

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 176/94

BETWEEN **MATAATUA COOPER** of
Rarotonga, Home Executive

AND **TERA TOA** and **TEMARAMA**
TOA both residents of New
Zealand

First Defendants

AND **JOHN TOA JUNIOR** of
Ngatangia, Rarotonga, Bus Driver

Second Defendant

AND **THE ATTORNEY GENERAL**
OF THE COOK ISLANDS for
and on behalf of the Ministry of
Works

Third Defendant

Mr Gibson for the Plaintiff
Mr Lynch for the Second Defendant
Miss Maki for the Third Defendant

Date of Hearing : 18 March 1995
Date of Judgment : 18 March 1995

JUDGMENT OF DILLON J.

The Third Defendant has filed an application to have the Attorney General struck out from the proceedings. In support of that application an affidavit has been filed by Mr Cowan, who was previously Secretary of Works for the Ministry of Works but retired from that position on 9 February 1995. He is now a consultant to the Ministry of Civil Aviation. Consequently as at the date of signing the affidavit Mr Cowan has no connection with the Ministry of Works which, in the present proceedings, is represented by the Attorney General, the Third Defendant.

The background to these proceedings relate to bulldozing work undertaken by the First and Second Defendants on their respective sections using Ministry of Works machinery operated by

Ministry of Works employees; supervised by a Ministry of Works supervisor; and authorised by the Honourable Minister Tiki Matapo, a Deputy Minister of Works. The fact that the Minister was also a Deputy Minister of Works was revealed in the course of an international conference call hearing earlier this morning. The other details just recited are contained and confirmed in Mr Cowan's affidavit.

He now alleges that the procedure when he was Secretary of Works for the Ministry was that the work undertaken by the Ministry of Works employees and supervised by another employee would not have been undertaken without the prior consent of the Minister of Works. In this case, however, we do have the consent of the Deputy Minister of Works. The purport of Mr Cowan's affidavit, therefore, is over-ridden by the Honourable Minister Matipo's consent which is referred to in Mr Cowan's affidavit.

Of more significance however, is that we have no information whatsoever from the two Ministry of Works employees, a Mr Kufi and a Mr Teura. We have no information from the Supervisor Mr Tutai. Finally we do not have any information from the Minister, and as to the form of consent that Mr Cowan refers to in his affidavit.

What we do have is that two employees of the Ministry of Works, under the supervision of a supervisor, and with Ministry of Works equipment, and authorised by the Deputy Minister of Works, proceeded to undertake excavation and bulldozing work on sections adjoining that section owned and built on by the Plaintiff, and that now as a result the Plaintiff's section is in serious danger of subsidence and erosion.

There are two engineering reports which confirm the remedial work necessary in order to prevent serious damage occurring to the Plaintiff's property.

In the course of the International Conference call this morning, Mr Lynch indicated that he intended to file a similar application to that filed by the Third Defendant for the purpose of having his client, the Second Defendant, struck out from the proceedings. Mr Lynch explained that the purport of an affidavit which he would be preparing for the Second Defendant was that the section belonging to the Second Defendant was twice removed from the section owned and bulldozed by the First Defendant, and was three times removed from the Plaintiff's section. Mr Lynch submitted that in those circumstances the section of the Second Defendant was too far

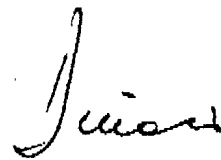
removed from the cause of action complained of by the Plaintiff and as a consequence was entitled to have his client dismissed from the proceedings.

Mr Lynch does not contest the affidavit filed by Mr Cowan whereby Ministry of Works employees, supervisor, and machinery were used in clearing the section of the First Defendant and of his client, who by their names are either brothers or related. The fact that there is a section separating the sections owned and cleared by the First and Second Defendants is, in the circumstances at present prevailing, of no consequence. As Mr Gibson pointed out in the course of the proceedings, the First and Second Defendants are charged with trespass of the roadway leading to the Plaintiff's property in the substantive proceedings. Consequently there are no grounds, in my opinion, for discharging the Second Defendant from the present proceedings, although in the course of hearing the substantive argument and evidence there may well be a time in the course of that hearing when Mr Lynch could make a further application. As at the present time his application for discharge of the Second Defendant must be disallowed.

Reverting now to the application by Miss Maki on behalf of the Third Defendant, the fact that Mr Cowan has confirmed that there were two Ministry of Works operators, plus a Ministry of Works supervisor, and that the work was authorised in some fashion which has not been disclosed by the Deputy Minister of Works, there is no justification whatsoever for discharging the Third Defendant. This work was carried out by Ministry of Works employees in the course of their employment and under the direction of the Deputy Minister.

Accordingly that application for discharge of the Third Defendant is disallowed.

The Plaintiff is entitled to costs against both the Second Defendant and the Third Defendant on these proceedings, to be fixed by the Registrar.



Dillon J.