

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

PLT 19/11

BETWEEN	SETH LOVE of Rarotonga	<u>Plaintiff</u>
AND	COOK ISLANDS GENERAL TRANSPORT	<u>Defendant</u>
AND	WESTPAC BANKING CORPORATION of Rarotonga, Cook Islands	<u>Proposed Third Party</u>

Hearing date: 27 August 2012

Counsel: Mr C Petero for Plaintiff
Ms L Rokoika for Defendant
Mr H Matysik for Proposed Third Party

Judgment: 27 August 2012

JUDGMENT OF THE COURT

- [1] There are two applications before the Court today for consideration. The first of these is an application by the defendant to strike out the plaintiff's claim against it. The second is an application by the defendant (if the strike out application fails) to issue a third party notice against Westpac as third party.
- [2] Counsel appeared today in support of the two applications and also in opposition.
- [3] During the course of argument various aspects of the claim clarified, and I think it is fair to say that, by the end of argument, all counsel accepted that the strike out application would fail and that a third party notice would issue.

Background

- [4] Mr Love owned a house which was in the course of construction. There were also tools associated with that construction. He fell into financial distress and the Bank as mortgagee sold his house to new owners. The new owners also bought some of the building materials and engaged builders to complete the construction of the house. Some other of the building materials however remained on site together with Mr Love's tools. The Bank made arrangements with the defendant to uplift these items and place them in storage in a container.
- [5] Although the facts will need to be resolved at trial it seems that someone gained access to the container and the tools went missing. There also seem to be issues as to whether the container itself was somehow damaged while in storage.
- [6] The Bank made rental payments to the defendant in relation to the storage of the container. It seems that the Bank primarily had possession of the keys to the container. The defendant says it did not have its own set of keys.
- [7] There seems to be no dispute that the various tools which are now set out in paragraph 12 of the Amended Statement of Claim went missing.
- [8] The plaintiff's Amended Statement of Claim dated 23 August 2012 sets out three causes of action – bailment, duty of care, and then a third cause of action described as *res ipsa loquitur*. As it happens, that is not strictly a cause of action but is a means by which the second cause of action may come to be proved. However there is no harm in having the allegation specifically set out in the statement of claim. The parties can be under no misapprehension that that is one argument that Mr Love will raise at trial.

Strike Out Application

- [9] The strike out application was brought last year but for various reasons has not yet been resolved. Ms Rokoika accepts that she must show that, as the case is pleaded, it is so clearly untenable that it cannot possibly succeed.
- [10] Following a vigorous debate between bench and bar Ms Rokoika effectively accepted that she could not satisfy the Court to that high standard. I think that was a right and proper concession on her part. It seems to me that both a bailment and a duty of care argument are available to the plaintiff. Of course it will be a matter of proof at trial as

to whether those allegations can be sustained but at face value they seem to be proper causes of action.

[11] At my questioning, Mr Petero has confirmed that he has no present intention to sue the Bank directly as a defendant. I mention that simply for completeness at this stage.

[12] For these reasons I dismiss the application to strike out the statement of claim.

[13] In the particular circumstances of this case, I reserve the question of costs for determination at some further point as may be appropriate.

Joinder of Third Party

[14] Originally Ms Rokoika filed an application to join four third parties including the Bank. The others were the purchaser of the house, the builder who then conducted the work to complete the house and also a plumbing company. These parties filed affidavits which provided helpful insights into what had actually occurred. As a result of these the defendant has quite sensibly withdrawn the application in relation to three of the four proposed third parties. I am told there is no outstanding issue of costs to be resolved.

[15] Mr Matysik for the Bank quite properly criticised the defendant for failing to file a draft statement of claim. As a consequence of that his helpful submissions did not address all of the arguments that ultimately were ventilated before me this morning. Certainly there is no criticism intended in that comment. Mr Matysik did his best to anticipate the arguments that would be raised but things have now moved on.

[16] I should also record that there was preliminary point that the application to issue the third party notice was made out of time. I have heard the reasons why that occurred and I am quite satisfied that that objection should not succeed. Mr Matysik accepted that that was the likely outcome on that particular front.

[17] So I turn now to the substance of the claim that the defendant might have against Westpac.

[18] It is accepted that there was a contract of some sort between the Bank and the defendant. The exact contents of that contract will need to be pleaded by Ms Rokoika quite carefully but, at face value, I accept there is scope for the defendant to allege a

breach of that contract on the part of the Bank, for example by reference to what it did with the keys. Obviously it would be a matter to be determined at trial as to what actually occurred in relation to the container. At this stage I am simply dealing with allegations that have or can be made.

[19] I also record Mr Matysik's concession that the Bank does not claim ownership of the tools. It says it was put in an invidious position because Mr Love would not remove them from the site and it needed to do something about that in order to give vacant possession of the property to the new owners. On the other hand, Mr Love says that he did want to gain possession of the tools but no-one would allow him to do so. Obviously I cannot resolve that issue today and that will be a matter for trial.

[20] However, I am satisfied that there is scope for the defendant to make sustainable allegations against the proposed third party Westpac and that it should be given leave to issue that third party notice. I expressly reserve leave to the Bank when it receives that pleading either to seek further particulars or to apply to strike it out if either course seems appropriate.

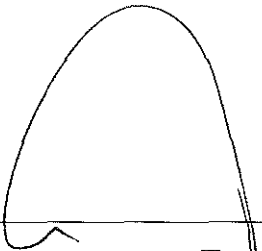
[21] Of course the Bank may accept that the pleadings are in proper form in which case I direct that it should file a particularised statement of defence within four weeks of receipt of the statement of claim issued by the defendant.

[22] Again I think it proper to reserve the question of costs for the moment. The Bank properly resisted the application for leave to issue on the basis of the materials before the Court. However, as I have explained, I do believe there is an arguable cause or causes of action that are arguable against the Bank and for that reason I have allowed the third party notice to be issued. I think we should allow the dust to settle so that the question of costs can be determined when the picture has clarified at some stage in the future.

Conclusion

[23] I direct the defendant forthwith to issue the third party notice plus a fully particularised statement of claim against Westpac. As I have already said, if Westpac decides to plead to that it should do so within four weeks thereafter, otherwise I reserve leave to the Bank to apply for further orders as it thinks appropriate.

[24] I do not think I should make other timetable orders in the meantime. We need to let the current steps take their course. Once that has occurred any party may of course apply to the Court for more comprehensive timetabling orders. The parties should do their best to cooperate in reaching any necessary arrangements as between them including in relation to discovery. I would hope that formal orders from the Court are not required. If the parties can reach agreement, then they can submit a consent memorandum to the Court setting out the timetable that they agree between them. All three parties are represented by senior counsel and I would expect they are well able to reach these sort of arrangements as between themselves.



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Tom Weston
Chief Justice