SUPREME COURT OF NAURU
YAREN
CIVIL JURISDICTION

Civil Case No. 13 of 2020

BETWEEN

DARKEY JEREMIAH — Plaintiff

AND

TAWAKI KAM — Defendant

Before : Fatiaki CJ.

Date of Hearing : 20 May, 2021
Date of Ruling : 15 July, 2021

CITATION : *Jeremiah v Kam*

CATCHWORDS: *"strike out application" "no cause of action" ; "Government Housing Scheme" ; "requirements of a valid contract" ; "certainty of terms" ; "consideration" ; "promissory estoppel" ; "strike out power to be sparingly used"; "misfeasance in Public Office" ; "negligence" ; "Wilful misconduct".*

LEGISLATION : Order 15 r 19(1)(a) Civil Procedure Rules 1972.

CASES REFERRED TO : Caming v Temby (1905) 3 CLR 419 ; Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 ; Combe v Combe [1915] 1 ALL ER ; Low v Bouveries (1981) 3 Ch D 82 ; Auckland Harbour Board v The King [1924] AC 318 ; Kepae v Jeremiah [2019] NRSC 29 ; Tom v Beneficiary of the Est of Ediribaini Tom [2019] NRSC 14 ; Tamakin v Ronphos [2012] NRSC 9 ; Takaro Properties Ltd v Rowling [1978] 2 NZLR ; Three Rivers DC v Bank of England [2001] 2 All ER 513 (HL).

APPEARANCES:
Counsel for the Plaintiff : R. Tagivakitini
Counsel for the Defendant : L. Scotty

RULING

INTRODUCTION

1. This is a civil suit brought by the plaintiff an elderly man who owns a four (4) bedroom house in Meneng District , against the defendant a resident of Aiwo District in his capacity as a Member of Parliament and *"a Cabinet Minister holding at least three Ministerial portfolios including as Minister for Transport , Sports , and Infrastructure"* at the relevant time.

2. Subsequently , the defendant successfully contested the General Elections held in August 2019 but this time , the defendant was not re-appointed as a Cabinet Minister and held no ministerial portfolio in the new Government.

THE PLEADINGS

3. Without relating all the background details leading up to the issuance of proceedings , suffice it to say that the plaintiff's *"cause of action"* is pleaded as follows in the Statement of Claim :

> *"(4) The Defendant , by himself , his servants and/or agents were constructing dwelling houses for Nauruans during the period leading up to the General Elections in August 2019.*
>
> *(5) The Defendant , by himself , his servants and/or agents approached the Plaintiff and his family members at his old dwelling house at Meneng District and advised the Plaintiff that they proposed to renovate the Plaintiff's old dwelling house.*
>
> *(6) The Plaintiff welcomed the proposal and agreed to the renovation of his old dwelling House because the Plaintiff knew that the government was assisting Nauruans in need to renovate or build their houses through a government housing scheme.*
>
> *(7) The Defendant , by himself , his servants and/or agents took measurements at the old dwelling house for the purpose of assessing and purchasing building materials for the renovation of the Plaintiff's old dwelling house. These measurements were for the purpose of obtaining quotations for the materials to be used for the renovation.*
>
> *(8) The Defendant , by himself , his servants and/or agents demolished all the four rooms , The toilet , the kitchen , the washing area , among other things in the old dwelling house and built a new one with bricks timber and corrugated iron. This new dwelling house was built from the floor of the old dwelling house.*
>
> *(9) The Defendant , by himself , his servants and/or agents built the walls of the new dwelling house with bricks , the roof structure with timber and covered the roof with corrugated iron. The new dwelling house had no rooms , no kitchen , no bathroom , no toilet and no electricity from the date the renovations ceased until the date of the Claim. The Defendant told the Plaintiff that he would complete the rooms , kitchen , bathroom , toilet and get electricity into the house.*
>
> *(10) The Plaintiff called the Defendant by phone a number of times to make enquiries about the*

completion of his new dwelling but there were no responses from the defendant.

(11) As a result , the Plaintiff sought legal assistance from the Office of the Public Legal Defender ("OPLD") and on 4th November 2019 , a letter was written by the Director of the OPLD on behalf of the plaintiff , asking the Defendant to :

a. Complete the Planitiff's dwelling house ; or

b. Provide money to the plaintiff so that the Plaintiff could purchase materials and employ his own carpenter in order to complete renovations to his house.

(12) The Plaintiff asked for a sum of $37,000.00 as sufficient funds to complete the renovations. This sum was based on the prices of the building materials at the material time."

4. Notable by its absence , is any averment of the formation or existence and breach of the terms of a building contract between the parties and any *"valuable consideration"* moving from the plaintiff to the defendant in support thereof. Neither is there a claim in "*negligence"* alleging a *"duty of care*" and breach thereof on the defendant's part other than a vague reference to assistance being provided to : *"Nauruans in need to renovate or build their house through a government housing scheme* (whatever that is or might entail).

5. On 11 June 2020 the defendant in denying liability for the Claim , filed a Statement of Defence wherein he pleaded interalia :

(4) Join issue with contents of para 4. With additional comment that Defendant's responsibility as an MP for Meneng District is primarily to help his constituents under the Nauru Housing Scheme and not all Nauruans ,….. In the Plaintiff's case the Defendant was originally using whatever government funding that were left over under his control before the 2019 parliamentary General Election.

(5) Deny contents of para 5. No approach was made by the Defendant to the Plaintiff with proposal to renovate the latter's house. The Defendant was approached and invited by one of the plaintiff's son namely John Jeremiah acting on advise from the Plaintiff to source out renovation of the old worn-down family dwelling house and to consult the Plaintiff on necessary programme of work.

(6) Deny contents of para 6. As in paragraph 5 above, there was no proposal by the Defendant. The plaintiff in pursuit of his approach to his MP the Defendant , welcomed imminent work to his old worn-down family house. It had been general knowledge on Nauru that a Government Housing Scheme was availed to those in need.

(7) Admit to contents of para 7.

(8) Admit to contents of para 8. The demolition was really necessary with consent from the Plaintiff to enable repairs and renovation to the rooms , toilet , kitchen and washing areas. The old house was small and well worn down along with kitchen and bathroom in atrociously unhealthy conditions. The Defendant with sympathetical concerns deviated from government policy of "repair and renovate" , but agree with the Plaintiff to "demolish and rebuild".

(9) Join issue with certain contents of para 9 , on the basis that prior to the rebuilding process the kitchen and bathroom areas were long broken down and not in use. Thereby demolition was justified……

and later :

(24) Deny the contents of para 24, to be a misleading statement. The said construction business is wholly and legally owned , registered and managed by the Defendant's wife. The wife is the supreme boss of the company. Any others associated with the entity are agents , assistants , facilitators or employees.

(25) Deny contents of para 25. The said Damages supposed to be incurred upon the Plaintiff ensued from his own actions. As depicted above, the Plaintiff had been a source of grave nuisance by constantly meddling into the scope of work……

(a) The Plaintiff's undesired actions contributed to the unfinished project , exacerbated by denial of government funding to the Defendant under the Nauru Housing Scheme after the new GE; inability of the workers to work due to constant interference by Plaintiff ; threats to workers by Plaintiff ' theft of the power saw machine on plaintiff's property ; aggressive attitude by Plaintiff toward workers ; Plaintiff's refusal to let Defendant complete the project.

(b) The purported agreement was not legally binding. The renovation project was instigated by approach to the Defendant. The Defendant did not offer service to renovate Plaintiff's house , …… The Defendant was invited to renovate the Plaintiff's house. No payment was offered or given to the Defendant by the plaintiff to work on his house. The Government Nauru Housing Scheme caters for all expenses – material , labour , etc. In other words the Plaintiff should sue the government as the principal in the GNHS project. The "gentleman's agreement" between the two parties on the project by the Defendant was breached through actions by the plaintiff.

6. Significantly , in the plaintiff's Reply to the Statement of Defence he admits *"para 8"* and *"confirms consenting to the demolition of the home".*

7. Be that as it may , on 8 September 2020 counsels executed a document entitled AGREED FACTS AND ISSUES in which the parties agreed two (2) facts as follows :

"(1) The plaintiff is a resident at Meneng District whose dwelling house was being renovated. (by who , is undisclosed) ;
(2) The defendant is currently a Member of Parliament and was a cabinet Minister before August 2019. (the relevance of this fact is also unclear) ;

8. The document also sets out four (4) agreed issues for determination :

- *Whether the plaintiff or the defendant terminated the agreement ?*
- *Whether the work done was up to standard ?*
- *Whether there was an intervening act that affected the work ?*
- *Whether the intervening act was sufficient ?*

9. If I may say so , the latter two (2) issues are meaningless without identifying what the *"intervening act"* is , and the first two (2) issues improperly assumes the existence of a valid enforceable agreement that has been part-performed by the defendant and which has been terminated.

10. Given the rather vaguely worded pleading of the *"cause of action"* and with a view to better understanding the true nature of the claim , plaintiff's counsel was directed on 16 February 2021 to provide two (2) case authorities that supported the *"cause of action"*. The Court was also mindful that the purpose of pleadings is to enable and inform the opposing party to know what claim is being made in sufficient detail to enable that party properly to prepare to answer it [***per*** Sackville LJ in British Airways Pension Trustees v Sir Robert McAlpine Sons Ltd *(1994) 45 Con LR 1 (CA*].

11. In this regard on 22 March 2021 Counsel drew the Court's attention to the Australian case of Caming v Temby (1905) 3 CLR 419 which concerned a written contract for the sale of land where there was a no completion date and making time of the essence and the approaches of the common law and equity to the same. This case is easily distinguished on the facts.

12. It does not support the pleaded *"cause of action"* and plaintiff's counsel conceded as much on the next mention date 22 April 2021 where he is recorded to have said :

"Claim not based on a written contract. It is based on an oral contract. Defendant is not a builder. He was a Minister MP at the time , there was no consideration for the oral contract".

13. On that date , the Court adjourned the case for a further month until 20 May 2021 and the plaintiff was ordered :

".... to file and serve a written submission with authorities in support identifying the cause of action which the claim is based on or the enforceable agreement alleged to exist between by the parties by 18/05/2021."

14. On 03 May 2021 in the absence of any submission from plaintiff's counsel , defence counsel filed an application seeking an order that the claim *"be struck out on the ground that it discloses no reasonable cause of action"* pursuant to Order 15 rule 19(a) of the Civil Procedure Rules 1972 which in turn , disallows consideration or the admission of any evidence [***see*** : Or15 rule 9(2)] beyond the pleadings.

THE SUBMISSIONS

15. On 20 May 2021 the *"strike out"* application was heard. Defence counsel submitted that :

"The claim refers to (an undisclosed and unexplained) ***Government Housing Scheme originated , funded , and dealt by Government where the Government builds houses for people*** *(*again , how or through what means is undisclosed). ***My client is a builder*** (this assertion plainly conflicts with para 6 above and the plaintiff's understanding) ***contracted by Government*** (how and when is undisclosed) ***to build the plaintiffs' house hence no privity of contract nor any consideration passing between the plaintiff and the defendant".***

16. Plaintiff's counsel in his written response broadly submits that : *"The cause of action being pursued is the law of contract"* where the defendant *"asked* (offered) *to renovate* (the plaintiff's house)" and the plaintiff orally accepted the offer and allowed the defendant access to his house. As for "*consideration*" , counsel writes : "..(the plaintiff) *accepted the offer on the promise that the renovation was to be completed under the Nauru Government "Housing Scheme"* **(NGHS)** , and counsel writes further : *"although no money was given to* (the defendant) *under the normal rules of consideration,* (whatever that means) *the consideration provided was that of* (an unpleaded) *"promissory estoppel"*

(my insertions in brackets)

17. If I may say so , the suggestion that ***"promissory estoppel"*** can constitute *"valuable consideration"* as that expression has come to be understood in contract law , without further elaboration and , where counsel himself has earlier conceded that *"..there was no consideration for the oral contract" ,* is both rash and unacceptable.

18. The modern "*doctrine of promissory estoppel"* as it has come to be called , owes its origins to Lord Denning MR in his seminal judgment in Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (*"the High Trees case"*) where he said interalia (at p134):

" The law has not been standing still since Jordon v Money. There has been a series of decisions over the last 50 years which , although they are said to be cases of estoppel they are not really such. ***They are cases in which a promise is made which was intended to create legal relations and which to the knowledge of the person making the promise , was going to be acted on by the person to whom it was made , and which was in fact so acted on. In such cases the courts have said that the promise must be honoured….."***

and later , in recognising several limitations of the "*doctrine*" his Lordship said:

"In each case the court held the promise to be binding on the party making it , even though under the old common law it might be said to be difficult to find any consideration for it. ***The courts have not gone so far as to give a cause of action in damages for breaches of such promises , but they have refused to allow the party making them to act inconsistently with them."***

(my highlighting)

19. The *"high water mark"* in this latter regard is another judgment of Lord Denning in Combe v Combe [1951] 1 ALL ER 767 where he said in explaining the *"doctrine"* at p 770:

"In none of these cases was the defendant sued on the promise *, assurance , or assertion or a cause of action in itself.* ***He was sued for some other cause of action*** *…… and the promise, assurance, or assertion only played a supplementary role …… that is , I think , its true function.* ***It may be part of a cause of action , but not a cause of action itself*** *…..*

Seeing that the principle never stands alone as giving a cause of action in itself , it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side wind ….. , it still remains a cardinal necessity of the formation of a contract."

(my highlighting)

20. Interestingly , it was in Combe's case that Birkett LJ endorsed as *"very vivid"* , counsel for the husband's description of the "*doctrine"* as being used *"…as a shield and not as a sword.."* This description has become synonymous with the *"doctrine"*.

21. In similar vein albeit sixty (60) years earlier , Bowen LJ said in Low v Bouverie (1891) 3 Ch D 82 (at p 105) :

"Estoppel is only a rule of evidence ; you cannot found an action on estoppel. *Estoppel is only important as being on step in the progress towards relief on the hypotheses that the defendant is estoppel from denying the truth of something which he said …….* ***The language on which the estoppel is founded , must be precise and unambiguous."***

22. On the basis of the foregoing , *"promissory estoppel"* cannot provide *"consideration"* or be a *"cause of action"* on which a claim might be based or initiated.

23. Plaintiff's counsel submits that :

"(the) *defendant entered into the verbal agreement in his capacity as an MP and Minister of Infrastructure not in his personal capacity. Defendant operated under a Government Housing Scheme using his wife's construction business.* (unpleaded). *Accept defendant entered into the verbal agreement as an agent of the Government* (how , is unpleaded)".

Asked why then , wasn't the Nauru Government sued as : *"the principal"* , counsel blithely answered that it did not occur to the plaintiff to sue Government yet , his house was purportedly being renovated under its Housing Scheme.

24. For completeness , counsel submits there was *"an intention from both parties to create legal relations"* (based on what is undisclosed) and the agreement between the parties is *"…certain and complete…* (and)… *capable of constituting a binding contract"* (in the absence of any completion date ; scope of works ; bill of quantities of materials ; detailed drawings or an arbitration clause). Counsel concludes that there is a reasonable *"cause of action"* pleaded and *"at least each element of the law of contract has been addressed"* except for the *"cardinal necessity"* of consideration.

(my insertions in brackets)

25. In brief , the oral agreement was *"to demolish and rebuild"* the plaintiff's four (4) bedroom house under the NGHS , the terms of which are unknown but within the availability of government funding which presumably would be a common assumption to both parties. In this regard reference may be made to the judgment of the Privy Council in Auckland Harbour Board v The King [1924] AC 318 where the **headnote** reads *interalia* :

"It is a principle of the British Constitution , inherited in the Constitution of NZ , that no money can be taken out of the consolidated fund into which the revenues of the State have been paid , except under a distinct authorisation by Parliament itself ; a payment made without that authority is illegal and ultra vires , and the money , if it can be traced can be recovered by the Government" (***see :*** in this regard Arts 58 & 59 of our Constitution).

26. It is also difficult to pinpoint the loss or damage (if any) allegedly caused to the plaintiff's *"old dwelling house"* which was in such a derelict state that it had to be gutted completely (with the plaintiff's agreement) , before being rebuilt with new concrete brick outer walls , a new timber roofing structure and new corrugated iron roofing sheets , all at no cost to the plaintiff.

27. In response , defence counsel iterated that there is no possible *"cause of action"* in contract in that , the NGHS which is a Government Housing Scheme , could not give rise to commercial building contracts that bind private individuals. It is also common ground that the plaintiff's rebuilding works that was started under the Scheme was abruptly terminated because *"Government funding dried up"* through no fault on the defendant's part.

28. In this latter regard I can do no better than to paraphrase what Rowlatt J said in "The SS. Amphitrite" [1921] 3 KB 500 where the British Government was sued in contract for damages for breach of an undertaking to give clearance to the plaintiff's ship which it refused , at p 503 :

"I have not to consider whether ...what Government did was morally wrong or arbitrary ; that would be altogether outside my province. All I have got to say it whether there was an enforceable contract , and I am of opinion that there was not.....this was not a commercial contract ; it was an arrangement whereby (**a Government Minister**) *purported to give an assurance as to what its executive action would be in future in relation to* **(the renovation of the plaintiff's house at Meneng District)**. *And that is , to my mind , not a contract for the breach of which damages can be asked for in a Court of Law. It was merely an expression of intention to act in a particular way* (**in future**). *My main reason for thinking is that it is not competent for Government to fetter its future executive action , which must necessarily be determined by the needs of the community when the question arises. It cannot by contract , hamper its freedom of action in matters which concern the welfare of the State."*

(my insertions in bold)

DISCUSSION and DECISION

29. **Order 15 rule 19(1)(a)** of the **Civil Procedure Rules 1972** relevantly provides :

"(1) The Court in which any suit is pending may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ of summons in the suit, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence , as the case may be ;

(2) No evidence shall be admissible on an application under sub-paragraph (a) of the last preceding paragraph."

30. Plainly , the Court is given a discretion in any pending case and at any stage of the proceedings , to strike out any claim on the ground interalia that the pleading. "*..discloses no reasonable cause of action..."* and , the Court *"may order the suit to be ….dismissed."*

31. In Kepae v Jeremiah [2019] NRSC 29 Vaai J. described , **Order 15 rule 19(2)** as having *"logic and purpose"* in so far as in , a strike out motion which alleges no *"cause of action"* : *"…the court assumes that the pleadings in the Statement of Claim can be proven or are assumed to be correct…. The* (rule) *however does not necessarily exclude the use of affidavits in support of the strike out motion…"*

32. In this latter regard and notwithstanding **rule 19(2)**, reference may be made to the Statement of Defence and Reply (if any) being part of the pleadings in the case from which a *"cause of action"* might be derived or inferred. In the present case , the facts pleaded in **paras 4,5,6,9&10** of the Claim are denied and **para 8** although admitted , is explained. Immediately if I may say so , the assumptions that the pleadings in the claim are *"correct"* and/or *"can be proven"* are undermined.

33. Be that as it may , although the court's discretion to strike out under Order 15 r19(1)(a) is unfettered , the pre-emptive nature and finality of the court's order is such that a cautious even benevolent approach should be adopted to ensure that the plaintiff is not summarily denied the opportunity of having his *"day in court"* and having his claim determined after a trial (***see*** : *per* Vaai J in Tom v Beneficiary of the Est of Ediribaini Tom [2019] NRSC 14 at para 11- referring to Halsbury's *Laws of England* (4th ed) para 435.)

34. The summary jurisdiction to strike out a claim as disclosing no reasonably arguable *"cause of action"* is one to be sparingly exercised in a plain and obvious case where it appears to the Court even after extensive argument , that the pleaded *"cause of action"* is so clearly untenable that it has no possible chance of success and is certain to fail. (***see*** : *per* Eames CJ in Tamakin v Ronphos [2012] NRSC 9 at para 14.)

35. In the present case , I have no reason to doubt the existence of the Government Housing Scheme which is common ground , but , in the absence of any clear evidence of its terms and conditions pertaining to a person's eligibility for assistance and how and through who or what agency the Scheme is to be implemented , there is no proper basis for imposing a private personal liability on any Minister or elected Member of Parliament on the bald assertion that he had something to do with it.

36. It is common ground that the renovation of the plaintiff's house was being undertaken under the Government Housing Scheme and involved *"public funds"* over which a Minister presumably had a dispensing power and discretion. The plaintiff's complaint at its most basic , is about abuse of power and/or the negligent application of public funds (***see*** *:* Takaro Properties Ltd v Rowling [1978] 2 NZLR 314 at pp 323/328 *per* Woodhouse J.) or , in the absence of a *"duty of care"*, the plaintiff may rely on the *"tort of misfeasance*

in public office" (***see*** : Three Rivers DC v Bank of England [2001] 2 All ER 513 (HL) at p 526 *per* Lord Hope of Craighead).

37. Finally , there may be a judicial review claim for *"wilful misconduct"* according to the *"legal principles"* outlined by Lord Bingham of Cornhill in Magill v Porter [2001] UKHL 67 at paras 19, 20 and 21 where , in rejecting the pursuit of narrow political ends as a *"lawful purpose"* for a housing scheme his Lordship said :

"...a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985 which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act."

38. After carefully considering the plaintiff's pleadings including the Reply to defence , and counsels written and oral submissions , I am not at all satisfied that the plaintiff has a valid or arguable *"cause of action"* in contract as pleaded , or , that it can be amended to raise one in the absence of any valuable *"consideration"* provided by the plaintiff.

39. Accordingly , the claim is struck out with costs of $300 summarily assessed and payable to the defendant within 30 days.

Dated : this 15th day of July , 2021

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D.V.FATIAKI
CHIEF JUSTICE