

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

JP APPEAL NO. 3/07
MISC. NO. 60/07

IN THE MATTER of Section 76 of the
Judicature Act 1980-81

BETWEEN **THE POLICE**
Appellant

AND **PAK YON NAM**
Currently of Rarotonga
First Respondent

AND **LEE YOUNG MING**
Currently of Rarotonga
Second Respondent

Deputy Commissioner Tetava and Senior Sergeant Howard for Police
Mr Vakalabure for First and Second Respondents
Date: 05 September 2007

ORAL JUDGMENT OF WESTON J

1. I have before me a notice of appeal lodged by the Police in relation to an order made by a JP on 9 August 2007 granting an ex-parte application for an interim injunction.
2. Before I deal with the substance of that appeal, I need to say something about the wider procedural framework.
3. There is a further appeal in 4/07 brought by one of the original defendants in the interim injunction application, that is, the directors of Matira South Fishing Limited. The Court has been advised by Mr McFadzien that that appeal has been withdrawn

on the basis that the two respondents have now returned to Korea. Mr McFadzien has, however, reserved rights to proceed again should either of the two respondents come into the jurisdiction.

4. In addition to those appeals, there are three proceedings in the High Court under numbers 60/07, 63/07 and 66/07. 60/07 was the number of the original interim injunction application made on 9 August when Mr Vakalalabure was acting for the two applicants.
5. Following the making of that order, Mr McFadzien, acting on behalf of Matira South Fishing Limited, issued two further proceedings in 63/07 and 66/07 against the two Korean defendants except that in 66/07 only one (who was the skipper) was sued.
6. I am advised that the two Korean gentlemen have now returned to Korea. I am also advised by Mr Vakalalabure that, in the original application 60/07, the interim injunction has, with the consent of the applicants, been discharged and that is noted on the file as occurring on 31 August 2007.
7. For these reasons this appeal is strictly moot in that the issues are no longer live. Nevertheless, the Police say an important matter of principle needs to be addressed and Mr Vakalalabure, even though he is appearing pro-bono and on behalf of clients no longer in the jurisdiction, has helpfully remained in Court to assist me as best he could. I'm grateful to him for that assistance.

8. I now set out the history in a little more detail. The starting point, at least for today's purposes, is that on 8 August 2007, Messrs Lee and Pak were given notices signed by the Principal Immigration Officer. They were given 24 hours in which to leave the country, that is, by 9 August.
9. Mr Vakalalabure has advised me that on 9 August at around about midday he received instructions to stay the effect of those notices. He was in some practical difficulty because the two Koreans needed to interact with the Korean Embassy in New Zealand in order to provide him with instructions. That was because of the language difficulties.
10. While that was going on, Mr Vakalalabure was drafting proceedings naming various parties as defendants including the Police Commissioner as the Fourth Defendant. Mr Vakalalabure was not able to complete an affidavit in time but lodged the application itself ex-parte at 3.30pm on 9 August.
11. Efforts were then made to find a Judge of the High Court to deal with the application but by 6.00pm no Judge had been located. In those emergency circumstances, a JP was located and he made orders, not exactly as sought but in terms not entirely dissimilar.
12. There were four terms of the injunction and I now set those out:
 - (a) "An injunction against the Directors of Matira South Fishing Limited from interfering molesting intimidating the Applicants

from having access to their abode being the ship known as the MATIRA which is anchored at the Avarua Wharf. It follows that the keys to the doors of the said ship to enable access to the Applicants be handed over to them by Director-Francis Garnier.

- (b) An injunction prohibiting Francis Garnier his servants and or agents interfering molesting intimidating the Applicants.
 - (c) And injunction prohibiting the Fourth Defendant and his officers from interfering molesting and intimidating the Applicants.
 - (d) That the Defendants be served according with the Applicants application and the matter is adjourned to the 31st of August for hearing at 9.30am."
13. The particular focus today was the third of the three orders made which effectively prevented the Police from carrying out their ordinary duties.
14. One of the complaints made by the Police on appeal was that the order is too broad. I agree and Mr Vakalalabure also agreed. He explained that the wording simply reflected the circumstances of urgency under which he was acting on the day.
15. The Police were served with the order either later on 9 August or shortly thereafter. On the 14th of August they filed the appeal to

set aside the order and that is the basis of the hearing before me today.

16. In setting out the terms of the order made by the Court above, it will be noted that the fourth provision in the order provided for the applicant to come before the Court again on 31 August. It was this date that resulted in Mr Vakalalabure giving notice to the Court on 31 August that he no longer wished to maintain the interim injunction.
17. An application for interim injunction ex-parte should be rare indeed (Mareva injunctions excepted). My impression is that Cook Islands lawyers are too ready to bring applications ex-parte. As it happens, I think Mr Vakalalabure was justified in proceeding ex-parte in this case. The circumstances of urgency facing him were extreme.
18. Having said that, however, I think he was then obliged to consider two matters. First, whether he gave notice to as many of the prospective defendants as he could of the course he was taking and, secondly, whether he took further steps to have the matter returned to the Court as soon as possible after the 9th of August.
19. The first course is referred to as a "Pickwick" order after an English case: *Pickwick International v Multiple Sound Distributors* (1972) 3 All ER 384, discussed in *Lala v Preliminary Proceedings Committee* (1993) 7 PRNZ 101. When that approach is followed, an applicant proceeding ex-parte gives notice to the other

parties who then at least have an opportunity of addressing the Court. It is a somewhat curious hybrid but it does ensure that justice is done to the extent possible. In this case, I believe Mr Vakalalabure would have been well advised to have given such notice to the Police. However, because of the urgency I am not prepared to make any comment any way critical of his actions on the day. I simply want to leave it on the basis that counsel (speaking generally rather than specifically) in the future should give more detailed consideration to the issue of whether they endeavour to give informal notice to the other parties if they choose to proceed ex-parte.

20. The second course would have been to bring the matter back before the Court again far more quickly than 31 August. I realize it is easy for a Judge familiar with the New Zealand environment to make such a criticism. The reality in the Cook Islands is that Judges are not immediately available.
21. Nevertheless, I still believe it would have been desirable for the application to have been returned before the Court within a few days, if necessary before the same JP so that all parties on notice would have had an opportunity of addressing the application for interim injunction. As I have already said, it is common ground that the order made against the Police was in terms that were broader than necessary. The Police should not have to appeal to have that issue resolved expeditiously.
22. For these reasons, I uphold the appeal brought by the Police. I hope that it does bring some clarity to how applications for

interim injunction should be dealt with in the future. I want to stress, though, that in upholding the appeal, I make no criticism whatsoever of Mr Vakalalabure and how he handled the file. He was clearly faced with an extremely difficult situation with clients not speaking English and in circumstances of extreme urgency. Furthermore, he was acting pro-bono. The Court would certainly not wish to be thought to criticize any solicitor in those circumstances for doing his best to act in the interests of his clients and I commend him for taking those steps. Equally, I intend no criticism of the JP for making the orders as requested.

23. In all the circumstances, there will be no order for costs and I am not anticipating in any event the Police would be seeking any order.

Judge