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: 18 March 2009 (NZT)

JUDGMENT OF THE COURT (DECLARING PROCEEDING A NULLITY)

Introduction

[1] There is an application before me to declare this proceeding a nullity and to strike out or dismiss the claim.

Statement of claim

[2] On 9 July 2008 Mr Travis Moore, describing himself as agent of the plaintiff, purported to file a statement of claim in the Civil Division of the High Court of the Cook Islands. It was accompanied by a plaint note in Form 10 signed by Mr Moore as agent for the plaintiff. The proceeding was accepted for filing by the Registry and ordinary summonses issued in terms of form 11.

[3] The pleading is not entirely easy to follow but appears to allege that the three defendants are in breach of contract. In the first cause of action judgment is

sought in the sum of $333,000 (plus interest and costs) said to be goodwill payable on 9 July 1996. In the second cause of action, various allegations are made but, in essence, it appears to be said that the defendants are in breach of an agreement made on 26 November 1986 which required performance on or about 9 July 1996. The damages sought in relation to the second cause of action exceed $2m. This is not a proceeding that could have been brought in the Land Division of this Court and Mr Vakalalabure has not argued otherwise.

Subsequent events

[4] The plaintiff served the first defendant in Rarotonga and the first defendant subsequently filed a statement of defence and lodged an application for security as to costs. No objection was taken by the first defendant to the commencement of the proceeding.

[5] The second and third defendants reside overseas and would not accept service. Mr Moore then filed an application on 21 August 2008 seeking leave to serve them at a distance. He filed an affidavit in support saying that he was the agent of the plaintiff and authorised by her to make the affidavit.

[6] The matter came before me on 2 October 2008 when I was hearing related proceedings (OA 1/08) between some of these parties. I noted on the file:

> *"2-10-08. Raised with Messrs Vakalalabure and Morley and Ms Rokoika at Chambers hearing today on 1/08. Mr Vakalalabure is not acting. I do not believe that Mr Moore can advance litigation in the name of Mrs Tupangaia. He should file a memorandum setting out the basis of his claim to do so. For the avoidance of doubt I do not presently believe that a power of attorney is a sufficient basis. This is to be specifically addressed."*

[7] On 7 October 2008 Mr Moore filed a memorandum which I now set out in full:

> *"1. Mrs Tupangaia had taken advice some time back from a New Zealand Solicitor on the question of the landowners / lessors of the Taakoka Island Villas Limited leasehold never having been paid the goodwill and or the New Zealand principals never having capitalized the company.*

2. *Just prior to my filing of the claim, that solicitor had as a matter of courtesy and responsibility written to Mrs Tupangaia to remind her that the 12-year limitation on time to file a claim was imminent.*

3. *Te Vaka Law at the time was engaged by Mrs Tupangaia on several fronts (and of course was engaged with its other clients) and simply did not have the time to study the mountain of documents nor the time to interview the writer and Mrs Tupangaia's son Parau for our intimate knowledge of the history of the leasehold and the history of the litigation that ran from 2004 to 2007.*

4. *In the circumstances, where the choice was to go outside of the 12 year limitation and hope the Court would in due course allow a filing out of time, the writer took matters into his own hands and prepared the claim as filed.*

5. *That is not to say that I did so recklessly or without advice. Once I had produced the claim, and there were many hours required to do so, I asked Mr Vakalalabure to peruse the claim.*

6. *Mr Vakalalabure did so, and indicated that I seemed to at least have told the story sufficiently for an urgent filing. While I felt obligated to Mrs Tupangaia to ask Te Vaka Law to put their name to the filing, and did make that request, of course Mr Vakalalabure was not at that 11th hour able to do so and I accepted that.*

7. *It was never my intention to prosecute the claim, and so at the time I did not seek leave of the Court to act as a non-practitioner if indeed the Court had the power to allow me to do so. For the avoidance of doubt I do not consider myself qualified nor would I purport to advance this matter beyond what was an urgent filing.*

8. *Prior to turning the file over to Te Vaka Law I felt I should at least serve the Defendants and successfully served the*

company but as the application to serve at a distance indicates serving the other defendants was not so easy.

9. *Mr Morley then filed, on behalf the company, an application that seemed to put the claim well onto the back burner and that brings us to the present time. Mrs Tupangaia's response to Your Honour's direction has been, through her son and power of attorney Parau Tupangaia, to direct me to formally instruct Te Vaka Law to advance the matter from this point forward. I have done that.*

10. *I note that I have worked within the High Court (Land Division) for some years and that I have always strived to do so to the best of my limited self-education and experience and take my responsibilities to the Court seriously. When the Law Practitioner's Act 1993-94 was amended earlier this year to require non-practitioners (acting under Sec 61(2) in the Land Division) to establish trust accounts for client funds I did that within four days of the law taking effect.*

11. *Upon that history and upon that formal instruction from Mrs Tupangaia and my subsequent formal instruction to Te Vaka Law, I respectfully ask the Court to consider that the matter is now in qualified hands and able to be advanced on behalf of Mrs Tupangaia."*

[8] I then directed that the application be listed when other litigation between the parties was called before me on 4 November 2008. There is a Minute on the file recording what occurred on that day. In brief, it was not clear whether Mr Vakalalabure actually had instructions (contrary to paragraphs 9 and 11 of the Memorandum) and I gave him leave to take such instructions and to report back by 7 November as to whether he did have those instructions. At paragraph 6 of the Minute I said that it appeared to me at least arguable that the proceeding was a nullity and I stayed the proceeding with leave reserved to any party to apply to have the stay revoked. I directed the first defendant, if it was minded to determine the status of the proceeding, to file any necessary application.

[9] On 7 November 2008 I received a short memorandum from Mr Vakalalabure confirming he was authorised to act. As far as I can tell, this is the first time

that Mr Vakalalabure or his firm had formally accepted instructions in relation to this proceeding. That raises considerable issues as to the accuracy of paragraphs 7, 9 and 11 of the Memorandum from Mr Moore.

The application

[10] On 4 December 2008 the first defendant brought an application to declare the proceeding a nullity and to dismiss or strike out the proceeding. It sought solicitor/client costs. The first defendant relied upon two grounds:

[a] the proceeding was issued without the prior knowledge, authority or permission of the Official Assignee in New Zealand;

[b] the proceeding was issued contrary to the provisions of the Judicature Act in that it was not filed by Mrs Tupangaia, a solicitor, or by an agent pursuant to the leave of the Court.

[11] Mr Morley filed a detailed memorandum which set out the submissions in support of the application. Mr Morley started by setting out section 42, Judicature Act 1980-1981, in the following terms:

> *"In any proceeding in the High Court, whether civil or criminal, any party thereto may be represented either by a barrister or solicitor or with the leave of the Court, by any other agent, but any such leave may at any time be withdrawn."*

[12] Mr Morley emphasised that the proceeding was issued by Mr Moore as agent for the plaintiff and he referred to such portions of the documents as make that clear. Mr Morley then drew the Court's attention to Mr Moore's memorandum of 7 October including Mr Moore's acknowledgement that he prepared and filed the statement of claim.

[13] Mr Morley noted that Mrs Tupangaia had been made a bankrupt in the High Court of New Zealand on 15 November 2007. Her property and powers vested in the Official Assignee in terms of the Insolvency Act 1967 (NZ). I accept Mr Morley's submission that that Act applies in relation to a chose in action and that the proceeding described in paragraph [3] above would fall within such a description.

[14] Section 655, Cook Islands Act 1915, recognises the New Zealand bankruptcy and Mr Morley submitted that the chose in action in the

proceeding is property which had fallen into the bankrupt's estate in New Zealand.

Directions on 18 December 2008 and 5 February 2009

[15] Various pieces of litigation involving these parties came before me on 18 December 2008. I gave directions on that day, including a direction in this proceeding that Mr Vakalalabure should respond to the first defendant's application by 4pm on 25 January 2009. Any such response should include submissions.

[16] I did not receive anything from Mr Vakalalabure and at a hearing convened on 5 February 2009 (New Zealand time) I gave Mr Vakalalabure a final opportunity to file a response reserving to Mr Morley a right of reply.

The plaintiff's response

[17] Mr Vakalalabure's memorandum is dated 12 February 2009. He opposed the application. His submissions addressed the two grounds relied upon by the first defendant.

[18] In relation to the bankruptcy, it appeared to be accepted by the plaintiff that there was a defect on the part of the plaintiff but it was said to be a defect that could be cured. Reliance was placed upon a letter from the solicitors for the Official Assignee (see paragraph 2.3 of the memorandum). It was said that the Court needed to stay the proceedings to allow the Official Assignee *"to come on board"*. Counsel said that the Official Assignee might allow the matter to proceed as he did in OA 01/08. Furthermore, counsel submitted that the basis of the current proceeding concerned an interest in land and therefore the Official Assignee might not have an interest in the chose in action.

[19] In relation to the second ground, the absence of leave to act as agent, the plaintiff accepted that Mr Moore was not the plaintiff, not a solicitor and did not have leave in the instant case. It was said, however, that he had filed civil and land matters in the Court on behalf of the plaintiff previously. Reliance was placed upon proceeding OA 01/08 where Mr Moore had acted as agent (for the respondent) and it was said the applicant was estopped from denying Mr Moore's status.

[20] The plaintiff went on to assert that because the Court had previously accepted documents from Mr Moore he was therefore accepted as the agent of the plaintiff and, it seems, therefore had leave in the instant case.

Reply by the first defendant

[21] On 20 February 2009 (New Zealand time) the first defendant prepared and subsequently filed a memorandum in response.

[22] In relation to the bankruptcy ground Mr Morley noted that the submissions ignored the relevant provisions in the Cook Islands Act 1915 and the Insolvency Act 1967 (NZ). He asserted that section 655(2), Cook Islands Act, did not apply in relation to the instant proceeding. Therefore, he submitted, Mrs Tupangaia's property, which included the chose in action, had passed to the Official Assignee and that Mrs Tupangaia had no ability, right or power to issue or bring the proceeding. He said there was no power retrospectively to validate the issue of the proceedings.

[23] In relation to the Judicature Act ground he referred to section 61(2), Law Practitioners Act, which enabled any person, with the approval of the Judge, to act as an agent for any person in the Land Division of the High Court. He submitted there was no such approval but, in any event, the claim did not fall within the Land Division of the Court. I have already concluded (see [3] above) that this is not a claim within the Land Division of this Court.

Discussion

[24] In this part of the Judgment I address and decide the two arguments raised by Mr Morley.

[25] First, I am satisfied that the claims set out in the proceeding are a chose in action which had passed to the Official Assignee in New Zealand as a result of Mrs Tupangaia's bankruptcy. Neither she (nor Mr Moore or her son on her behalf) had any interest in that chose in action entitling them to bring the proceeding. In effect, there was no claim she could advance because it had passed to the Official Assignee.

[26] I am not aware of any power retrospectively to obtain the consent of the Official Assignee in New Zealand to advance this proceeding and thus to validate it. Mrs Tupangaia has taken no steps to obtain that consent, in any

event, and she has had sufficient opportunity to do so should she have chosen to follow that course. Consequently, there is no evidence before the Court that the Official Assignee has any interest in pursuing the claim (assuming, for the purposes of argument, that that is relevant).

[27] There seems little doubt that only the Official Assignee had the right to bring the proceeding. There may well be arguments available that provisions of the Insolvency Act 1967 (NZ) operate to prohibit or stay the claim. I was not expressly addressed on such arguments. Indeed, there might be difficult issues of law that arise as to the relationship between the New Zealand legislation and Cook Island law. But I do not need to get into that in order to decide the point raised by Mr Morley. I am quite satisfied that there was no claim available to Mrs Tupangaia (or those purporting to act on her behalf). The absence of a good claim does not, of itself, render a proceeding a nullity but it certainly does render it subject to a strikeout application. Consequently, and for the reasons set out above, I strike out the proceeding on the first ground advanced by Mr Morley.

[28] The second ground relied upon by the first defendant was that it was not issued in terms of the provisions of the Judicature Act by a party, a solicitor, or an agent with leave. Section 61(2), Law Practitioners Act, is clearly intended to work in conjunction with the Judicature Act provisions.

[29] It is common ground that Mr Moore did not have actual leave to issue proceedings in this case. It was said that in some way he had a general leave to act as a result of other proceedings in which he is involved. Reference was specifically made to OA 01/08. I observe that OA 01/08 is a proceeding concerning the forfeiture of a lease (and that lease is not property that has passed to the Official Assignee in New Zealand). The bankruptcy does not apply to it: section 655(2), Cook Islands Act. In that regard I note the contents of the fax dated 27 March 2008 attached to Mr Morley's Memorandum of 4 December 2008.

[30] The plaintiff also alleged an estoppel. That argument was misconceived. It cannot possibly apply in determining the status of this proceeding.

[31] Section 42, Judicature Act, supported by section 61(2), Law Practitioners Act, clearly requires that leave must be granted in any proceeding to be commenced by an agent. The statutory provisions do not specifically refer to issuing the proceedings (as opposed to the question of representation) but

the legal ability to represent a party goes to the heart of the commencement of a proceeding by the agent purportedly on behalf of a plaintiff. An agent may only take that step with the leave of the Court. The necessary implication is that, in the absence of leave, an agent is not entitled to issue a proceeding.

[32] There is no legal basis to argue that Mr Moore had some general leave (assuming that to be made out on the facts) to issue this proceeding in the Civil Division of this Court. In the present case, Mr Moore made no attempt to obtain leave either prior to filing the proceeding or at the same time as doing so. He has candidly admitted that. In fact, many months went by before this issue was even addressed. If I had not raised the issue it seems unlikely that Mr Moore would have arranged for a solicitor to take over the file. Even now, there is no formal application for leave, simply a plea to regularise the proceeding after the event.

[33] I was not specifically addressed on the Code of Civil Procedure although there was a general reference to it in the first defendant's application of 4 December 2008 and the plaintiff referred, in passing, to rule 4. Rules 66 and 67 govern the issue of proceedings. Rule 69 specifically authorises the Court to treat as regular, proceedings otherwise wrongly commenced. But that rule is clearly procedural only. Similar broad powers can be found in rules 4 and 5. But these, too, are procedural rules, and cannot overcome the absence of leave if that is required by statute. I am satisfied that, in the Cook Islands, a proceeding, in order to be validly commenced under the Code of Civil Procedure, must be commenced either by a party, a solicitor, or an agent with the leave of the Court. If someone else purports to commence a proceeding, the proceeding has not been validly commenced and must be regarded as a nullity. I do not believe I have jurisdiction to cure such a defect. This is not a case such as *Edwards & Hardy Hamilton Limited v Woodhouse* 3 PRNZ 362. In that case, the Court appears to have assumed that the deficiency was merely an irregularity under the rules. The Court referred to and relied on an Australian decision, *Hubbard etc v Anderson & Just (No 2)* [1972] VR 577, dealing with non-compliance with the rules. It appears to me that the defect here is fundamental and is not a procedural oversight that can be overcome by reliance upon rule 5. That defect arises as a consequence of statute and not by rule.

[34] However, and if I am wrong as to that, I address the issue of whether I would exercise my discretion to regularise the proceeding. I would not do so. I believe that Mr Moore issued these proceedings knowing he was not entitled to do so. It goes too far to say that he was holding himself above the law, but I think it fair to say there was an element of taking the law into his own hands. If he had moved, at the same time as filing the proceeding, to seek leave to issue that might have indicated an entirely different attitude on his part. But he did not do so. And he continued to conduct the proceeding as if he was authorised to do so. The Court must be careful to ensure that the right to issue proceedings is protected. But at the same time, that right must be guarded so as to ensure it is not abused. The legislature has set out who might issue proceedings and the three categories provided for recognise the responsibilities that go with the right to commence proceedings. A party who issues proceedings personally is subject to costs orders. A solicitor is subject to disciplinary proceedings. An agent who has the leave of the Court is then subject to the Court's jurisdiction and disciplinary oversight. Commencing legal proceedings is a serious business and it is not a right extended to anybody. Mr Moore did not have the Court's leave and did not bother to seek it. In those circumstances I would have declined any jurisdiction to regularise the proceeding.

[35] While I have addressed that discretion, I am quite satisfied that it does not need to be exercised in this case. For the reasons set out above I believe the proceeding was a nullity at the time it is issued and I so declare it. I therefore strike it out. The filing fee is to be returned to Mr Moore.

[36] On the basis of the reasoning set out above I conclude the proceeding is a nullity in relation to the second ground. I strike it out in reliance on both arguments.

Costs

[37] I have declared the proceeding to be a nullity. The reality, however, is that the proceeding was filed, the first defendant was served, and legal representation paid for by the defendants. I have now struck out the proceeding, being the procedural means by which my declaration is brought into effect.

[38] The plaintiff's actions, as carried into effect by Mr Moore, have put the first defendant to trouble and expense. I believe it is entitled to costs.

[39] In the usual course, costs would be payable by the cited party, that is, Mrs Tupangaia. In the present case, however, the failures are those of her agent. In the unusual circumstances of this case, I see no reason why Mr Moore should not be the subject of costs. For example, if a solicitor issued a proceeding without authority, claiming to do so in someone's name, I imagine the Court would have no difficulty in awarding costs against that solicitor. Conceptually, the present case appears to be no different.

[40] I have not received any submissions on this topic from Mr Moore. I direct that Mr Vakalalabure file such submissions within fourteen days from the date of release of this Judgment. I will then make a final decision on the question of costs. For the avoidance of doubt, I do not require any further submissions on this topic from the first defendant.

Dated 18 March 2009 (New Zealand time)