

10 **The Free Wesleyan Church of Tonga v Fua & Lawton
Construction Ltd**

Court of Appeal
Roper, Ryan & Morling, JJ

26 March, 1992

20 *Procedure - striking out defence - failure to allow further time - failure to consider
all defences - failure to give reasons*

Respondent sued appellant for balance owing on a building contract. After correctly
striking out a defence under the Contracts Act, two defences remained (i) a claim that the
appellant was not liable and the persons who signed the contract did not have authority
to bind the appellant; (ii) a claim that the respondent had overcharged. Further particulars
of that latter defence were ordered; on the due date the appellant applied for further time
to supply them; that was refused and Martin CJ struck out the defence and entered
judgment for the respondent. The appellant appealed arguing that an extension of time
should have been given, and that, in any event, that failure to supply the ordered
particulars only affected the second of the defences.

30 HELD:

1. The appellant was entitled to have the first defence go to trial irrespective of the overcharging defence.
2. The overcharging defence should not have been struck out and that the appellant should have been given a further brief extension of time.
- 40 3. The Court of Appeal would be reluctant, ordinarily, to allow an appeal against discretionary orders but here:
 - (a) no reasons were given for the refusal to allow further time.
 - (b) draconian consequences followed.
 - (c) there was an apparent failure to appreciate that another defence had been pleaded.
4. Martin CJ's orders be set aside and appellant furnish further particulars.

Judgment

The Respondent (Plaintiff) has sued the Appellant (Defendant) for the balance of the money it claims is owing to it under a contract to build a Youth Hall at Puke on land leased to the Appellant. In the amended Statement of Claim it was alleged that the contract was entered into by one Saia Moala on behalf of himself and the Building Committee of the Free Wesleyan Church Puke Youth Hall and or on behalf of Noble Fohe and/or the Appellant. This allegation was denied in the original Statement of Defence.

In substance, the amended Statement of Defence raises three defences, namely:-

1. A denial of the contract and of the amount claimed.
2. A claim that the Respondent had overcharged for the work done; and
3. A defence under the Contract Act.

On 11 June 1991 Martin CJ struck out those paragraphs in the amended Statement of Defence in which the defence under the Contract Act is pleaded. He held that the Appellant was a corporation aggregate and that since the Contract Act applies only to individuals it afforded no defence to the Appellant.

On the same date Martin CJ ordered the Appellant to provide particulars of its defence of overcharging by 2 July 1991. He further ordered that in default of those particulars being given the defence should be struck out and that the Respondent should be entitled to enter judgment for the amount claimed.

On 2 July 1991 an application was made for an extension of time to provide the particulars which were required to be given by that date. The reason for the application was said to be that "further investigations as to the actual prices of materials used for the church building is not yet completed". It was also said that one of the main suppliers of materials was currently making a stock take and that further information was being sought from that supplier.

The application came before Martin CJ on 8 July 1991. He refused the application for further time to comply with order of 11 June 1991, struck out the defence and entered judgment for the Respondent for the amount claimed.

This appeal (which was filed on 2 August 1991) is expressed to be against the orders made on 8 July 1991, although the grounds of appeal raise the correctness of the orders made on 11 June as well. An application was made for an extension of time for leave to appeal against the orders made on 11 June 1991. We refused this application and we are no longer concerned with the orders made on that date.

In our opinion the Chief Justice was in error in making orders on 8 July striking out the Appellant's defences and granting the Respondent leave to enter the judgment. One of the Appellant's defence was that it was not liable at all under the contract alleged to have been made with it. This defence raised the question whether the person or persons referred to in the amended Statement of Claim as "representatives of the Defendant" had authority to bind the Appellant. The Appellant was entitled to have this issue go to trial, irrespective of its defence that the amount claimed was an overcharge.

Further, we do not think an order should have been made striking out the overcharge defence. On the material before the Chief Justice we think the Appellant should have been granted a short extension of time to furnish the particulars which were directed to be given on 11 June, 1991.

We were informed by Counsel for the Respondent that a report furnished to the Appellant by an expert retained by it demonstrates there is no merit in this defence.

Whether this is the fact or not, we do not think it disentitled the Appellant to a short extension of time to furnish the particulars which it was ordered to give on 11 June.

Counsel for the Respondent submitted that since the orders made by Martin CJ were made in the exercise of a discretion vested in him, this Court should not set the orders aside unless they could be seen to have been made without any justification. We would ordinarily be reluctant to allow an appeal against the making of discretionary orders.

However, there are a number of considerations which make it proper for us to interfere with the exercise of the Chief Justice's discretion. These include:

- 700
- (a) The fact that no reasons were given by the Chief Justice for refusing to allow a short extension of time for the particulars to be furnished.
 - (b) The draconian consequences of the orders made by the Chief Justice.
 - (c) The apparent failure of the Chief Justice to appreciate that the Appellant had denied liability on the ground that it was not its representative who had made any contract with the Respondent.

The orders made on 8 July 1991 are set aside. The Appellant is to furnish the further particulars referred to in Martin CJ's order within 21 days from today.

In all the circumstances, we make no order as to the costs of the appeal.