

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

**CV 65 of 2016**

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**BETWEEN:            PACIFIC INTERNATIONAL COMMERCIAL BANK  
                             LIMITED**

**- Plaintiff**

**AND:                 THE NATIONAL RESERVE BANK OF TONGA**

**- Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:        Mr. S Tu'utafaiva for the plaintiff  
                      Mr. H Waalkens QC KC and Mr. R Stephenson for the  
                      defendant**

**Hearing:           29 May 2018**

**Judgment:        5 July 2018**

**JUDGMENT**

**The claim**

- [1] The plaintiff (PICB) challenges the decision of the defendant (the NRBT) of 26 July 2016 revoking its banking licence under the Financial Institutions Act 2004 (as amended by the Financial Institutions Amendment Act 2014) (the Act).

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- [2] Another proceeding by PICB against the NRBT arising out of the same matters was previously withdrawn (CV 40 of 2016).
- [3] There are six causes of action pleaded in PICB's statement of claim. Five of the causes of action seek judicial review of the NRBT's decision to revoke PICB's licence. The sixth cause of action was in tort seeking damages. This last cause of action was struck out in a ruling of the Court on 28 July 2017.
- [4] At the commencement of the hearing, Mr. Tu'utafaiva advised the Court that PICB now advances only the first ground of review in the statement of claim. That ground alleges that the revocation of PICB's licence was unlawful because the NRBT failed to give 10 working days' notice to PICB to submit reasons why the licence should not be revoked. PICB seeks a declaration quashing the NRBT's decision to revoke its licence.
- [5] Mr. Tu'utafaiva concedes that the issue raised is a matter of statutory interpretation and that if the NRBT was not required to give notice then PICB's claim must necessarily fail. Mr. Tu'utafaiva said that if no notice was required the NRBT cannot be said to have acted outside of the Act and that is an end of the matter. PICB does not therefore require the Court to consider any of the other grounds of review pleaded in the statement of claim.
- [6] The NRBT argues that the licence was revoked under s. 37 of the Act and that it was not required to give any notice to PICB of its intention to do so.

**The facts**

- [7] Despite the single ground of PICB's challenge I have decided to provide a reasonably full summary of the facts due to the public interest in this case and because I consider it will provide assurance to the public that banking operations are conducted in the Kingdom on a sound financial basis and subject to the proper supervision of the NRBT.
- [8] This summary follows closely the affidavit evidence of the Governor of the NRBT, Sione Ngongo Kioa. I make no apologies for that. The principal evidence for PICB was given in an affidavit of Ms. Mishka Tu'ifua. Her affidavit was notable for its brevity. It was also clearly incorrect in certain respects. Mr. Kioa's affidavit was both more comprehensive and correct. Although PICB had the opportunity to respond to Mr. Kioa's affidavit it chose not to do so. As a result, much of Mr. Kioa's evidence must be considered uncontested.
- [9] PICB was incorporated under the Companies Act 1995 on 19 September 2011. It was issued with a business licence under s. 9 of the Business Licence Act 2012 on 25 March 2013.
- [10] PICB was issued with its banking licence under s. 8(2) of the Act on 2 July 2013. The licence was issued in reliance upon documents and information provided to the NRBT by PICB under s. 6 of the Act and the NRBT's guidelines.
- [11] Section 7 of the Act provides that in considering an application for a licence made under s. 6 the NRBT is to have regard to, *inter alia*, the adequacy, sources and proposed beneficial owners of the applicant's

capital (s. 7(a)) and the effectiveness of accounting, internal controls, audit and risk management systems that the applicant will put in place (s. 7(c)). It is an offence to provide false or misleading information in connection with such an application (s. 6(4)) and it is a ground for revoking a licence that it was issued on the basis of information that was false or misleading (s. 10(1)(f))

- [12] The documentation provided with PICB's application included a business plan which included the following statements and commitments:

The funding of the [PICB].....activities would not rely on local depositors for its banking activities as it will be primarily funded from external sources through the Shareholders and foreign investors.

As reflected in the financial forecasts, the [PICB] will receive up to USD\$100m of deposits in the first year of operation and further deposits of USD\$25m in the subsequent second and third years of operation. This is evidenced in the Shareholders Commitment as outlined in Attachment 1 of this business plan.

The major shareholder is adequately equipped with capital to ensure ongoing capital requirements are maintained if and as required.

The financing of the proposed PICB's growth over the first three years will be initially aided by the Shareholders initial capital offering and retained earnings in the first 3 years. Furthermore, the funding of the NRBT's activities is outlined herein with a dual focus on local and offshore funding. If additional capital raising required above that anticipated and reflected in the business plan and balance sheet, the Board of Directors will develop strategies for the Shareholders consideration and monitor the required capital levels closely.

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- [13] Also included with the business plan were financial forecasts for PICB's first three years of operation. These anticipated a very healthy position in each of the three years which, by way of example, included that after year one of operation PICB would have attracted deposits of TOP\$185M, have total capital of TOP\$20M and earned net income after tax of TOP\$4.5M.
- [14] It will be observed then that features of PICB's business plan were:
- (a) PICB would not rely on local depositors to fund its banking activities;
  - (b) PICB would be funded from its shareholders and foreign investors and would receive very substantial deposits in the first three years of operation;
  - (c) That the majority shareholder was financially able to support PICB's ongoing capital requirements; and
  - (d) Very healthy financial forecasts including substantial profits in the first three years of operation.
- [15] The business plan played a significant part in the NRBT's consideration and ultimate approval of PICB's application for its licence.
- [16] PICB did not commence its operations as a bank until late May 2014. The date set for compliance with pre-operation conditions was 1 January 2014 but they were not met. The NRBT agreed to a request by PICB to defer the date for satisfaction of the conditions and the commencement date for operations to March 2014. As at the end of

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March 2014 the pre-operation conditions had still not been met to the NRBT's satisfaction. Notwithstanding this, PICB arranged a formal opening ceremony for its operations by His Majesty King Tupou VI on 7 April 2014 without the prior approval of the NRBT.

[17] The NRBT conducted a pre-operation examination of PICB on 3 April 2014, and PICB then requested that the NRBT allow PICB to commence operations on 16 May 2014 in order that PICB could attract foreign investors to meet the capital stipulations in PICB's business plan. Further pre-operation examinations were conducted on 14 May 2014.

[18] In paragraph 13 of her affidavit, Ms. Tu'ifua asserts that the NRBT's decision to authorise PICB to commence its banking operations 'meant that it was satisfied that PICB had met all the Pre-Commencement Conditions'. This is not correct. After the pre-operation examinations conducted by the NRBT on 3 April 2014 and 14 May 2014, PICB was granted approval to commence operations subject to restrictions while PICB worked with the NRBT to resolve remaining areas of concern. This was confirmed in a letter from the NRBT to PICB dated 28 May 2014. The NRBT's requirements were addressed by PICB over time.

[19] Following the granting of the licence and through to its revocation on 26 July 2016, the NRBT became increasingly concerned about PICB's failure to comply with the requirements imposed upon PICB under the Act and in the NRBT's prudential statements and requirements for the proper management of operation of licensed financial institutions.

[20] Under s. 15 of the Act the NRBT is required to undertake the 'prudential supervision' of licensed financial institutions 'in order to maintain public confidence in the operation and stability of the financial system and to protect the interests of clients, and investors and the general public'. The NRBT may issue written prudential statements, guidelines and directives on regulatory and supervisory matters including requirements for licensing, ownership and management of licensed financial institutions. There are penalties that may be imposed under the Act for the contravention by a licensed financial institution of a prudential statement or directive issued by the NRBT and it may also be a ground for the revocation of its banking licence (ss. 10(1), 33(1) and 36(c)(iii)).

[21] The evidence satisfies me that the specific areas of the NRBT's justifiable concern were the following:

- (a) The failure of PICB to comply with the NRBT's prudential statements issued under and in accordance with s. 15 (3) of the Act in relation to matters such as capital management, corporate governance, and liquidity;
- (b) PICB's declining liquidity and mounting financial losses each month of its operation;
- (c) PICB's failure to provide and institute any effective management plan;
- (d) PICB's failure to comply with directives provided to it by the NRBT; and

- (e) PICB's failure to complete, provide and publish audited accounts in accordance with the directions of the NRBT and ss. 23 and 24 of the Act.

[22] In every month of its operation PICB incurred significant losses. There are tables attached to the affidavit of Mr. Kioa showing both monthly and accumulated losses which have been compiled from information provided by PICB. After five months of operation, from May 2014 through to September 2014, PICB had losses approaching TOP\$1M. After one full year of operation the accumulated losses exceeded TOP\$2M. The losses for the month of September 2014 alone approached TOP\$300,000. After two full years of operation the accumulated losses exceeded TOP\$4.5M. This is in glaring contrast to the financial projections included with PICB's application and business plan which forecast net income after taxes of TOP\$4.5M in year one and TOP\$6.5M in year two.

[23] On 9 September 2014, the NRBT wrote to PICB following receipt and analysis of reports submitted to it by PICB. The NRBT expressed concern at the 'fast deterioration in the bank's liquidity position as reflected in the Exchange Settlement Account balance...'. The letter went on to note that PICB was incurring monthly operational losses that were depleting its capital reserves resulting in a decline in its capital position.

[24] The NRBT issued a directive to PICB pursuant to s. 37(1)(a) of the Act that it required PICB to:



- (a) Ensure that all monthly deficits were cleared by the injection of capital by the 15<sup>th</sup> day of the following month; and
- (b) Maintain the Exchange Settlement Account above a TOP\$100,000 threshold.

[25] The Exchange Settlement Account system is one of great importance to the financial system. It is the means by which banks meet their obligations to each other. Mr. Kioa explained that at the end of each day cheques drawn upon the banks are tallied to determine what amounts are owed by and between them. Any bank which owes money to another bank is expected to clear this the same day from its Exchange Settlement Account. If a bank is unable to fund its Exchange Settlement Account to effect this payment, then that bank must make appropriate arrangements with the NRBT. Member banks expect compliance as well as cooperation between participants in order for the banking system to function properly. A breach by one of the member banks in meeting its commitments is a matter of importance and could, potentially at least, put the banking system in jeopardy.

[26] The NRBT undertook an inspection of PICB under s. 25(4) of the Act and then wrote to PICB on 2 October 2014 expressing the NRBT's concerns about the reliability and accuracy of data submitted by PICB to the NRBT, the mounting financial losses of PICB and its failure to curb those losses by provision of further funding. The NRBT issued a directive under s. 37(1)(a) of the Act requiring PICB to appoint an external auditor to audit PICB's accounts to verify capital and the accuracy of PICB's Balance Sheet and Profit & Loss Statement by 31

October 2014. The NRBT also called for the submission of a new business plan to reflect PICB's reliance on domestic depositors, a budget for the year ending 30 June 2015 by 31 October 2014, an undertaking that the principal shareholders would contribute additional capital to cover the anticipated operating deficit (with that capital to be provided by 30 November 2014) along with the setting aside of 20% of deposits in excess of TOP\$100,000 to PICB's Exchange Settlement Account with the NRBT.

[27] A further directive under s. 37(1)(a) was issued to PICB by the NRBT on 14 January 2015. By this time, PICB's accumulated operating losses had grown to TOP\$1.5M. The directive addressed concerns regarding PICB's financial performance and capitalisation and called for a revised business plan, which had not been provided in compliance with the prior directive of 2 October 2014, as well as the provision of additional funding and the temporary cessation of lending activities until further capital was provided. The directive also referred to PICB's failure to comply with exchange control requirements and to provide supporting documents for the sale of foreign exchange as required by the NRBT.

[28] The directive concluded with the following:

Failure to comply with any component of this order will result in the revocation of PICB's licence under section 37(1)(f) of the FI Act.

The NRBT will start imposing administrative penalties on PICB's late and erroneous reports as prescribed under the NRBT's Prudential Statement No. 3 starting on all reports due on the week beginning 19<sup>th</sup> January 2015 and thereafter.

[29] PICB had instructed KPMG of Fiji to carry out the external audit required under the directive of 2 October 2014. The audit report was produced in draft by KPMG and it was provided to the NRBT in late January 2015. The draft was never finalised.

[30] The content of the draft audit report was of great and immediate concern to the NRBT. It included the following statements concerning PICB:

1) Inadequacy of internal controls

We were unable to rely on the internal control environment of the [PICB] for the period under audit. In our view the lack of evidence of oversight by management over the financial reporting process and the lack of account reconciliation and evidence of monitoring of transactions have rendered the internal control environment inadequate to ensure the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

2) Completeness and accuracy of the general ledger

....

We are not able to obtain sufficient appropriate audit evidence to support certain transactions totally TOP 2,862,046 posted to the excel spreadsheet. In addition certain journal entries totaling TOP 1,888,174 relating to plant and equipment contributed by a shareholder could not be located to identify and clarify the corresponding credit entry entered into the excel spreadsheet and also its impact on the statement of cash flows could not be quantified...

We are unable to confirm or verify by alternative means the completeness and accuracy of the general ledger and accordingly amounts disclosed in the special purpose financial statements.

3) Journal Entries

We are unable to obtain sufficient audit evidence over the accuracy and completeness of journal entries, during the period due to the lack of internal controls surrounding the completeness of journal

entries and the ineffectiveness of internal controls ...

Accordingly we are not able to determine whether any adjustments might be necessary to the amounts and disclosures in respect of the account balance "Other Contributed Equity".

4) Amounts Contributed by Shareholders

We are unable to obtain sufficient appropriate audit evidence over the accuracy of the amounts contributed by a shareholder totaling TOP 2,250,104 disclosed as "Other Contributed Equity" in the statement of financial position as at 31 October 2014 as we are unable to obtain any documentation to support the payments and accordingly the validity and accuracy of the amount...

5) Plant and equipment and intangible assets

We are unable to obtain sufficient appropriate audit evidence on the accuracy of additions to plant and equipment and intangible assets carried in the statement of financial position at TOP 1,322,273 and TOP 2,657,595 respectively as at 31 October 2014...

Accordingly we are not able to determine whether any adjustments might be necessary to the amounts and disclosures in respect of plant and equipment and intangible assets.

6) Liquid assets

....We are unable to satisfy ourselves by alternative means concerning the completion and accuracy of liquid assets held at 31 October 2014 which is recorded in the statement of financial position at TOP 213,930.

Accordingly we are not able to determine whether any adjustments might be necessary to the amounts and disclosures for liquid assets.

8 Expenses

We are unable to satisfy ourselves over the validity and accuracy of certain expenses including administrative expenses, other expenses and preliminary expenses totaling TOP 2,290,137 as stated in the statement of comprehensive income due to a lack of documentary evidence to support their existence and accuracy.

Accordingly we are not able to determine whether any adjustments might be necessary to the amounts and disclosures for expenses.

- [31] The Disclaimer of Opinion in the draft audit report stated:

Because of the significance of the matters described in the Basis for Disclaimer of Opinion paragraph, we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion. Accordingly we do not express an opinion on the special purpose financial statements.

- [32] This was followed by what is headed 'Emphasis of Matter' which was in these terms:

Without qualifying our Disclaimer of Opinion, we draw attention to Note 2(a) in the special purpose financial statements which describes material uncertainty regarding the banks ability to continue as a going concern in the event that additional capital is not received from its shareholders. Without additional capital, the bank's liquidity position is adversely impacted as well as its ability to continue to comply with the prudential requirements of the National Reserve Bank of Tonga.

- [33] The precarious state of PICB's financial position was recognised in its own special purpose financial statements at Note 2(a) which stated that without additional financial support there was a significant risk that PICB could not continue as a going concern and that its banking licence would be withdrawn by the NRBT.

- [34] In paragraph 14 of her affidavit, Ms. Tu'ifua states that 'based on the satisfaction of the Pre-Commencement conditions' PICB shareholders committed TOP\$9,733,912 to the capital to PICB and PICB used TOP\$6,665,527 of that capital to set up its operations in Tonga. This was not proven and KPMG was not able to verify the total capital contributions to PICB by the shareholders based upon the financial information provided by PICB.

- [35] Mr. Kioa says that PICB verbally advised the NRBT that it did not agree with the findings in KPMG's draft audit report but PICB neither had the draft report finalised by KPMG nor commissioned another audit report.
- [36] The KPMG draft audit report further heighten the NRBT's concerns that PICB was conducting unsafe and unsound banking operations that were likely to jeopardise its obligations to its depositors or other creditors or to adversely affect the operation or stability of the financial system. PICB's financial position was deteriorating. It had also failed to comply with requirements of the directives of 2 October 2014 and 14 January 2015. The NRBT considered that PICB was likely to become unable to meet its obligations or suspend payments. This was an entirely proper and understandable inference.
- [37] The NRBT reached a decision to issue a notice under s. 33(4)(o) of the Act revoking PICB's licence. The notice of revocation was issued on 30 January 2015.
- [38] The revocation notice sets out in detail the reasons for the NRBT's action against PICB which fell under three general headings followed by particulars. The three headings were:
- (a) PICB's contraventions of the Act;
  - (b) PICB's contravention of the NRBT's directives and prudential statements; and
  - (c) PICB's unsafe and unsound banking activities putting PICB and its

customers and the financial system at risk.

- [39] Under paragraph 1, concerned with contraventions by PICB of the Act, it was noted that PICB had:

*[Failed]* to comply with the External Audit held on 26 November to 15 December 2014, the consequences of which the External Audit was unable to verify capital and accuracy of the Balance Sheet and Profit and Loss Statement....in breach of section 23(3) of the FIA.

- [40] Under paragraph 2, concerned with contraventions of directives and prudential statements issued by the NRBT, it was noted that PICB had failed to submit a number of policy documents (concerned with management, governance and banking practises) as required by various prudential statements and the following other matters:

- (a) Non-compliance with the NRBT directive of 2 October 2014 by failing to submit to the NRBT a revised business plan reflecting the change in PICB's business model from a recipient of foreign deposits to reliance on domestic depositors;
- (b) Non-compliance with the NRBT directive of 2 October 2014 by failing to submit an undertaking that its shareholders would contribute to PICB's capital sufficient funds to cover the anticipated annual operational deficit;
- (c) Non-compliance with the NRBT directive of 14 January 2015 by failing to give effect to the required capital injection; and

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- (d) Non-compliance with Prudential Statement 3 (Administrative Penalties) with late submission of monthly reports for the months of June 2014, August 2014 and September 2014.

[41] Under paragraph 3, concerned with PICB's unsafe and unsound banking activities, the following matters were noted:

- (a) PICB's declining liquidity with no definite liquidity or funding contingency plans;
- (b) PICB was engaging in hazardous lending and lax collection practices by extending credit which was inadequately secured, extending credit without first obtaining complete and current financial information, extending credit without adequate and appropriate supporting documentation and granting loans to employees whereby loan application requirements were waived and/or exempted;
- (c) PICB's inadequacy of internal controls through lack of oversight by management so that the internal control environment was inadequate to ensure the preparation of financial statements that were free from material misstatement;
- (d) The uncertainty regarding PICB's ability to continue as a going concern in the event that additional capital was not received from PICB's shareholders;
- (e) That PICB was operating with management whose policies and practises were detrimental to PICB and jeopardized the safety of deposits; and



- (f) That PICB was operating without adequate supervision and direction by its board of directors to prevent unsafe and unsound banking practices and violations of laws.

[42] The revocation letter noted that under s. 33(6) of the Act PICB was required to respond in writing to the NRBT within 14 working days and concluded:

The decision of the NRBT is regrettable. However, the NRBT is obligated by law to undertake prudential supervision of banks in order to maintain public confidence in operation and stability of financial system and to protect the interests of the depositors. The NRBT has imposed exhaustive corrective and remedial measures on PICB since the issuance of its banking licence with a view to promoting sound banking activities and practices. The NRBT is no longer confident in the ability of PICB to conduct banking business in the Kingdom.

[43] PICB responded to the notice with a lengthy letter of 17 February 2015 signed by Ms. Tu'ifua. PICB sought to excuse or contest the grounds for revocation. The letter asked that PICB's licence not be revoked. PICB nevertheless acknowledged the failure to meet the requirement for the injection of additional capital under the directive of 2 October 2014.

[44] PICB's letter was obfuscatory. By way of example, it labelled the audit report as 'inconclusive' and blamed KPMG for failing to achieve the object of the report when it is plain that fault for that could only rest with PICB. PICB criticised the NRBT for making use of the draft audit report because, it was claimed, PICB believed that the NRBT would only review the draft report until a final report was available. There is nothing at all to suggest that the NRBT engendered any such belief on the part of PICB. The draft audit report raised concerns as to PICB's financial position, governance and management that the NRBT could not, in my opinion, simply ignore.

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- [45] Following receipt of PICB's letter and meetings and discussions between PICB and the NRBT the NRBT resolved to give PICB the opportunity to rectify matters of concern. This was to be subject to adherence by PICB to a strict set of conditions directed by the NRBT. The NRBT agreed to withdraw the revocation notice upon those strict conditions and this was accepted by PICB.
- [46] That decision, and the terms and conditions with which PICB was required to comply, were set out in a notice from the NRBT to PICB dated 2 April 2015.
- [47] The notice begins with an assessment by the NRBT of submissions made to it by PICB including in relation to PICB's failure to submit an acceptable revised business plan or revised budget to the NRBT. It also noted that PICB had no firm liquidity support or arrangements in place and that its Exchange Settlement Account continued to fluctuate at 'critically low levels'. It was noted also that PICB's submissions did not address the high liquidity risk 'which is of most immediate concern'.
- [48] The notice went on to state:
- Notwithstanding our findings the NRBT Board is still hopeful that the capital injection will be received within the first calendar year of operation, and a revised business plan with a realistic schedule for the installments of the foreign capital injection. Further, a realistic workplan must be established and adhered to. The NRBT Board is of the view that PICB is to be given a final opportunity to meet the conditions of its licence within its first year of operation on 16<sup>th</sup> May 2015.
- [49] The notice included a new directive under s. 37(1)(a) of the Act which was to supersede the directives of 2 October 2014, 14 January 2015 and 30 January 2015 intended to ensure that PICB conducted safe and sound banking

practises. It went on to list 11 requirements of the NRBT which included the following that are of particular relevance:

- (a) That PICB conduct its banking business in accordance with the original business plan submitted on 22 May 2013;
- (b) That PICB cease any new lending activities pending receipt of a further capital injection of TOP\$5M;
- (c) That PICB was to refer to the NRBT for approval of all new deposits or additional deposits to existing deposit customers' accounts exceeding TOP\$5,000; and
- (d) That the Exchange Settlement Account was to be maintained above a zero balance at all times and should it fall below zero PICB would be suspended from the clearance system.

[50] In addition NRBT advised PICB as follows:

Failure to comply with this Directive will result in the revocation of PICB's licence.

[51] PICB could not have misunderstood that any failure to comply with the directive would result in the revocation of its licence and it is clear that it did understand that. In a letter from PICB's Chairman, Ms. Tiantian Hu, to the NRBT dated 8 May 2015 the letter of 2 April 2015 was acknowledged with assurances that PICB's Board understood 'the severity of the NRBT concerns' and as to PICB's intention to comply with the NRBT's directives. PICB assured the NRBT that a payment of USD\$3M (TOP\$5M) would be deposited by the major shareholder of PICB in order to comply with the directive but

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requested an extension until 16 June 2015 for the funds to be deposited and said:

The Board noted that the licence may be revoked after the 15<sup>th</sup> of June 2015 if the deposit of the major shareholder is not received by the latest date of 15<sup>th</sup> June 2015....

The [NRBT] has been patient and supportive of PICB so far and this is greatly appreciated. But let me assure you that PICB will facilitate the transfer of funds to Tonga by the latest date of 16<sup>th</sup> June 2015 as per its Board Resolution and the consequences of the failure to do so is also acknowledged.

- [52] In a letter of 20 May 2015, the NRBT agreed to the extension of time for the receipt of the TOP\$5M by 16 June 2015. PICB failed to honor its obligation and commitment in relation to the deposit of those funds.
- [53] On 16 June 2015, Ms. Hu wrote to the NRBT advising that the funds were not deposited as promised 'due to situations outside our control'. The letter stated that the major shareholder accepted that he must consider options to capitalise PICB and sought one to two months to complete the process.
- [54] The final sentence of the letter acknowledged that the Board of PICB was prepared to pursue various options of capitalising the bank 'to ensure the continuity of PICB'.
- [55] The failure by the major shareholder to pay the funds to capitalise PICB reinforced NRBT's assessment that PICB was indeed in a precarious financial position.
- [56] PICB did not successfully pursue any of its options to further capitalise. It continued to incur significant operating losses. Accrued losses for the 13

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month period to the end of May 2015 exceeding TOP\$2M. PICB did not achieve a profitable month during the period of its operation.

- [57] PICB completed its first full financial year of operation on 30 June 2015. At that date the issues raised by KPMG's draft audit report remained unresolved. Related to this, ss. 23 and 24 of the Act required PICB to appoint an external auditor in each financial year and no later than four months after the end of each financial year to publish in any newspaper circulated in Tonga, once every week for four consecutive weeks, a copy of its audited balance sheet and profit and loss account. It was also required to provide a copy of those accounts to the NRBT at least 30 days prior to their publication.
- [58] Mr. Kioa's evidence was, and I accept, that the requirements of ss. 23 and 24 are of vital importance as the preparation and subsequent publication of the audited accounts affords the NRBT, the general public and the other financial institutions an opportunity to review and be assured about the financial position of the financial institution with which they are conducting business.
- [59] By the end of October 2015, PICB had not provided any audited accounts for its 2014/2015 financial year to the NRBT, and no such accounts had been published by PICB in any newspaper circulated in Tonga. No audited accounts for PICB have ever been published or provided by PICB to the NRBT. This was a serious breach of PICB's obligations under the Act.
- [60] At paragraph 19 of her affidavit, Ms. Tu'ifua refers to PICB's request to have the Auditor General for Tonga accept appointment as PICB's auditor for the 2014/2015 year. In paragraph 20 of her affidavit, Ms. Tu'ifua says that the NRBT was aware of the request and on the basis of the content of a letter from

the NRBT to PICB expected that the NRBT was waiting for information concerning the fitness of the Auditor General to undertake PICB's audit before taking any further steps in respect of its licence.

- [61] It is the case that on 15 June 2016 the NRBT wrote to Ms. Tu'ifua seeking information so that it could confirm that the 'proposed external auditor complies with the 'fit and proper criteria outlined in NRBT Prudential Statement No. 8' but that does not contain any commitment by the NRBT to put its supervisory function on hold awaiting PICB's reply. Furthermore, the information the NRBT sought from PICB was not provided and there was no response to the NRBT's letter over the next six weeks down to 26 July 2016 when NRBT determined to revoke PICB's licence.
- [62] Mr. Kioa says, and I agree, that Ms. Tu'ifua's assertion that PICB expected that the NRBT was awaiting further information concerning the fitness of the Auditor General to conduct PICB's audit before taking any further action in respect of PICB's licence is inappropriate and misplaced.
- [63] PICB was and remained in breach of s. 24 of the Act and the NRBT gave no assurance that it would accept the appointment of the Auditor General even had the Auditor General been willing to accept PICB's request. There are good reasons why that course may not have been appropriate and the four licenced financial institutions in Tonga (Bank of South Pacific Tonga, ANZ Bank, MBf Bank and Tonga Development Bank) have all appointed private accounting firms to act as their auditors.
- [64] PICB also continued to commit breaches of the directives of 2 April 2015, with examples given by Mr. Kioa in the following respects:

- (a) PICB failed to maintain its Exchange Settlement Account above a zero balance at all times, particularly from January 2016 onwards. PICB's Exchange Settlement Account fell into a negative position of \$54,970 on 26 July, 2016 which deficit could not then be covered by the capital and funds held by PICB with the NRBT; and
- (b) In June of 2016 issues arose in relation to the provision of unarranged overdrafts for PICB customers.

[65] In addition, NRBT had learned that PICB's operations had become focussed on attracting deposits at high interest rates. This was indicative of a need for liquidity so that PICB could fund its expenses and repay customers' deposits. A practise of offering high interest rates out of kilter with the rest of the banking sector is a *red flag* to the NRBT and reinforced the impression of the precarious financial position that PICB appeared to be in.

[66] As a result of the matters I have described, the NRBT considered that PICB was in significant financial difficulty and its operations posed a risk to the interests of PICB's depositors, customers, investors and the banking system generally. It issued a notice revoking PICB's licence on 26 July 2016.

[67] The notice of revocation did not stipulate what section of the Act was relied upon but Mr. Kioa says that the NRBT was relying upon ss. 36 and 37, and the proviso to s. 10 (2), to which I shall later refer.

[68] The letter of revocation referred to the directive of 2 April 2015, which as I have noted was described and accepted by PICB as the final opportunity to meet the conditions of PICB's licence, and identified the following matters:

- (a) PICB's failure to honour its business plan upon which the NRBT had relied in granting its licence;
- (b) PICB's failure to have its accounts audited since inception;
- (c) That the accuracy and reliability of PICB's reports to the NRBT was 'questionable' and could not be verified in certain respects, particularly in relation to its compliance with directives; and
- (d) PICB's accumulated losses (at this stage stated to be at least TOP\$4.9M) and that its operation was focused on attracting deposits at high interest rates to fund PICB's expenses and repay deposits.

[69] Ms. Tu'ifua criticised the NRBT for the manner in which the licence was revoked and the fact of a press release and notification of the decision to revoke to the public. I do not accept any of her criticisms but also do not consider they are relevant to the single issue that I have to decide.

[70] Following the revocation of PICB's licence depositors' funds were available to be withdrawn by them from TOP\$2M held on account of PICB with the NRBT. The funds in that account were not sufficient to cover all deposits. There was a shortfall of TOP\$8,000 if all deposits were claimed and in addition the NRBT received notices from the Ministry of Revenue and Customs and the National Retirement Benefit Fund demanding payment of amounts claimed by them of \$84,379.81 and \$36,352.88 for PAYE and retirement fund contributions.

**The statutory provisions**

[71] Before dealing with PICB's submissions I will set out the most relevant provisions in the Act.



[72] Section 15(1) imposes upon the NRBT the obligation to supervise licenced financial institutions in the Kingdom for the broad purposes of maintaining public confidence in the financial system and protecting the interests of clients and investors and general public depositors.

[73] Section 15 provides:

**15 Reserve Bank to supervise licenced financial institutions**

(1) The Reserve Bank shall undertake prudential supervision of licenced financial institutions in order to maintain public confidence in the operation and stability of the financial system and to protect the interests of clients, and investors, and the general public depositors.

(2) The Reserve Bank may require licenced financial institutions and any affiliates or subsidiaries or associated persons or those persons exercising control as defined under this Act, to file with the Reserve Bank such returns, financial accounts or information relating to their business as may be specified by the Reserve Bank.

(3) The Reserve Bank may issue in writing prudential statements, guidelines, directives, and other acts on regulatory and supervisory matters, including requirements for licensing, ownership and management of licenced financial institutions.

[74] The term 'supervision' is defined in terms which make clear that the NRBT is to be concerned not only with ensuring compliance with the provisions of the Act, (including rules, orders, directions and prudential statements made or issued under it) but also that licensed financial institutions conduct business according to sound practices and maintain both liquidity and solvency.

[75] The definition reads:

supervision means to ascertain that regulations, rules, orders, directions, or prudential statements are complied with, investigating, inspecting or examining to determine whether an institution is conducting its business

on a sound financial basis, and inquiring into the solvency and liquidity of the institution

[76] In so far as the NRBT's power to revoke a licensed financial institution's licence is concerned, PICB places special reliance upon s. 10. PICB relies particularly on s. 10(2)(a)(ii) in so far as it provides a requirement that 10 working days' notice of the NRBT's intention to revoke is be given along with an opportunity for the licensee to submit reasons why the licence should not be revoked.

[77] Section 10 reads:

**10 Revocation of licence**

(1) The Reserve Bank may revoke a licence if the licensee —

- (a) requests revocation of the licence;
- (b) fails to commence business within one year following the issue of the licence;
- (c) ceases to carry on banking business in Tonga;
- (d) contravenes the terms and conditions of its licence or the provisions of this Act;
- (e) is subject to voluntary or involuntary winding up proceedings or has a receiver appointed; or
- (f) was licenced on the basis of any information or document which is false or misleading in any material particular.

(2)

(a) The Reserve Bank shall give the licensee —

- (i) written notice of intention to revoke the licence; and
- (ii) within 10 working days from the date of the notice, an opportunity to submit reasons why the licence should not be revoked:

Provided that subject to section 37 a licence may be revoked without notice.

(b) The Reserve Bank may, after consideration of any submission under this subsection, either confirm its intention to revoke or withdraw the notice.

- [78] There are other provisions in the Act that provide the NRBT with power to revoke a licensed financial institution's licence which do not in their terms require the giving of any notice of an intention to revoke. These are sections 33 and 37 (which must be read with section 36).
- [79] Section 33 provides that in the circumstances set out in s. 33(1)(a) and (b) the NRBT may, *inter alia*, 'revoke the licensed financial institution's licence and order it to dissolve under applicable law' (s. 33(4)(o)). Under s. 33(6) the licensed financial institution is to be notified of the decision and has 14 days within which to respond to the decision in writing.

- [80] Section 33 reads:

**33 Penalties and Remedial Actions**

(1) The Reserve Bank may impose any of the measures in this section where –

(a) a licenced financial institution or any of its officers, directors or shareholders contravenes any provision of this Act or any directive, prudential statements, or any act or decision, issued in accordance with this Act or any other relevant Act; or

(b) in the opinion of the Reserve Bank, a licenced financial institution conducts unsafe or unsound activities including any action, or lack of action, which is contrary to international sound practices and standards of banking operation, the possible consequences of which, if continued, would result in risks to itself, its customer or to the financial system.

....

(3) In light of the facts relating to the specific contravention, or the unsafe or unsound activities of the licenced financial institution, the Reserve Bank may-

(a) issue written warnings;

(b) enter into a written agreement with the board of directors of the licenced financial institution providing for a program of remedial action; and

(c) issue written orders to cease and desist such infractions and the actions referred to in the following subsection.

(4) The Reserve Bank may also take the following actions-

....

(o) revoke the licenced financial institution's licence and order it to dissolve under applicable law;

(5) The imposition of administrative fines under sections 3(3), 18, 24(4), and 25(5) is without prejudice of the application of provisions stipulated in subsections (2), (3) and (4) of this section.

(6) Any licenced financial institution to which subsections (1), (2), (3) and (4) apply shall be notified in writing by the Reserve Bank of its decision. The licenced financial institution shall respond in writing to the Reserve Bank within 14 working days.

[81] Section 36 sets out the circumstances under which the NRBT may exercise certain powers under s. 37.

[82] Section 36 provides:

**36 Grounds for Reserve Bank to consider**

Where —

(a) a licenced financial institution informs the Reserve Bank that it is insolvent or likely to become so, or is likely to suspend payment;

(b) a licenced financial institution becomes unable to meet its obligations or suspends payment;

(c) the Reserve Bank is of the opinion, either as a result of an inspection carried out pursuant to section 25 or otherwise, that a licenced financial institution —

(i) is following unsound or unsafe practices in the conduct of its business such that it is likely to jeopardise its obligations to its depositors or other creditors, or adversely affect the operation or stability of the financial system;

(ii) is insolvent or is likely to become unable to meet its obligations or is about to suspend payment; or

(iii) has contravened or failed to comply with the terms and conditions of its licence or the provisions of this Act;

(d) the Reserve Bank has reasonable grounds to believe that any affiliate, subsidiary or associated person of a licenced financial institution is —

(i) likely to become unable to meet its obligations;

(ii) insolvent or about to suspend payment; or to

(iii) subject to conditions described in paragraphs (a), (b) or (c) of this subsection; or (e) the Reserve Bank considers it necessary in the interests of the soundness of the financial system or to minimise detriment to the interests of depositors or creditors of the licenced financial institution, the Reserve Bank shall exercise one or more of the powers specified in section 37.

[83] The powers of the NRBT under s. 37(1) include:

(a) to require the licenced financial institution to take whatever action in relation to its business as the [NRBT] may specify;

.....

(f) revoke the licenced financial institution's licence.

- [84] There is no requirement in s. 37 that the licensee is to be given any notice of the NRBT's intention to revoke its licence or an opportunity to submit reasons either before or following revocation.

**PICB's submissions**

- [85] Mr. Tu'utafaiva presented written submissions and spoke to the relevant parts of them. He argued that ss. 10, 33 and 36 of the Act must be read consistently with each other and the Act as a whole and that this required that PICB be given 10 working days' notice of the NRBT's intention to revoke its licence and an opportunity to submit reasons why the licence should not be revoked.
- [86] The kernel of the submission is that the requirement to give notice of the NRBT's intention to revoke under s. 10 must also be read into ss. 33 and 36 of the Act. Mr. Tu'utafaiva (in his written submissions) sought to draw support from the common law, which it was said requires notice and an opportunity to be heard before a decision maker may revoke a licence. He also argued that the revocation of a licence is a significant decision in respect of which high standards of disclosure and fair treatment are required.
- [87] In relation to the proviso to s. 10(2) Mr. Tu'utafaiva argued that it is intended to only apply if a directive had first been given to the licensee under s. 37(1) which had not been complied with. Interpreted in this way, as I understand the argument, there is no conflict between the proviso and s. 10 and the proviso 'adds nothing'

**Discussion**

- [88] I am guided by the principles that the primary object of statutory construction is to construe the enactment in a manner that it is consistent with the language and the purpose of the statute as a whole and on the *prima facie* basis that its provisions are intended to give effect to harmonious goals.
- [89] The long title to the Act states that it is to 'regulate the licensing and supervision of licenced financial institutions'. This reflects its underlying goal, which is the protection of the public interest in an effective stable financial sector.
- [90] The NRBT has regulatory and supervisory duties and powers under the Act. The duty of the NRBT to investigate, inspect and examine to determine whether financial institutions are conducting their businesses on a sound financial basis as well as inquiring into the solvency and liquidity of financial institutions implies an ongoing not intermittent obligation.
- [91] The supervisory powers of the NRBT include the right, in the circumstances set out in the Act, to revoke a financial institution's licence. This power is contained in ss. 10, 33 and 36. However, each section is in a different Part of the Act. Each Part is concerned with a different subject matter.
- [92] Section 10 appears in Part II of the Act dealing with the licensing of financial institutions. Section 10 is concerned only with the conduct of the licensee and affords the NRBT a discretionary power to revoke a licence if the circumstances set out in s. 10(1)(a) to (f) should arise. It requires the licensee to be given notice of an intention to revoke the licence.
- [93] Section 33 appears in Part IV of the Act which is headed 'Supervision of Licensed Financial Institutions'. It is concerned with the conduct of the

licensee and also 'any of its officers, directors or shareholders'. It does not require that any notice be given to a licensee of an intention to revoke its licence but does give the licensee the right to be notified of a decision in writing and to respond within 14 days.

- [94] Sections 36 and 37 appear in Part V of the Act headed 'Controllership and Receivership'. They are concerned with the conduct of the licensee as well as 'any affiliate, subsidiary or associated person' and contain no requirement that the licensee be given notice of a decision or an opportunity to respond to it.
- [95] Whilst there is some element of overlap, the power to revoke under each of these sections arises in different circumstances. Section 10 is not directly concerned with the grave issues of unsafe and unsound practises and potential or actual insolvency which give rise to the powers to revoke under ss. 33 and 36.
- [96] Importantly, whilst under ss. 10 and 33 the NRBT has a discretion whether to exercise its powers, under s. 36 the NRBT is given no discretion but is obligated to act where any of the circumstances set out under subsections (a) through (e) has arisen. It provides:
- the Reserve Bank shall exercise one or more of the powers specified in section 37.
- [97] Recognition of these differences between ss. 10, 33 and 36 immediately undermines PICB's submission that all three sections must be read consistently compelling the implication of a notice requirement into ss. 33 and 36.



- [98] I accept the submissions of Mr. Waalkens that the absence of any notice requirement under s. 36 is plainly because the legislature has recognised that the circumstances giving rise to the power to revoke under that provision places the NRBT in a position where it must act expeditiously to protect the interests of clients, investors and depositors pursuant to the NRBT's statutory duty arising under s. 15(1). It also recognises that even a 10 day notice period might in some circumstances place those persons' interests in unnecessary jeopardy. It would therefore defeat the purpose of s. 36 to imply into it a notice requirement.
- [99] PICB's submission faces the obvious difficulty that s 10(2) permits revocation without notice. It contains the proviso 'subject to section 37 a licence may be revoked without notice'. Whilst one could be critical of the drafters, insofar as it is s. 36 and not s. 37 that contains the instruction to revoke, the effect of the proviso is palpable clearly. As a matter of construction a proviso will operate to qualify that which proceeds it so as to make the preceding provision of an enactment subject to its words. The proviso in s. 10(2) was intended to make clear that the power to revoke under ss. 36 and 37 was not subject to a requirement to give prior notice.
- [100] To interpret the proviso in the manner that PICB contends for would render it redundant and offend against the principle that the Court, when construing a statutory provision, must strive to give meaning to every word of the provision. The Court is not to readily find that words in a statute are superfluous, void, insignificant or mean something other than what they clearly say.

- [101] I do not see any merit in the argument advanced by PICB that the proviso is intended to only apply if a directive had first been given to the licensee under s. 37(1) which had not been complied with. That is not what the proviso says. The interpretation requires one to read additional and unnecessary words into the proviso so as to allow for the very construction that the proviso was enacted to avoid.
- [102] There is no merit either in the submission that the interpretation PICB advances should be adopted as congruent with the common law right to notice and a fair hearing. The rules of natural of justice at common law do not apply when plainly excluded by the terms of a statute, as is the case here.
- [103] It follows that PICB's assertion that NRBT was required to give prior notice of its intention to revoke PICB's licence is misconceived and I reject it.

**Discretion**

- [104] Had I found that the revocation notice was invalid on the ground advanced by PICB I would not have granted it any relief. The granting of a remedy in proceedings for review is discretionary. I have said on a number of prior occasions that if a substantial breach of law is established a remedy should generally be granted. I am not resiling from that principle.
- [105] However, circumstances where a remedy may be refused in the exercise of discretion include where despite some breach of the law the outcome of the case was inevitable or the granting of a remedy would serve no useful purpose (P A Joseph 'Constitutional and Administrative Law in New Zealand' 4<sup>th</sup> Ed at 1200-1203). Both circumstances apply in this case.

- [106] PICB had since it was licenced failed to comply with the requirements of the Act, NRBT directives and prudential statements. Mr. Kioa said, and it was not disputed, that no other bank has ever presented the NRBT with the problems and challenges as those presented by PICB.
- [107] The notice of revocation set out specific grounds for the NRBT decision to revoke PICB's licence. The matters listed had been the subject of the NRBT letter to PICB of 2 April 2015 giving it a final opportunity to meet the conditions of its licence and, as the revocation notice records, in 14 months PICB had:
- (a) Failed to honour its business plan;
  - (b) Failed to have its accounts audited;
  - (c) Failed to provide accurate and reliable reports to the NRBT; and
  - (d) Continued to incur losses (and I would add, failed to attract further capital).
- [108] There is absolutely no prospect that PICB would have been able to comply with its obligations and thereby avoided revocation of its licence had it been given 10 days' notice.
- [109] Furthermore, it was accepted by PICB on a number of occasions that a failure to recapitalise would result in the revocation of its licence and/or undermine its ability to continue as a going concern. It was not able to recapitalise and there is no suggestion that it is now in a position to do so. There is also no evidence that PICB has any funds available to operate as a bank in the Kingdom. The minimum capital that is required to obtain a licence to operate

as a financial institution under the Act is TOP\$2M (s. 12(2)) but the NRBT has indicated that it would require a higher amount given PICB's financial history (s. 12(3)).

- [110] In addition, PICB has never provided any audited accounts for the years ending 2015 or 2016 and has not operated as a licensed financial institution for two years. It is not realistic to think it could now remedy its breaches of the Act and successfully resume operations in the Kingdom. It is no answer for PICB to argue that it has been put in this position by the NRBT's revocation of its licence. Following the revocation the PICB applied for interim relief but withdrew that application prior to the hearing.

**The name restriction.**

- [111] Section 4(1) of the Act provides that the word 'Bank' shall be used only by a bank licenced under the Act. PICB is no longer licenced under the Act but continues to use the word 'Bank' in its name.
- [112] The NRBT has sought an order that PICB desist from the use of the word Bank in its name. Mr. Tu'utafaiva had no instructions upon which he could advance an argument that such an order is not appropriate. I can see no reason why the order sought by the NRBT should not be granted.

**Result**

- [113] PICB's claim is dismissed.
- [114] There shall be an order that PICB is to forthwith change its name to remove from it the word 'Bank'

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

**CV 65 of 2016**

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[116] The NRBT is entitled to its costs to be fixed by the Registrar if not agreed. I direct the Registrar that the NRBT's costs are to be paid to the extent possible from the funds deposited by PICB as security for costs. Should there be a balance after payment of the NRBT's costs that should be refunded to PICB.



**NUKU'ALOFA: 5 July 2018**

A handwritten signature in blue ink, appearing to read "O.G. Paulsen".

**O.G. Paulsen**  
**LORD CHIEF JUSTICE**