plaintiff and her counsel during the said period as to the true state of affairs, namely, that the Defendant was not going to pursue settlement, was inconsistent with the expectations of a model litigant.[23] It also unnecessarily prolonged the proceeding.

8. Secondly, and consistent with the reasons expressed in the primary judgment,

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[18] *Bellamy's Australia Limited v Basil (No 2)* [2019] FCAFC 169 referring to *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants Pty Ltd*, supra, *Colgate-Palmolive v Cussons*, supra and *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra;
[19] *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 4)* [2015] FCA 570.
[20] *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 141 ALR 727; *Bollag v A-G (Cth)* (1997) 149 ALR 355 at 376. See also Shuster J in *Vaitu'ulala v 'Iongi* [2010] TOSC 18.
[21] *Sammy Russo Stores Pty Ltd v Safeway Stores Pty Ltd* (1998) ATPR ¶41-641; *Liberty Financial Pty Ltd v Scott* [2005] VSC 472.
[22] *Yates Property Corporation Pty Ltd v Boland (No 2)* (1997) 147 ALR 685.
[23] *Hausia v Fatongiatau* [2002] TOCA 11; *Fusitu'a v Minister of Public Enterprises* [2016] TOSC 9; *Kacific Broadband Satellites International Ltd v Registrar of Companies* [2021] TOSC 93.

on the central question of whether s 57 applied, I consider that, properly advised, the Defendant should have known that it's defence had no chance of success. On a plain reading of the provision, there was no question that it applied to the Plaintiff as a 'person'. That TAL was the certificate holder had no bearing on the interpretation of s 57. The distinction between TAL and the Plaintiff was made abundantly clear by s 55. The Director had been earlier advised by the Attorney General Office of the importance of observing the requirements of s 57. The Director did not seek advice before issuing his decision. The defence as pleaded had all the hallmarks of a technical after thought designed by the Defendant's legal team, on instructions no doubt, to justify the blindingly obvious failure by the Director to follow the requirements of s 57.

9. Thirdly, the fact that Mr Tohi purportedly assessed the Plaintiff in accordance with s 56 was damning to the Defendant's defence in relation to s 57. There was no other reason for resorting to s 56 other than for the purposes of an adverse decision under s 57. By that fact alone, the Defendant's defence had no chance of success.

10. Fourthly, had the SPA Summary been discovered, as and when required, it is likely that the defence denying the applicability of s 57 would have been struck out, either in whole or in part. There has been no satisfactory explanation for the failure to discover the document in accordance with the Defendant's obligations and, moreover, as a model litigant. This appears to be yet another example where a lawyer has left to the client the task of identifying documents in the client's possession which may be relevant to an issue in the proceeding. That task should be undertaken by the lawyer reviewing all the client's documents relating to the subject matter of the litigation (here, all dealings with TAL and the Plaintiff in the months leading up the 1 September decision and beyond). Further, during the course of preparing Mr Tohi's brief of evidence, it ought to have been abundantly clear, had proper instructions been taken, that his involvement in the Plaintiff's assessment as a FPP was critical to the process adopted and basis upon which the Director reached his decision. Proper enquiries by the Defendant's counsel team of Mr Tohi's involvement would inevitably have led to him referring to the Summary and the document being unearthed.

11. For those reasons, I am satisfied that the Plaintiff should not be left out of pocket

for her legal expenses in having to pursue her claim in this proceeding.

12. Therefore, I order that the Defendant pay the Plaintiff's costs of the proceeding, on an indemnity basis, to be taxed in default of agreement.

NUKU'ALOFA
5 September 2022

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE