REEF PACIFIC TRADING LIMITED -v- THOMAS KAMA

High Court of Solomon Islands
(Palmer J.)
Civil Case No. **209 of 1993**
Hearing: **24 November 1993**
Judgment: **4 February 1994**

M. Rafter for Plaintiff
T. Kama in person

PALMER J: This is an application by way of a summons filed on the 9th of August 1993, by the Defendant, to have the Writ of Summons struck off, inter alia as it is vexatious, embarrassing and an abuse of the process of the court.

The first point to consider is whether it can be justifiably said that the statement of claim filed on the 13th of July 1993 together with the Writ of Summons is vexatious and embarrassing.

It is not disputed that the Defendant had acted as legal counsel at one stage for the Plaintiff in the cases ***Peter Alexander Mathew -v- Reef Pacific Trading Limited, CC65/91*** and ***Island Enterprises Limited -v- Reef Pacific Trading Limited, CC119/90.*** The Defendant submits however that these related to specific matters which he duly attended to and then withdrew his services to take up a case against Reef Pacific Trading Limited in Civil Case 246/91. The Defendant submits that he had considered the instructions received from his clients very carefully, and after having satisfied himself that there was no conflict with the other two cases, he agreed to take up an action in CC246/91.

In paragraph 7 of the statement of claim, there is a specific allegation of impropriety against the Defendant, for using one set of instructions which he had already been told by the plaintiff were false, against the Plaintiff in CC246/91.

In paragraph 8, there is an allegation that the Defendant failed to return all files, notes, memorandum and other materials provided to him by the plaintiff. The Defendant denies holding anything belonging to the Plaintiff, however there seems to be an

acknowledgment that at some stage these were handed to the Receivers as appointed by the court.

In paragraph 9(i), there is an allegation of a failure to preserve the confidentiality of information entrusted to the Defendant. What exactly that piece of information is not known, but I can accept that it is a matter that can be further pursued under an application for further and better particulars.

I can accept from the above allegations that there is a cause of action against the Defendant for negligence.

However, the second part of the Defendant's application needs to be considered in detail.

This relates to the submission that this action is an abuse of the courts process, by way of a threat for a collateral advantage in CC 246/91. Mr Kama submits that CC209/93 had been instituted to further levy pressure on him to come to some sort of settlement with the Plaintiffs in CC246/91.

In paragraph 6 and 7 of Mr Kama's affidavit filed on the 22nd of September 1993 he states and I quote:

> *"On Monday 26th July, 1993 I met Mr Milte and Mr Tegavota at the Honiara Hotel. Mr Milte started the discussion by accusing my clients and claimed that the Federal Police of Australia would soon have an order to arrest Mr McCluskey of Price Waterhouse which was and still is a Defendant in action No.120 of 1993 and Mr Price would soon be arrested on his part in action No.246/91. I was asked to contact my client in action No.246/91 to consider the discharge of the writ of fieri facias and agree to the release of the monies held by the Registrar of the High Court in respect of execution against the Plaintiff in various other actions including CC246/91 and he will discontinue the writ against me. He produced from his papers a document and gave it to me and on reading it I discovered that it was an unexecuted copy of writ of summons by the Plaintiff against Mr Andrew Nori. He further stated that he would not take any further action against local practitioners which he meant Mr Nori and myself if my clients agreed to settle. He asked me to contact Price Waterhouse and ask Mr McCluskey to come to Solomon Islands to negotiate a settlement in action No.120/93. I replied him that I would contact my clients about his suggestion and I would contact him later in the week. He said he could only wait until Tuesday afternoon. I have a firm belief that Mr Milte's proposal is grossly unprofessional.*

> *I was in court most of monday 26th July 1993 and called Mr Price on Tuesday 27th July, 1993 and discussed Mr Milte's client's proposal. He was amazed that Mr Milte could issue such a threat to attempt to settle an action and refused the proposal entirely. In the afternoon I called Mr Milte and informed him that my client would not agree to the release of the monies held by the Registrar to Mr Milte's client until further orders of the court."*

In a further affidavit filed on the 28th of September 1993, Mr Kama stated at paragraph 2, 3 and 4:

> *"On Monday 26th July, 1993 in the same meeting stated in paragraph 6 of my Affidavit filed on 22nd September, 1993 further demonstrated a threat against me. He produced and handed to me an unexecuted Affidavit by Mr Wolfgang Meiners. I read it through quickly and asked him what relevance was it to the present proceedings and he just laughed.*
>
> *At about 9.05 am on 23 September, 1993 two police officers came into my office and asked to see me. I accepted them and after a brief explanation I was shown a charge and an affidavit. Having glanced through I realised that it was the same Affidavit shown to me by Mr Milte on 26th July, 1993. Now shown to me and produced marked "C" are true copies of the Affidavit and charge.*
>
> *I can now understand Mr Milte's intention then was to threaten me with civil and criminal action if my clients and I did not agree to the proposals for settlement he put to me and asked me to convey to my clients.*

From what Mr Kama has deposed to, he seeks to establish that these proceedings had been brought for an improper purpose, and therefore an abuse of the courts process.

Mr Kama seeks to rely on several case authorities in support of his submission. The two of direct relevance are, ***Williams and Others -v- Spautz 174. C.L.R 1992, 509.,*** and ***Goldsmith -v-Sperrings Ltd [1977] 2 All E.R., 566.***

The facts in ***Goldsmith -v- Sperrings Ltd,*** briefly are as follows. The Defendants were news agents whose business activities included the distribution of newspapers and magazines of various kinds. One of the magazines which they distributed was called Private Eye. This magazine had the reputation of being a "*...contentious and controversial magazine which made a practice of caricaturing well known people for the amusement of its readers...*" especially focusing on matters of wrongdoing. On three of its successive

publications, it made references to the Plaintiff, which were unpalatable to him. He therefore sued the Defendant and 36 other secondary distributors. On receipt of the writs, some of the distributors decided not to handle any further publications of the magazine. For such distributors the suits were promptly dropped. Others decided not to distribute copies of the magazine which contained publications making references to him. This was not acceptable to the plaintiff. He wanted a blanket refusal to distribute any further publications of 'private eye'. Altogether, 16 distributors agreed not to distribute Private Eye again. The others and the Defendant, took out a summons instead, to have the plaintiff's actions '...stayed or dismissed on the ground that they had not been brought bona fide for proper purposes but were an abuse of the process of the court in that the plaintiff's purpose in issuing the writs was to obtain an extraneous or collateral purpose which could not have been obtained in a judgement of the court against them...'

The Court of Appeal in a majority decision, ruled that the actions of the plaintiff was not for an improper or ulterior purpose. ***Lord Denning MR*** dissented. However, his assessment of the law is relevant. At page 574, he states:

> *In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the indication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression or to exert pressure so as to achieve an improper end. When it is so abused, it is tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.*
>
> *At other times the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law. This appears distinctly from the case which founded this tort. It is* ***Grainger v Hill*** *which arose out of the old process of capias. The plaintiff recovered damages for abuse of the process. It had been abused because it had been taken, as Tindal CJ said, 'to effect an object not within the scope of the process,... and as Bosanquet J said:* ***'the process was enforced for an ulterior purpose."***

In the judgment of ***Scarman L J.,*** he states at page 581 and 582:

> *"If the plaintiff's purpose in initiating or pursuing his actions against the secondary distributors be to destroy Private Eye, to use his wealth so as to suppress it, he is abusing the process of the court. Neither wealth nor power entitles a man to censor the press. If, however, his purpose be to vindicate and protect his reputation the use of all remedies afforded him by the law for that purpose cannot be an abuse of the court's process. It is never easy to determine a man's purpose. Ordinarily this task of judgment is tackled only after trial. In the instant case, we are being asked to pass judgment on the plaintiff's purpose on a preliminary application, the effect of which, if successful, will prevent him bringing to trial actions in each of which (it was admitted in argument) he is pleading a cause of action recognised by the law. It is right therefore, that to obtain before trial the summary arrest of a plaintiff's proceedings as an abuse of the process of the court the task of satisfying the court that a stray should be imposed is, and should be seen to be, a heavy one: See* ***Shackleton -v- Swift.*** *Unless the court is satisfied, a stay is a denial of justice by the court - a situation totally intolerable.*
>
> *In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process:'* ***Grainger v Hill per Tindal CJ.*** *In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought:* ***see Re Majory."***

At page 583, his Lordship continued:

> *"But equally a man, while pursuing the remedies offered by law, may negotiate, to secure by agreement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement. Such a negotiation, undertaken by properly advised parties, each of whom may have a legitimate interest in avoiding litigation and may be prepared to concede more than the law requires of them to achieve that end, does not necessarily mean that the plaintiff by his litigation is reaching out to secure a collateral advantage."*

At page 586, Bridge LJ also had some pertinent remarks to make. I quote:

> *"For the purpose of Evershed MR's general rule, what is meant by a collateral advantage? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose on an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant and alternative right of way over the defendant's land, these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it. But on the view I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract."*

The second case relied on is **Williams and Others -v- Spautz** (1992) 174 C.L.R 509. The facts of that case briefly involved a lecturer who commenced an action against a university for wrongful dismissal. The lecturer then later took other actions against various officers of the university for various offences. Those officers then sought declarations for stay of proceedings on the basis of abuse of process, arguing that the lecturer's predominant purpose in instituting and maintaining the criminal proceedings was to exert pressure upon the university to reinstate him and (or to agree to a favourable settlement of the case for wrongful dismissal).

On a majority decision, the High Court of Australia ruled that the prosecutions were an abuse of process and properly stayed. The High Court adopted ***Lord Evershed's dictum*** *in the case* ***In Re Majory [1955] Ch., at pp 623-624*** as stating the correct principle of law:

> *"that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral*

> *advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."*

I am satisfied this statement of principle should also be applied here.

This brings me to consider the application of this principle to the facts as alleged by Mr Kama.

First, has an improper purpose been established?

In paragraph 6 of Mr Kama's affidavit as filed on the 22nd of September 1993, he states:

> *"I was asked to contact my client in action CC No.246/91 to consider the discharge of the writ of fieri facias and agree to the release of the monies held by the Registrar of the High Court in respect of execution against the Plaintiff in various other actions including CC 246/91 and he will discontinue the writ against me. He produced from his papers a document and gave it to me and on reading it I discovered that it was an unexecuted copy of writ of summons by the plaintiff against Mr Andrew Nori. He further stated that he would not take any further action against local practitioners which he meant Mr Nori and myself if my clients agreed to settle."*

In a further affidavit filed on the 28th of September 1993, at paragraph 2, Mr Kama also stated:

> *"On Monday 26th July 1993, in the same meeting stated in paragraph 6 of my Affidavit filed on 22nd september, 1993 further demonstrated a threat against me. He produced and handed to me an unexecuted Affidavit by Mr Wolfgang Meiners. I read it through quickly and asked him what relevance was it to the present proceedings and he just laughed."*

In response to these affidavits the plaintiffs have filed an affidavit by Kerry Leon Milte on the 27th of September 1993. At paragraph 17(e), Mr Milte denies mention of any action against Mr Andrew Nori, and mention to Mr Kama, of any criminal action against him. There was however no mention or denial of the assertion, by Mr. Kama

that he was shown an unexecuted copy of a writ of summons by the plaintiff against Mr Andrew Nori.

There has also been no further affidavit filed in response to the assertion by Mr Kama in his further affidavit filed on the 28th of September 1993.

There is no justification for showing that unexecuted affidavit of Wolfgang Meiners to Mr Kama on the 26th of July 1993, other than to exert pressure on him to agree to the terms as put to him by Mr Milte. It was totally unrelated to civil action 246/91.

The omission too by the Plaintiff to file an affidavit by Mr Philip Tegavota in my view is quite significant. Mr Tegavota was present during the discussions held between the Defendant and Mr Milte at Honiara Hotel. Although he acts as the town agent for the Plaintiff's Solicitor, he could be regarded to some extent as an objective witness to the discussions that transpired that morning. His omission whether deliberate or inadvertent, does not help the plaintiff's case.

On the balance of probabilities I am satisfied that the proceedings instituted and maintained against Mr Kama were for an improper purpose. Mr Milte had no right in law whatsoever, to require Mr Kama to ask his client in action 246/91 to consider discharging the writ of fieri facias and to agree to the release of funds held against that case, in exchange for the discontinuance or withdrawal of the writ in this proceedings against him. The writ issued against Mr Kama is completely separate and different from the actions taken by Mr Kama's clients in CC No.246/91.

The collateral advantage sought, related to the discharge of the writ of fieri facias and the release of surplus funds held by the Registrar of the High Court inrespect of execution against the Plaintiff in CC No.246/91. This was contrary to the purposes for which this proceeding had been designed to achieve. This proceeding sought damages for Mr Kama's negligence. It cannot be said that the actions of Mr Milte as the purported legal counsel for the Plaintiff could ever be brought within the bounds of the remedy sought in this proceeding.

The mention of this action too by Mr Milte in the hearing of an application CC 246/91, on the 22nd July 1993 was most improper, and inappropriate, and goes to show the way in which this action was intended as far back as the 22nd of July 1993 to be used as a bargaining tool to obtain a collateral advantage. Whether Mr Kama was aware of this pending action against him on that date makes no difference, as this case is different and separate from the action in CC 246/91. The fact also that Mr Milte may have felt so strongly about his clients having been placed in a desperate situation by a series of

judgments obtained against them through fraud, does not entitle him to raise this action in that hearing.

The directors of the Plaintiff Company deny instructing their solicitor to make any such suggestions to Mr Kama. However, on the balance of probabilities, I am not satisfied that the actions of Mr Milte could not have been at his own instigation. The case was filed at a time when the writ of fieri facias was sought to be renewed by Mr Kama and also when the judgment obtained in CC 246/91 was being sought to be set aside. Further, Mr Kama was specifically called for discussions on Sunday the 25th inrespect of CC 246/91. I doubt very much that the suggestions made by Mr Milte were made on his own initiative.

In paragraph 5 of Mr Kama's affidavit filed on the 22nd of September 1993, it was indicated there that Mr Tegavota knew what was going on, but refused to take part in it, because he knew that it was improper. Mr Tegavota was present during the discussions on the 26th of July 1993 at the Honiara Hotel. He was therefore a witness as to what transpired in that discussion. I have pointed out he has not made any affidavit in support of Mr Milte's affidavit. I have also pointed out that this does not help the Plaintiff's case, and on the balance of probabilities I accept the version of Mr Kama as correct and true.

There may have been a prima facie case against the Defendant. However, the timing of this proceedings would seem to also support the view that it was intended to add pressure on the Defendant to get his clients in CC 246/91 to settle that action according to the terms of the Plaintiff.

Does the Plaintiff have an ulterior motive in bringing this action? The actions of the Plaintiff's solicitor and the suggestions made to Mr Kama show this quite clearly. Does the Plaintiff seek a collateral advantage for himself beyond what the law offers, 'to effect an object not within the scope of the process'? With respect, I am satisfied that is so.

There is evidence before me to show that this court proceeding was used or threatened against Mr Kama to obtain some collateral advantage other than for the purpose for which such proceedings were properly designed and exist. I am satisfied accordingly on the balance of probability that this proceeding amounts to an abuse of the courts process and accordingly should be stayed permanently.

The other submission brought before this court is that Mr Milte is not qualified under the Legal Practitioner's Act 1987 to commence legal proceedings in this case. The policy adopted by the learned Chief Justice in admitting qualified lawyers from other

jurisdictions to practice in this jurisdiction is on a case by case basis. Mr Milte's admission has been confined to representing the Plaintiff, Wolfgang Meiners, Joan Meiners and Davinia Philips in Civil Case No. 246/91. It is not a general certificate of admission.

It is not disputed that Mr Milte is a qualified lawyer. However, his Certificate of Admission does not entitle him to commence proceedings inrespect of this action. Had I not found that there had been an abuse of the courts process, I would have given time for amendment of the writ of summons so that the process is commenced by a qualified lawyer duly admitted to practice in this jurisdiction. Unfortunately, for the plaintiffs that is not possible.

The appropriate order is to have the proceedings stayed permanently, with costs.

(A.R. Palmer)
JUDGE