IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 1 of 2013**

BETWEEN: **JOHN JOSEPH CAUCHI**

\- **Plaintiff**

AND **:** **KINGDOM OF TONGA**

\- **Defendant**

L.M. Niu SC for the Plaintiff
N.J. Adsett SC (Attorney General) for the Defendant

DECISIONS

[1] The following applications were filed:

(i) Plaintiff: that a transcript of the proceedings of the Court on 19 to 26 November 2013 be prepared and provided to the parties upon payment of the required fees;

(ii) Plaintiff: that the Plaintiff's costs of the proceedings 19 to 26 November be paid by the Defendant;

(iii) Defendant: that the Defendant's costs of the proceedings 19 to 26 November be paid by the Plaintiff;

(iv) Defendant: that the action be stayed until provision by the Plaintiff of security for the Defendant's costs;

(v) Plaintiff: that an "independent judge" take over the action; and

(vi) Defendant: that the Plaintiff's Statement of Claim be struck out.

Transcript

[2] The Court does not provide transcripts except in the case of an Appeal (COA Rules 1990 – O8r2(1)) and even then only of that part of the proceedings held by the Registrar to be necessary for the fair disposal of the appeal. The Supreme Court Registry has neither the staff nor the facilities to prepare transcripts when an appeal has not been filed. After discussion with Counsel at the hearing of these applications on 6 June 2014 it was agreed that the Court would provide soft copies of the recordings made of the proceedings at no cost and that the parties would prepare such transcripts as they required with their own staff and at their own expense.

Costs

(a) The Plaintiff's application for the costs of the trial.

[3] The application, filed on 29 January 2014, advances 17 grounds upon which the Plaintiff should be awarded the costs of the abandoned trial. Central to these grounds is the suggestion that the Plaintiff did not agree "to a procedure to be followed whereby the jury was to decide only the questions of fact at the trial" and that "the trial proceeded, not by consent, but by the direction of the judge that the

jury only decided the questions of facts". It is said that since the procedure that was followed was against the wishes of the Plaintiff the jury were "not properly directed". It is said that this was the basis of the Plaintiff's motion that the jury be discharged and that the motion was upheld. In the premises the Defendant should pay the Plaintiff's costs of the trial thrown away.

[4] In my "Reasons for Order" dated 13 January 2014 I gave a full explanation of my reasons for discharging the jury. While the Plaintiff had moved for the discharge and the discharge in fact took place, it is quite misleading to state that the motion was upheld. In fact, the grounds advanced for the motion were rejected; the jury were discharged for reasons quite other than those advanced by the Plaintiff.

[5] I have little to add to what I wrote on 13 January and respectfully refer any reader of this Decision to that Ruling. I do however wish to refer to an affidavit filed by Mr Niu.

[6] In Mr Niu's affidavit, filed in support of this application, he avers that "I did not agree ... to a procedure to be followed whereby the jury was to decide only the questions of facts at this trial ...". What Mr Niu omits to state is that the agreement which he denies took place was, as recorded in paragraphs 9 to 11 of my Reasons for Order an agreement reached in my chambers after discussion between counsel and with a chambers clerk present (Mrs 'Elenoa Takataka). I have attached as Appendix A a transcript of the note taken by me at the time. It is not consistent with Mr Niu's evidence of what occurred. In particular, it is inconsistent with Mr Niu's recorded suggestion that

the questions of law which Mr Adsett wanted to raise might be part of a no case submission at the close of the Plaintiff's case.

[7] At the hearing of this application I asked Mr Niu whether he stood by his affidavit. He confirmed that he did. I explained to him that the course taken by him was of concern to me: first, his evidence appeared to contradict the record taken by me of what had occurred in chambers. Secondly, I pointed out that Mr Niu, as counsel appearing, should not have filed evidence.

[8] In 2011, after I had been in Tonga for a few months, I noticed that counsel, particularly sole practitioners, had the tendency to file affidavits of service in cases in which they were appearing. In one case the service was denied and the Court was faced with the unacceptable position that the same man was appearing both as counsel and as a witness for the Plaintiff. I discussed the problem with Mr Niu who was then and is now, the President of the Tonga Law Society. Mr Niu sent a letter to all legal practitioners explaining that it was improper for counsel to file evidence in cases in which they were appearing. Unfortunately, the Supreme Court's copy of that letter is missing.

[9] The rule that counsel should not file evidence (except perhaps of an entirely uncontroversial kind) in a case in which they are appearing is so well known that it was a little surprising to me that it needed to be restated in Tonga. If authority be needed, reference is made to *R v Secretary of State & Ors v Ezekiel* [1941] 2KB 169; *R v Lui* [1989] 1NZLR 496 and *Kooky Garments Ltd v Charlton* [1994] 1NZLR 587.

[10] When this matter was raised with Mr Niu he apologized and stated that he had "overlooked" the rule. On the basis of my contemporaneous notes and recollection I reject Mr Niu's evidence: the manner in which the trial proceeded was agreed by both counsel. There was no objection raised at any stage, either by Mr Niu or by the Plaintiff himself until the conclusion of the case for the Crown. The reason for discharging the jury has already been explained and does not require repetition. The Plaintiff's application for costs is in my view wholly without merit and is accordingly dismissed.

(b) <u>The Defendant's Application for the costs of the trial.</u>

[11] I refer once again to my "Reasons for Order" dated 13 January 2014. As explained in those reasons it was only on the first day of the trial that the Crown indicated that it wished a preliminary argument to be considered which it predicted would be fatal to the Plaintiff's case. It was agreed in Chambers that this argument could be heard after the jury had returned its answers to the questions drawn up by the parties at the conclusion of the evidence. In the event, this occasion never occurred because the jury was discharged. The jury was discharged because neither the Crown nor the Plaintiff had been even halfway accurate in estimating the time needed for the disposal of the trial. The trial simply could not proceed to its completion because it ran for six rather than three days and the Court had other commitments which prevented it running very much longer. In my opinion, both parties were to blame for this state of affairs and accordingly the Crown's application for the costs of the trial thrown away also fails.

(c) The Defendant's Application for security for costs

[12] This application is brought pursuant to RSC O17r1 which provides that where the Plaintiff is either ordinarily out of the jurisdiction of the Court or may be unable to pay the Defendant's costs then the action may be stayed until security is furnished.

[13] The grounds advanced by Mr Adsett were that the Plaintiff resides in Tasmania and has no known assets in Tonga. The likelihood was that any re-trial would be at least as lengthy as its predecessor. He asked for security amounting to TOP$27,000 which was calculated on a ten day trial with leading counsel at TOP$1800 per day and junior counsel at half that rate. Mr Adsett noted that in his evidence at the trial the Plaintiff had conceded that he had not worked since leaving Tonga in May 2010.

[14] Mr Niu opposed the application but did not file any evidence in response. He suggested that the taxpayer should fund the proceedings. His instructions were that the Plaintiff could not afford to pay the costs of the proceedings. He suggested however that any order in favour of the Defendant could be enforced under the Reciprocal Enforcement of Judgments Act (Cap 14). In my experience, the reciprocal enforcement of judgments is an expensive and laborious exercise offering little prospect of a successful outcome. If, as stated, the Plaintiff is without means then it will also be without purpose. In my view, both limbs (a) and (b) of Order 17r(1) are satisfied in this case and therefore the Plaintiff is entitled in principle to an order that the action be stayed until security is

provided. For reasons that will appear in paragraph 29 below no order will be made at this stage.

Independent Judge

[15] The Plaintiff's application was for "an independent judge to sit in the continuation of this case for the following reasons:

(1) The subject matter and the matters which will be covered in this case will include:
   (a) The removal of the then Attorney General (who was the Minister of Justice);
   (b) The appointment of Law Lords to Privy Council;
   (c) The non renewal of the contracts of service of the Judges, Chief Justice Ford and Justice Andrew;
   (d) The renewal of the contract of Justice Shuster;
   (e) The abolition of the Judicial Service Commission and its replacement by the present Chancellor and the Judicial Appointments and Discipline Panel.

(2) Both the present two judges of the Supreme Court were appointed by the new body, the Chancellor and Judicial Appointments and Discipline Panel, to replace Chief Justice Ford and Justice Shuster.

(3) It is desirable that the judge who will sit in this case is one that is appointed by the Chancellor and Panel only for this case".

[16] Mr Adsett strongly opposed the application which he described as an insult and an affront to the Chief Justice. Citing authority, he argued that there were no grounds for recusal. He also pointed out the high cost to Tonga of importing a special judge for no good reason.

[17] At the hearing on 6 June 2014 Mr Niu did not develop the grounds included in his application. He accepted that any fresh judge would also be appointed by the "Lord Chancellor and Judicial Appointments and Discipline Panel". He did however hand up a photocopy of an advertisement which had appeared in New Zealand Law Talk May 2014 which notified the expectation that a vacancy would arise in the Chief Justice of Tonga's position in September 2014. Given that development, he suggested a fresh judge be allocated.

[18] It is not entirely clear what is meant by the matters raised "being covered" at the trial. There is a difference between alluding to events about which there was controversy and placing the correctness of the decisions reached during those events into issue. During the course of his evidence at the trial in November 2013, the Plaintiff suggested that his advice regarding the reappointment of Mr Justice Shuster (whose name was quite unnecessarily dragged into the hearing) had been disregarded. This evidence was apparently adduced in order to prove not merely that the Plaintiff's legal advice was sometimes disregarded but, much more crucially, that by not accepting his advice the Crown had breached his contract.

[19] During his evidence (which according to my notes did not include any reference to former Chief Justice Ford or to Justice Andrew) the Plaintiff asserted that the Government of Tonga had acted

unconstitutionally by re-appointing Justice Shuster, by abolishing the Judicial Service Commission and by replacing it with the Judicial Appointments and Discipline Panel. He conceded that all the requirements of the Constitution of Tonga had been met but suggested that the unconstitutionality of the whole process lay in its failure to comply with the Latimer House Principles. The principles allegedly breached were not identified.

[20] In my view the correctness or otherwise of the advice given by the Plaintiff is not and could not be an issue before the Court. The Crown conceded that some of the Plaintiff's advice had not been accepted but maintained that it had every right to reject the advice of an adviser (however senior) if, in all the circumstances, it thought it best to do so. In my view that is one of the central issues raised in this case, not whether the advice, as actually given was correct. To embark on an investigation into the correctness of the advice (to "cover" that advice) would be wholly impractical and would require wholesale amendment of the pleadings.

[21] In my view the grounds advanced by the Plaintiff are entirely unconvincing. I find neither logic nor merit in them. As explained in my "Reasons for Order" I did not discharge the jury on the ground of misdirection. I do not accept that any grounds have been established for recusal. I do not accept that either Mr Justice Cato or I are not independent judges. The application is dismissed.

Defendant's Strike Out Application

[22] As appears from paragraph 1 of the application filed on 6 March 2014, the Defendant wishes to argue that the Plaintiff's letter of resignation dated 30 April 2010 (Exhibit P-32) invoked legal principles of affirmation, waiver and estoppel which would be fatal to his claim. It also appears from the same paragraph that the application was brought pursuant to RSC O.8r8.

[23] Paragraph (2) of O.8r8 which was apparently overlooked by Mr Adsett is clear: "No evidence shall be heard on an application under paragraph (1)". Given that the reference to Exhibit P-32 was essential to the application, Mr Niu submitted that it should be dismissed.

[24] In answer, Mr Adsett referred to the new Civil Procedure Rules 1998 3.4(2) which in England and Wales has replaced the old RSC O.18r 19 from which our own rule is derived. The new rule does not reproduce rule 19(2), which is equivalent to O.8r(2). He suggested that the Court's management powers were sufficient and that it was desirable to consider the legal submission at this stage. Mr Adsett referred to remarks by Lord Woolf in *Kent v Griffiths* [2000] 2 WLR 1158:

> "Courts are encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense".

The question, however, to my mind is not whether the important issue raised by Mr Adsett should be raised but whether it can properly be raised in this manner at this stage of the proceedings.

[25] It is important to bear in mind that an application under O.8r8 is an application to strike out *the pleadings*. Such applications should be made as soon as possible and, where the Statement of Claim is being attacked, preferably before the Defence is served (*Att-Gen of Duchy of Lancaster v L & NW Ry* [1892] 3 Ch274.). It is only in "plain and obvious" cases that recourse should be had to the rule: if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O.25r.4 (our equivalent to the former RSC O.33r3) (*Hubbuck v Wilkinson* [1899] 1 QB 86, 91).

[26] In paragraphs 3 to 6 of my "Reasons for Order" I commented somewhat unfavourably on the state of the pleadings. In paragraph 35 I suggested that the pleadings be amended by both sides so that the issues between them (including the present issue) were properly identified. That has not been done.

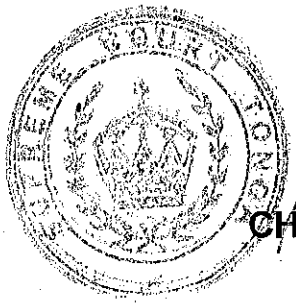
[27] This application has had the desirable consequence that it has finally placed before the Court the issue that the Crown has been wanting to raise for consideration since day one of the trial. The Crown however has still not placed it before the Plaintiff or the Court in due pleaded form. It has not made an application under O.25r4 for an issue of law to be tried as a preliminarily issue. I do not accept that the Court's management powers entitle me to overlook authority and proceed to hear the application under RSC O.8r8.

[28] In all the circumstances, the strike out application is dismissed. The grounds for dismissal are, of course, purely procedural and have nothing to do with merits of the argument which it is proposed to present to the Court. There is nothing to prevent (and indeed very much to be said in favour of) bringing the issue before the Court in due form.

[29] In paragraph 14 I referred to this paragraph. The Court does not have the power to compel a party to identify and apply for the trial of a preliminary issue. It may be that the Crown may decide not to proceed with the application. In these uncertain circumstances it would not be right to require security for the costs of a full trial when the matter might be disposed of in a much shorter time and on the basis of submissions already prepared by the Crown. I therefore order that the application for security be adjourned for continuation and further order in the event that the matter proceeds to full trial.

Result: Application (i) is allowed as modified by consent;
(ii) is dismissed;
(iii) is dismissed;
(iv) is adjourned part-heard;
(v) is dismissed;
(vi) is dismissed.

I will hear counsel as to costs.



DATED: 18 JULY 2014 **CHIEF JUSTICE**

Appendix A Transcript of Proceedings in Chambers 19 November 2013.

Appendix B Extract from Judges Notes 26 November 2013.

Appendix A

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION **CV. O1 of 2013**

BETWEEN: JOHN JOSEPH CAUCHI - Plaintiff

AND: KINGDOM OF TONGA - Defendant

Transcript of proceedings in chambers at 9:45 on 19 November 2013

L.M. Niu with Mrs P. Tupou for the Plaintiff

N.J. Adsett for the Defendant.

D/C: I wish to clarify two matters.

(1). How is the trial to proceed with the jury?
Complicated questions of law and fact are raised.
Are questions to be framed for the jury?

(2). I have a question of law independent of facts which would conclude the case and would obviate the need to empanel a jury at all, if successful. Consideration should be given to dealing with this as a preliminary issue.

Ct: What are the issues of fact for the jury?
I agree that complicated questions of law are raised.

P/C: Questions to be put to the jury can be framed after the evidence has been heard.

Questions in yes/no form.

As to the preliminary point of law this can be raised at the close of the Plaintiff's case as a no case submission.

Ct: The advantage of that is that the present hearing is not wasted.

D/C: The preliminary point is that there is no case. It is not based an disputed facts.

Ct: This application should have been made a long time ago. We have got a jury waiting.

The question is whether the Defendant acted in such a way that it could be accepted as a constructive dismissal. How long would the jury have to wait while that was being argued? What if there was an appeal?

D/C: I agree that the questions can be framed after the evidence has been heard. I will not press the preliminary submission.

Ct: Then, we are ready to proceed.
It is agreed : (1) issues of fact will be framed for the jury after the completion of the evidence. (2) All submissions of law will be made at the close of the case.

M.D.S.
19-11-13.

Appendix B

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION **CV. O1 of 2013**

BETWEEN: JOHN JOSEPH CAUCHI - Plaintiff

AND: KINGDOM OF TONGA - Defendant

Extract of notes taken by Scott CJ on 26 November 2013 at about 9:30am in the absence of the jury

P/C: I am asking for the jury to be discharged. The Plaintiffs cannot carry on with this procedure. They were not happy with what was agreed in chambers.

D/C: I oppose the discharge of the jury. They were told to listen carefully of what was said and at the end they would be told to consider the questions. There has been no lack of preparedness by the jury. There is no way in which a jury of laymen could decide this case.

Ct: Plaintiff seeks discharge of the jury on the grounds of a mistrial. I will hear counsel more fully on the application at midday. I will rule in the presence of the jury at 2pm. I will send the jury away now until 2pm.

(Position explained the jury). Adjourn to 12 noon for further argument.

Noon

P/C: I have a motion in addition to my written submissions. I have nothing to add.

D/C: I have an extract from Archbold. I can find no grounds similar to those advanced by Mr Niu. We want to find a safe way to conduct the trial. I agree that not enough time has been allocated for the case.

Ct: What would happen after the jury was discharged?

P/C: We summon a new jury and have a new trial before a different judge.

D/C: We say there has been no miscarriage.

Ct: I can find no demonstrate procedural error. However this is a civil case, not a criminal one and the Plaintiff cannot be forced to proceed. He could e.g. withdraw his instructions and force the issue in that way.

D/C: Forum shopping.

P/C: We think that the jury have been misdirected and cannot function.

Ct: I will allow the application for reasons which I will give as soon as I am able. Following delivery of the reasons I will consider the questions of costs thrown away, the possibility of allocating another judge and will give directions generally.

2pm Counsel as before

Jury return.

Jury discharged with thanks.

Jury retires.

Ct: Adjourned to 23 January 2013 at 9am in Chambers for directions and hearing of applications and for delivery of my reasons for discharging the jury today.

Signed M.D.Scott

26 November 2013