IN THE SUPREME COURT OF TONGA NO.C.126/97.

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : *POLYNESIAN AIRLINES (INVESTMENTS) LIMITED* - **First Plaintiff;**

AND : *POLYNESIAN AIRLINES (HOLDINGS) LIMITED* - **Second Plaintiff;.**

AND : *KINGDOM OF TONGA* - **Defendant.**

Counsel appearing: Mr Waalkens for Plaintiff,
Mr McGillivray for Defendant.

Date of Hearing: 7 October 1998.
Date of Judgment: 27 January, 1999.

FURTHER JUDGMENT OF FINNIGAN J ON COSTS

INTRODUCTION

On 28 August 1998 I gave judgment in this action for the defendant. Costs had not been an issue in the trial, and I invited counsel to settle costs if they could, otherwise costs were to be taxed.

Costs have not been settled. Indeed there is no agreement even as to liability. Counsel for the plaintiffs has filed a submission that there should be no order for costs, advancing 7 arguments. In the alternative, he has submitted that, if the defendant is held entitled to costs, the order should be stayed, because the plaintiffs have filed an appeal. As a further alternative, he has submitted that, if the defendant is held entitled to costs, they should be reduced by 50%. Counsel for the defendant has filed submissions in reply. On behalf of the defendant, he seeks an order for costs in favour of the defendant.

Counsel for the plaintiff filed a reply to the defendant's submissions, and counsel for the defendant filed a rejoinder to the reply, inviting the court to reject new arguments advanced

in the reply. Counsel for both parties appeared before me on 7 October 1998 and made oral submissions.

I have considered all of the submissions, oral and written, in reaching the clear view I have formed. Because of the long delay since the hearing, I shall not set out the submissions. The delay has been caused by my assuming other duties in the interim.

THE ARGUMENTS

I regret that I have been unable to accept the plaintiffs' carefully marshalled arguments. At the end of the day, costs in this case will follow the normal course. The first argument for the plaintiffs is that the action was litigation between two liability insurers, and they should bear their own costs. This is a novel argument to me, contrary to my experience and in my view contrary to principle. Subrogation of rights to sue and defend does not affect liability, except between the party and the insurer, by their contract. The authorities cited by the defendant are in point.

The second argument for the plaintiffs is that there plainly were real factual, legal and public policy issues that had to be resolved, and therefore to embark on the litigation was reasonable. The Court expects the parties in litigation to act reasonably, it is unreasonable conduct that is reflected in costs. Litigation as one of the reasonable options open to the plaintiffs involved its own expenses and risks, to be assessed in advance. The guiding rule, that costs may be expected to follow the event, is applied against that background.

The third argument for the plaintiffs is that the issues and the decision created important public policy consequences, particularly in the field of public safety. They invite the Court to note for itself that significant benefits have been achieved in physical changes to the airport environment, as a result of the litigation. The defendant replies that there is no evidence to support that assertion, and points to the evidence which was given during the trial, that improvements to the airport environment and particularly its security, depend and have always depended on the availability of funds from foreign aid donors.

I am strongly of the view that this was a claim in tort for recovery of money spent. The events occurred in the public arena, but in my view raised no issues of public law, and decided no issues of public policy. I have no evidence to justify a conclusion that as a result of these proceedings the defendant has taken action to prevent a recurrence of the stowaway event.

The plaintiffs' fourth argument is that this was a test case. It seems to me that it was a case whose facts have not been litigated before, because counsel have told me that no similar case can be found in the reports. Apart from that, the case found no new principle, it applied established principle, as found, to the facts as found. Primarily it decided liability for this incident on this airport, for the purposes of the parties alone. Secondarily it may be a precedent, but it may not even be that. In my view it is not in the category of cases represented by *Securities Commission v Kiwi Co-op Dairies Ltd* [1995] 3 NZLR 26.

The plaintiffs' fifth argument is that the defendant brought this action on itself, to the extent that the event complained of occurred while the aircraft was in the control of the defendant, and while apron security was the responsibility of the defendant. This argument is defeated by the findings of fact in the judgment.

The sixth argument is that the plaintiffs have already been twice penalised, and should not suffer a third penalty. The first two penalties are said to be the expense of the initial losses, and the costs of bringing the proceedings. One may feel strong sympathy with the plaintiffs' misfortune in being put to the heavy expenses of which they gave evidence. One may empathise with their further expenses in pursuing their conviction that the defendant is liable to it for those losses. An element of penalty however is difficult to discern. The same may be said about the costs of the proceedings. They were likely to be borne by either party, depending on the outcome. In general, they are a consequence of the plaintiffs' election to proceed and the defendant's election to defend. They (normally) follow the event.

The seventh argument is that the defendant engaged in disentitling conduct throughout the litigation. There were 3 heads of pre-trial conduct suggested, and 1 of conduct during the trial. Another was raised late and during oral submissions was expressly abandoned. The first and second of the 3 pre-trial allegations arise out of the discovery and interrogatory processes. The plaintiffs say that the defendant was dilatory in discovering documents piecemeal and in refusing to answer adequately the plaintiffs' Notice to Admit Facts. The defendant replies that the documents were not all together and some came to light as witnesses were briefed. They say that in any event there was no prejudice to the conduct of the trial thereby. Insofar as the defendant did not satisfy the plaintiffs with its answers to interrogatories, the defendant points to the length and complexity of the exercise set for it by the plaintiffs, and says the matter was, in any event, argued and settled before the commencement of the trial.

The third of these pre-trial allegations arises from the defendant's interlocutory application to strike out wholly or partly the statement of claim. The plaintiffs say that although the defendant was partly successful, it did not wholly succeed, and the plaintiffs incurred significant costs in opposing it. The defendant suggests that in deciding this issue the Court found for the parties in equal measure, and points out that it declared that the costs of that application were to be costs in the cause. The defendant submits that now the judgment is issued, those costs like the others should follow the event.

About the latter issue, my view is that the merits of costs on the interlocutory application were not decided by the court, but reserved for consideration in the final costs determination. The merits, in my view, favour slightly the defendant in that it achieved, despite opposition, part of its objective, and some small allowance should therefore at this time be made in the defendant's favour if costs are to be awarded and assessed. About the first two issues, I think the first yardstick for decision is the progress of the trial. There was no notable lengthening or hindrance in the conduct of either party's case caused by pre-trial shortfalls of one or the other. The second yardstick is whether either party was put to significant unnecessary pre-trial expense by the conduct of the other. From the submissions,

and from my own observations, it has seemed to me that each party was engaged to about the same degree in the pre-trial applications, whether as moving party or as respondent.

On the issue about conduct during the trial, the plaintiffs say that the defendant significantly lengthened the trial by failing to admit, in response to the plaintiffs' Notice to Admit Facts, that the stowaway had gained access to the aircraft at the airport apron. Further, they say, the defendant advanced a theory of its own before the trial, the threshold theory, requiring additional evidence from the plaintiffs. In the result, they say, the plaintiffs' apron assertion prevailed. They seek recognition in costs of the expense incurred. The defendant replies that the apron/threshold issue arose naturally, and in any event did not cause a significant increase in the length or cost of the proceedings. It says that the evidence involved occupied less than an afternoon, an assertion with which plaintiffs' counsel did not quibble in oral submissions.

Resolution of this issue, with related security issues, occupied 16 of the 29 pages in the judgment that were devoted to factual issues. It was open to the defendant to raise its own theory as a positive defence, and it could not be denied the opportunity to prove it. It was not insignificant, and the time spent on it in evidence (and submissions) was in my view necessary. Upon that depended the course to be taken in assessing the defendant's duties of care to the plaintiffs. The hearing time taken for the respective theories was, by my assessment, no longer than necessary. It is that factor which decides the issue, not the factor of whether the defendant's assertion was upheld or not. I bear in mind also that it was not only the defendant that had a theory. When challenged by that theory the plaintiffs, while asserting that it did not matter where the stowaway boarded, went to some lengths to prove the alternative theory. Finally, it should also be remembered that the court did not find the evidence for either theory decisive. The selection ultimately made, at p 20, was on the basis that no other choices were offered, that the apron theory was favoured by the balance of probabilities, and was no more than the more likely of the two.

DECISION

For all of the above reasons, I cannot uphold the plaintiffs' submission that costs should not be awarded. From the authorities cited to me for the defendant I have no doubt that this is a case for the normal practice, and that costs should follow the event.

I turn to the plaintiffs' alternative submission that, this being the Court's view, the order for costs should be stayed. Appeals generally do not operate to stay proceedings. It is not normal for the Court to award the fruits of litigation and then exclude the successful party from them. Strong reason is needed for that, and, where damages or other monetary remedies have been awarded, the courts normally require an appellant to satisfy them that, if it pays the amount awarded and then succeeds, it has no reasonable prospect of recovering. The defendant submits that the same principle applies to costs, but I am not fully persuaded of that. It seems to me that costs are awarded on a different principle. Their purpose is to compensate to a degree the cost of establishing an entitlement to judgment. In particular cases, an award of costs to a successful party in a lower court can, whatever the outcome of the appeal, remain meritorious. It may need separate consideration when the appeal is

disposed of. In my view, if costs are to be awarded in the lower court, they should normally be awarded. After all, the decision about costs itself may be subject to appeal. I can see no reason to stay the award in the present case.

I turn to the plaintiffs' further alternative submission, that the award should be reduced by 50%. The grounds for this submission appear to be the 7 grounds which I have rejected above, and I can not see any other grounds. I cannot see any arguable case for reducing what otherwise may be awarded, and hold accordingly.

I therefore, for the reasons I have stated, determine the applications in respect of costs by directing that costs in these proceedings shall be paid by the plaintiffs. The proceedings include this application and the interlocutory application to strike out the claim. I turn now to the next steps. These are governed, as counsel have said, by O29, Rr1-4 of the Supreme Court Rules 1991. I am unable to assess the amount of costs payable, and so the costs are, unless otherwise agreed, to be taxed in accordance with O29 Rr2-4. There are two practice directions for guidance, PD02/92 and PD01/94.

NUKU'ALOFA: 27 January, 1999

JUDGE