IN THE COURT OF APPEAL OF TONGA

ON APPEAL FROM THE SUPREME COURT OF TONGA

NUKU'ALOFA REGISTRY APPEAL NO. AC 16 of 2010

BETWEEN: PAUL DAVID KARALUS

Appellant

AND : ROYAL COMMISSION OF INQUIRY INTO THE SINKING OF THE M.V. PRINCESS ASHIKA on 5th August 2010.

Respondent

Coram: Burchett J, Salmon J, Moore J

Counsel: Mr Afeaki for the Appellant
Mr. Kefu, solicitor-general, as amicus curiae

Date of Hearing : 4 October 2010.

Date of Judgment : 8 October 2010.

JUDGMENT OF THE COURT

[1] This is an appeal from a refusal of leave to bring a proceeding for judicial review of the report of the Royal Commission into the sinking of the Princess Ashika (the Ashika). Although other issues were raised – in particular whether the application had been made promptly as required by the Rules – the ground of the decision was the Appellant's failure to satisfy the judge he had an arguable case.

[2] The statement of claim filed in support of the application was a discursive document, expressed largely in general terms, reading more like a submission than a Statement of Claim. It complained broadly that there was "no material evidence of any probative value upon which to properly base the accusations of serious misconduct and dishonesty made against the plaintiff – that he was dishonest untruthful and lacked any credibility or plausibility, knew of the vessel's poor condition and unseaworthiness before the sinking disaster and sought to avoid responsibility." But when the Statement of Claim gave some details of particular findings, none of them suggested the Appellant knew of the unseaworthiness of the vessel before it sank. Repeatedly, the findings of the Royal Commission distinguished between poor, even appalling, condition and unseaworthiness. And the Report acknowledged the evidence that the Appellant was not expert with respect to the seaworthiness of vessels. Counsel did not draw our attention to any passage which could fairly be said to be contrary to this, nor have we ourselves been able to find any. We have read those parts of the Royal Commission's Report which address specifically the role of the Appellant.

The Commission found that the Ashika was both unseaworthy and in an appalling condition. The Commission attributed knowledge to the Appellant only in relation to the appalling condition. Nowhere to the best of our knowledge did the Commision suggest that the Appellant had knowledge of the unseaworthiness of the vessel before it sank.

[3] As to the other findings objected to as unsupported by probative evidence, the Appellant failed to show at the hearing that they were not open to the Royal Commission. Judicial review does not provide a means of appealing against findings of fact. Not only does the Appellant seek to challenge findings of fact ; he also seeks in this judicial review proceeding to insist that other findings of fact, which the Royal Commission did not make, should have been made.

[4] Of course, if findings are made by a Royal Commission without evidence, or in circumstances where natural justice is denied to a party affected by those findings, a ground of judicial review may arise. We have therefore anxiously considered for ourselves whether the particular findings complained of appear to be vulnerable in either of these ways, even though the Statement of Claim does not make out such a case. But we have been unable to conclude that any reasonably arguable case can be made out on the material put before us in this appeal.

[5] What the Appellant seeks to rely on is a ground of natural justice, understood in the wide sense referred to by Richardson P, Henry and Keith JJ in *Peters v Davison* [1999] 2 NZLR 164 at 185, which embraces "lack of probative evidence". But we are unable to accept that this is reasonably arguable upon the material put before us. The appeal is

therefore dismissed. The Appellant must pay the costs of the amicus curiae.

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Burchett J

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Salmon J

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Moore J