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

Plaint No. 57/08

BETWEEN	**R TUPANGAIA**
	Plaintiff
AND	**TAAKOKA ISLAND VILLAS LIMITED**
	First Defendant
AND	**K CLARK**
	Second Defendant
AND	**R LYON**
	Third Defendant

Counsel: Mr Vakalalabure for Plaintiff
Mr Morley for First Defendant (a party served) and the Second and Third Defendants (as parties cited but not served)

Judgment: 12 June 2009 (NZT)

JUDGMENT OF THE COURT (AS TO COSTS)

Introduction

[1] In this Judgment I address the question of whether Mr Moore should pay costs as a consequence of my Judgment dated 18 March 2009 (NZT) in which I declared the proceeding to be a nullity and struck it out as the procedural means by which my declaration was brought into effect.

[2] In paragraph [39] of my earlier Judgment I set out my provisional view that Mr Moore should be the subject of a costs order. At paragraph [40] I noted that I had not been addressed on that topic and I ordered that Mr Vakalalabure filed submissions on the question of costs.

[3] On 3 April 2009 I received submissions from Mr Vakalalabure who made the point that he was counsel for the plaintiff (Mrs Tupangaia) and that he was *"duty bound to protect the interests of Mrs Tupangaia, not the agent"*.

Mr Moore was the agent. Counsel signalled that there might be a conflict of interest. Notwithstanding that submission, counsel went on to address the issue of whether Mr Moore should be the subject of a costs order.

[4] On 13 May 2009 (NZT) I issued a Minute in response to Mr Vakalalabure submissions. At paragraph [8] I noted:

> *"I have reflected upon the position and believe that the safest course is specifically to invite Mr Moore, should he chose to do so, to provide a memorandum to the Court addressing the preliminary view set out in paragraph [40] of my Judgment. In responding to this invitation Mr Moore should assume that I will take account of those matters already raised by Mr Vakalalabure. Mr Moore does not need to repeat those. It is only if there are other matters arising that he need address the Court."*

[5] Mr Moore took up the invitation and set out his position in a lengthy memorandum dated 4 June 2009. This memorandum attached a number of documents said by Mr Moore to be relevant.

Mr Vakalalabure's memorandum dated 3 April 2009

[6] I have already mentioned the submissions made by Mr Vakalalabure on what he called the *"potential conflict of interest"*. I now summarise the other submissions made by Mr Vakalalabure.

[7] At paragraph 9 Mr Vakalalabure noted the key issue is whether Mr Moore, as agent, is liable for costs because of his failure to obtain leave before or at filing. I agree that is the central issue.

[8] At paragraph 15 Mr Vakalalabure set out lengthy submissions as to the general law of agency. The issue addressed was whether the principal (said to be Mrs Tupangaia) was liable for the actions of her agent. With respect, I believe the submission to be misconceived. The issue before me is whether Mr Moore should be subject to the Court's jurisdiction to award costs. The issue of whether Mr Moore is then entitled to an indemnity, in his capacity as agent, is a separate and subsequent issue which is not before me to determine. As Mr Vakalalabure acknowledges in paragraph 15.4 of his submissions, the agent must follow the regulations and requirements of the place in which he acts as agent.

[9] In paragraph 15.5, Mr Vakalalabure submitted that Mr Moore made an honest mistake. This is a matter elaborated upon by Mr Moore in his subsequent memorandum and I address that argument below. On the basis of such an argument, though, Mr Vakalalabure submits that the principal should be liable for the omissions or errors of the agent who acted on the basis of an honest and reasonable mistake. For the reasons already pointed out, I do not accept that submission. The question of costs is not, I believe, to be addressed via the law of agency. Rather, the focus must be upon the actions of the agent in terms of his dealings with the Court.

[10] Mr Vakalalabure then submitted, by reference to rule 300, Code of Civil Procedure, that the Court's jurisdiction in costs is limited to the parties to any proceeding. Notwithstanding, Mr Vakalalabure accepts (paragraph 16.4) that the Court could order costs against the legal representative where the conduct of the representative has been improper, unreasonable or negligent or where the representative has pursued a hopeless case or there is a want of authority to issue the proceedings. It is said, however, that this does not apply in the case of an agent. At paragraph 16.6 Mr Vakalalabure submits, *"here the omission or error is by someone who has not even got over the hurdle of representing someone in the Court. The initiating document was declared a nullity and therefore there is indeed no legal representative in Court."*

[11] Mr Vakalalabure argued that if, contrary to the above, the Court has jurisdiction to order costs against Mr Moore, it should decline to do so on various bases including that Mr Moore had acted on instructions from Mrs Tupangaia and that Mr Moore had made an honest mistake that he could file such documents because he had previously been allowed to do so in two cases (OA 54/04 and OA 01/08).

Mr Moore's memorandum dated 4 June 2009

[12] Mr Moore's memorandum is, in a number of respects, difficult to follow. In other respects it attempts to re-litigate the issues that lead to my substantive Judgment.

[13] Paragraphs 4-26 of the memorandum raise issues as to the consequences of Mrs Tupangaia's insolvency. Mr Moore goes on the attack claiming that Mr Morley, in his capacity as counsel, has breached the Insolvency Act.

Mr Moore put it in terms that Mr Morley had been *"admonished"* by the Official Assignee for his actions (for example, see paragraph 15 of the memorandum).

[14] I do not read the materials as Mr Moore appears to do. And Mr Moore's attempt, in paragraph 17, to say that my earlier Judgment amounted to a finding that the procedure adopted by Mr Morley was irregular is not consistent with my understanding of the earlier Judgment.

[15] Be that as it may, I do not believe that these submissions carry much weight in relation to costs. If they are relevant at all, they are issues that should have been raised prior to my earlier Judgment and not subsequently.

[16] At paragraphs 27-43 of his memorandum, Mr Moore then rehearsed arguments, again, that should have been addressed prior to my Judgment. In this part of his memorandum Mr Moore explained that he had authority from Mr Tupangaia (the plaintiff's son) and explained how he attempted to have Mr Vakalalabure file the proceedings on his behalf. In paragraph 34 he criticised Mr Morley, concluding *"to suggest that Mr Vakalalabure act in such an unprofessional manner is nonsense"*. While I struggle to see that this issue is relevant to the question of costs, I do not subscribe to the submission made. It is not uncommon for counsel to issue proceedings, including proceedings claiming significant sums, on an urgent basis. Interim injunctions are just one example where that occurs. But none of that is to the point. The need for urgency, here, appears to have been self-inflicted. I find it hard to see how Mrs Tupangaia could have been caught by surprise in relation to a potential limitation argument. There has been litigation between the parties for a number of years and the legal issues as between the parties have been extensively reviewed by their respective advisers and by this Court.

[17] In paragraph 37 Mr Moore submits he was doing his best *"to find the time to give Mr Vakalalabure the minimal background that would allow him to be in a position to take over the claim with integrity"*. With respect, I simply do not accept the submission. As I made clear in my original Judgment, I think it highly unlikely that Mr Moore would have addressed any issue of authority to act if the Court had not raised it in the first instance. I refer to paragraph [32] of that Judgment.

[18] The most significant submissions by Mr Moore appear in paragraphs 44-78 of his memorandum where he dealt with the practice of the Court. I believe these submissions are relevant to the question of costs. It would have been helpful if such submissions had been made prior to my original Judgment. Such submissions would not have altered my conclusion but they may have resulted in a more nuanced Judgment. In any event, I will address those submissions in the next section of my Judgment. At this point, I summarise the submissions as follows:

- it is not the practice, in the Cook Islands, to require agents to seek leave prior to issuing proceedings;
- the common practice is, if the issue is raised at all, for the agents to seek leave to act at the first call of the matter;
- there should be no difference between the land jurisdiction of the Court and the civil jurisdiction (although the Land Agents Registration Act 2009 does now recognise such a distinction);
- in relation to the land division of the Court a large number of proceedings are commenced by agents acting for a principal.

[19] In the course of these submissions Mr Moore, submitted that he should not be punished with a costs order for following the Court's usual practice.

[20] Mr Moore's memorandum concluded, at paragraphs 79 and 80, by arguing that Mr Morley had failed to disclose the practice in the Cook Islands. Frankly, I do not understand this submission. If Mr Moore wishes to suggest that Mr Morley in some way is to blame for Mr Moore's actions then I would disregard such a submission.

[21] The last two paragraphs of the memorandum, under the heading *"Conclusion"*, restate propositions already addressed. The last sentence in the memorandum repeats that Mr Moore should not be punished for acting in the same manner as virtually every agent has acted in the Court before.

Discussion

[22] To some extent, the issues in this case are of academic interest because the question of agents acting in the land division of the Court is now the subject of more precise legislation. So far as the civil division is concerned,

however, the position is as I have set out in my earlier Judgment. I do not repeat that here. In the present case, Mr Moore, by his own admission, knew he was not authorised to issue the proceeding. In his memorandum dated 7 October 2008 he made it clear that he *"took matters into his own hands and prepared the claim as filed"*. He said it was *"never my intention to prosecute the claim"*. If this had indeed been his intention he should have taken immediate steps to seek leave or to ensure that counsel was appointed and then sought leave. But none of that happened. Instead, Mr Moore sought leave to serve the proceeding overseas. Plainly this was a step in the proceeding and Mr Moore purported to take it as if he was properly acting on behalf of the plaintiff. In these circumstances, it is entirely wrong to speak in terms of Mr Moore making an honest mistake. He knew what he was doing. He knew he was not authorised to act but he continued to act notwithstanding.

[23] It is common ground that, in appropriate circumstances, a solicitor representing a party might personally be subject to an order for costs. I see no conceptual difficulty with extending that to a person purporting to act as agent. If it was to be otherwise, the procedures of the Court would easily be subject to abuse. An agent would purport to issue proceedings in the name of a bankrupt knowing that a costs order against the bankrupt would be fruitless and the agent subject to an immunity. That could not be right. As I said in my previous Judgment, the right to issue proceedings is an important one and it must be protected. Equally, though, defendants must be protected from the improper issue of proceedings. There is a balance to be struck.

[24] Mr Vakalalabure's argument, set out at the end of paragraph [10] above, is a clever argument but ultimately lacking in merit. It is simply another way of running the argument that the agent of a bankrupt plaintiff should be immune from a costs order. The reality is that the question of the proceeding's status needed to be determined and the Court's energies, and those of the named defendants, were directed to that end.

[25] Consequently, I conclude that in the circumstances of this case Mr Moore can and should be the subject of an order for costs.

[26] What, then, is to be the quantum of such an order? The fact that Mr Moore acted deliberately, and with knowledge that he lacked authority, is a factor

justifying a significant award. To be measured against that is the reality, in the Cook Islands, that litigation in the land division is often conducted by agents and, at least until the legislative position changed, there may have been a blurring between the civil and land jurisdictions. On that, though, I can express no concluded view because I have not received detailed submissions. The issue is complex and the Court might well require the assistance of an *amicus* if the issue was to be explored in detail.

[27] I am satisfied that that is not necessary to do so in the present case. Enough ink has already been spilled. Judicial resources are limited and must be used as efficiently as possible. The issue of costs must now be addressed on the basis of the materials put before the Court. I believe Mr Moore's submission (as to the general practice of the Court) can properly be brought to account by giving him the benefit of the doubt. Without this factor, I would have fixed costs somewhere in the range of $1500-$2000.

[28] In my opinion a costs order of $400.00 would properly represent the costs that should be payable by Mr Moore. This balances, as best I can, the different interests. I appreciate that $400.00 will be a relatively insignificant contribution to the actual costs incurred on behalf of the named defendants and that they will have a legitimate concern they have been put to substantial expense by Mr Moore's actions in issuing the proceeding without authority. On the other hand, the proceeding has been brought to an end and they have been spared further costs as a consequence.

[29] For the reasons set out above I fix costs in the sum of $400.00 which is to be paid by Mr Moore to the named defendants jointly and severally.

Dated 12 June 2009 (NZT)