IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

PLN: 13/11

TAAKOKA ISLAND VILLAS LIMITED

v

TRAVIS MOORE

Hearing: 15 December 2011

Counsel: L Rokoika for the Plaintiff
C Petero for the Defendant

Date: 15 December 2011 (delivered orally)

ORAL DECISION OF THE HON JUSTICE GRICE

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[1] This is an application to strike out the proceedings by the defendant on the ground that no reasonable cause of action was disclosed and upon further grounds it refers to, in the affidavits of Travis Moore and the memorandum of counsel.

[2] The grounds were further refined today at the hearing.

[3] The case itself involves a longstanding matter between the parties. Counsel for the defendant annexed to his memorandum a decision of the then Chief Justice Williams, in proceedings plaint OA1/08 which sets out the chronology and history of the litigation up to October 2009.

[4] This particular claim is a claim by the plaintiff against Mr Moore in relation to the excavation of sand on a property. The Statement of Claim alleges that the plaintiff is the lessee of property at Aremango Section 7A1A2 for a term of 60 years from 1 September 1988. It further alleges as follows:

> 3. The defendant is a land agent and has acted on instructions from one of the landowners, Ruta Tupangaia and/or Mrs Tupangaia's son, Parau Tupangaia.

[5] The claim goes on to record that in various and diverse dates in 2008 the defendant instructed certain individuals to enter the property and excavate and remove sand and the sand has not yet been replaced. There is a large hole in the property, which it is alleged renders it unusable and a risk to the users of the property.

[6] The first cause of action, and I will set the causes of action out in full, is in trespass and reads as follows:

> Wherefore the plaintiff claims trespass to the property against the Defendant and the particulars are as follows:
>
> (a) The Defendant, whether on his own accord or on instructions of the landowner Mrs Tupangaia or Parau Tupangaia was under a legal duty not to interfere with the property that is vested in the plaintiff by virtue of the lease.
>
> (b) The Plaintiff has suffered injury or loss as a direct result of the defendant's breach by excavating and removing sand from the property which has now resulted in loss to the plaintiff to reinstate and remediate the property, being 5,000m^3 x $90 per cubic metre = $450,000.00.

[7] The second claim is in nuisance as follows:

> Wherefore the Plaintiff claims nuisance against the Defendant the particulars are as follows:
>
> (a) The Defendant, whether on his own accord or on instructions from the landowner Mrs Tapangaia or Parau Tapangaia was under legal duty not to interfere with the property that is vested in the plaintiff by virtue of the lease.
>
> (b) The Plaintiff has suffered injury or loss since the Property has a large hole in it which will cost $450,000.00 to reinstate and remediate.

[8] The final and third cause of action is in conversion as follows:

> Wherefore the Plaintiff claims conversion of the sand against the Defendant and the particulars are as follows:

(a) Upon severance from the Property by way of excavation, the sand became goods capable of being converted.

(b) The Defendant was under a legal duty not to interfere with the sand as the Plaintiff is the lessee of the Property from which the sand was extracted.

(c) The Defendant unlawfully assumed ownership of the sand without authorisation by excavating and removing it from the Property.

(d) The Defendant wrongly interfered with the sand by excavating and removing it from the Property.

(e) The Plaintiff has suffered loss as the excavation removal of the sand has created a large hole in the property which will cost $450,000.00 to reinstate and remediate.

[9] The claim then goes on to claim $450,000 for special damages and various other claims, including general damages and exemplary damages, as well as interest and costs.

[10] The application to strike out is made on three grounds. First, that the wrong defendant has been sued. This centres on the Defendant's contention that Mr Moore is the agent of Mrs Tapangaia. It is set out in counsel for the defendant's memorandum that the defendant is a registered land agent and he has acted for Mrs Tupangaia in respect of land and civil matters since December 2003. He then goes on to say that he was acting on instructions. He says if anyone is liable for the removal of the sand it is Mrs Tupangaia who instructed Mr Moore. Mrs Tupangaia is bankrupt. It then goes on to say the plaintiff knows this and the plaintiff should be pursuing the Official Assignee, not the defendant.

[11] The second head of the application to strike out is based on an allegation that the claim is grossly overstated and an abuse of process. This is summarised at paragraph 12 of the submission. The defendant says the claim is for the cost of the removal and reinstatement of the sand. But this is not the cost that he considers it should be.

[12] The final head of the claim is that the claim is vexatious and intended to embarrass. This is based on two matters. First, as set out in the memorandum, one of the majority shareholders filed a claim in New Zealand against Mrs Tupangaia

and the defendant for $6 million, then broken down apparently to sub-claims. The claim received significant media coverage in the Cook Islands. Once that had occurred, Mr Clark withdrew the claim. This is set out at paragraph 13. In paragraph 14 the claim is that the plaintiff has made a claim that bears no resemblance to reality. It should have been a maximum of $30,000, in which case there would have been little or no media interest at all. The memorandum says:

> As it is, there was a half-page story of the $500 claim published locally with pictures of the excavation.

[13] Turning to the principles which govern the application of the power to strike out a claim, there appears to be no contention between counsel as to the applicable provisions.

[14] To summarise, the Court in approaching a strike out application must consider the following criteria:

(a) Assume pleaded facts are true; that is not to say that the truth of pleaded allegations should be accepted if they are entirely speculative and without foundation.

(b) Causes of action must be clearly untenable. They must be so clearly untenable they cannot possibly succeed.

(c) The jurisdiction will not only be sparingly exercised, or exercised sparingly in a case where the Court is satisfied that it has the requisite information.

[15] I also refer to the decision of Hugh Williams J in *Tuaki v Tuakana, Te Wheta & Ors*, High Court Cook Islands, 30 September 2010, plaint 11/2010, where His Honour said:

> 5) Rule 131 of the Code of Civil Procedure of the High Court gives the Court power to strike out proceedings if they disclose no reasonable cause of action.
>
> 6) The body of law which governs applications to strike out is well settled.
>
> 7) Applicants to strike out proceedings on the basis they disclose no reasonable cause of action must show the pleading is so clearly untenable, where as a matter of law or incontrovertible fact, that it cannot possibly succeed. The jurisdiction is exercised sparingly and only in clear cases where the Court can reach a settled conclusion. That applies even in complex cases. The hurdle to strike out proceedings is deliberately set high so as not to impinge on citizens' rights of access to the Court. Successful striking out proceedings are more often based on assertions that the claim is incapable of success as a matter of law, rather than a matter of fact, because Courts, on striking out the proceedings, do not and cannot embark on any consideration or disputed factual issues. Finally, if a proceeding can be satisfactorily amended, the Courts will almost always follow that course and give the party whose claim is under attack an opportunity to amend rather than the proceeding be struck out.

[16] Turning to this case, the first head that the agent should not be sued, but it should be the principal who is the defendant. Mr Petero submitted that an agent is jointly and severally liable with the principal. He took me to paragraph 162 of *Halsbury's Laws of England*, fourth edition, in the Agency volume, it says:

> 162 An Act expressly authorised, where a principal gives his agent express authority to do a particular act, which is wrongful in itself, or which necessarily results in a wrongful act, the principal is responsible, jointly and severally with the agent, to third persons for any loss or damage occasioned thereby.

[17] Ms Rokoika referred me to the decision *Blenheim Burrow and Wairau Riverboard v British Pavements Canterbury Ltd* (1940) NCLR 564. The issue appears to be whether the River Board had the authority to grant permission to take the river gravel and the Court found in fact it did not. It seems the case is rather off the point here.

[18] I also refer to *Bowstead and Reynolds on Agency* (19th edition, Sweet and Maxwell, at para 24.11, page 714), which deals with agent's liability for third parties outside contract, and in particular liability for conversion. And I read from that passage, 24.14:

The general rule, stated by Roma J, in *Barker v Furlong* is that:

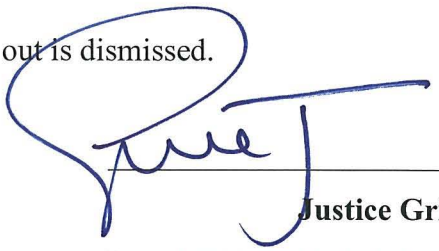
> Where an agent takes part in transferring the property in a chattel and it turns out that his principal has no title, his ignorance of this fact affords him no protection.

[19] I accept that the law in relation to liability of agents and principals is not straightforward. I anticipate that that is going to be an issue at trial upon which there will be evidence, but for the present purposes it seems to me the causes of action are sufficient such as if the pleadings are taken at their face there is a cause of action available. The law of joint and several liability allows the agent to be sued jointly and severally. Assuming the facts are true that are pleaded the causes of action are tenable against Mr Moore. This is not a head under which I would make an order striking out the proceedings.

[20] The second matter is the quantum of the claim. This can be dealt with quite shortly. The defendant's counsel's memorandum and his affidavit referred to material concerning quantum. It attached invoices and material concerning estimates for removal and reinstatement of gravel issue. There is an issue which is clearly a matter that needs to be dealt with in a hearing. The evidence needs to be tested at trial. This is not a head under which the proceedings should be struck out under the above principles.

[21] Finally, turning to third head that the claim is vexatious, this is related to the previous head in that the claim, it is alleged, is far too high and designed to draw attention from the media and others. Again I do not consider this head justifies striking out the claim on the above principles.

[22] Accordingly, the application for striking out is dismissed.



Justice Grice

Signed 27/3/2012 (NZ Time)