

MARINE EXPORTS LIMITED-v-ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS
(Mwanosalua, J.)

Civil Case No: 42 of 2005

Hearing: 12th May 2006
Ruling: 14th July 2006

A. Radclyffe for the Plaintiff
N. Moshensky QC and M. Ipo for the Defendant

RULING

Mwanosalua, J: On 3rd March 2006, the Court granted leave to the Plaintiff to seek redress under section 18(1) of the Constitution against the Defendant who by law stood in for Solomon Islands Government. On 17th March 2006, the court granted further leave for the Plaintiff to file pleadings in support of its other claims for damages in tort so that all matters can be heard at the same time in this case. That Statement of claim was filed on the same day seeking relief inter alia: (a) declaration that the Fisheries (Prohibition of Export of Dolphins) Regulation 2005 ("the Regulation") is null and void; in the event that the court declines (a) above, compensation pursuant to Section 18 of the Constitution for breaches of Sections 3 and 8 of the Constitution; (c) damages for wrongfully interfering with the contract referred to in paragraph 9 of the Statement of Claim and (d) exemplary damages on the grounds of oppressive, arbitrary or unconstitutional action by the Government Minister and/or Government Servants.

In the meantime, the Defendant seeks orders by summons filed on 11th April 2006, inter alia, to: (a) strike out the Statement of Claim on the ground that it discloses no reasonable cause of action and is frivolous or vexatious and that the action be stayed or dismissed or judgment be entered in favour of the Defendant.

Brief Background

The Plaintiff is a company incorporated in Solomon Islands. It is a foreign owned company. It obtained approval from the Foreign Investment Board[FIB] to export Marine Mammals from Solomon Islands. Later, it obtained a licence to, inter alia, export 80 dolphins per annum. The Licence was valid for the period between 28th April until 31st December 2005. The Licence is renewal annually upon payment of the relevant fee. It executed an agreement with Wildlife International Network Inc. ("the Buyer") to sell 25 dolphins. It then applied to the Government for a permit to export the dolphins. The Permit was never issued even through the Plaintiff had paid the relevant fee. Faced with that situation, the Plaintiff filed civil case No. 511 of 2005 for mandamus to compel the relevant Government official to issue the export permit. While that case was still pending before the court, the Government Minister responsible for Fisheries and Marine Resources made a regulation in November 2005

prohibiting the export of the dolphin species which the Plaintiff was going to sell to the Buyer. The dolphins were not exported.

The Case for the Defendant

The Defendant contends that the claim by the Plaintiff pursuant to Section 18(1) of the Constitution does not disclose any reasonable cause of action because: First, Section 3 of the Constitution is a mere preamble which does not establish any rights independent of those set forth in the succeeding sections of Chapter II; and Second, as the Plaintiff's Statement of Claim does not allege that by virtue of the Regulation its business was acquired by the Government, the protection afforded by Section 8 of the Constitution relates solely to compulsory acquisition of property but does not relate to the deprivation of property or taking possession of property.

Application to strike out the Statement of claim

The power of the court to strike out pleadings is discretionary both under O.27 r.4 of the High Court (Civil Procedure) Rules 1964 and its inherent jurisdiction. O.27 r.4 provides:

"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Under its inherent jurisdiction, the court has power to stay or dismiss actions, and to strike out pleadings which are vexatious or frivolous or in any way an abuse of the process of the court¹. But in this case the Defendant did not make any submissions to support that the Plaintiff's action is either vexatious or frivolous.

The onus is on the Party marking the application to satisfy the court that there is no reasonable cause of action or that there is no question disclosed by the facts for the court to consider. This must be shown on the facts as disclosed in the pleadings².

In Lowa-v-Kipe³, as to what constituted a "Cause of Action" in that case, his Honour Kapi Dep. CJ then, now CJ said at page 290:

"The phrase "Cause of Action" has two components. First, there must be a right which is given by Law, such as, entitlement to reasonable damage for breach of human rights under S.58 of the Constitution. This is what is referred to as the form of action. Secondly, the pleadings must disclose all the necessary facts which give rise to the form of action."

¹ *Reichel v. Magrath, 14 App. Cas 665; Remington-v-Scoles [1897] 2 ch1 and Reef Pacific Trading Limited and Others- v-Reef Pacific (Sydney) Pty Ltd and Other – Civil Appeal Case No. 1 of 1994 CAC).*

² *Christopher Columbus Abe-v-Minister of Finance and Attorney-General – Civil Case No. 197 of 1994.*

³ *Lowa-v-Kipe [1991] PNG LR265*

His Lordship Muria CJ adopted his Honour's approach as to how pleadings which involve both matters of Constitutional and Statutory Laws can be examined in order to determine the cause of action.⁴

The Plaintiff seeks relief, inter alia, compensation pursuant to section 18 of the Constitution for breaches of sections 3 and 8 of the Constitution by the Government.

Relevant Provisions of the Constitution

Chapter II of the Constitution is headed "Protection of Fundamental Rights and Freedoms of the Individual" and comprises sections 3 to 19 inclusive. Section 3 is in these terms –

"3. Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

- (a) life, liberty, security of the person and the protection of the law;*
- (b) freedom of conscience of expression and of assembly and association; and*
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,*

the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

S.8 is entitled "Protection from deprivation of property" and subsection (1) is in this terms –

"(1) No property of any description shall be compulsorily taken possession of, and no interests in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –

- (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town or country planning or the development or utilization of any property in such a manner as to promote the public benefit; and*
- (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and*
- (c) provision is made by law applicable to that taking of possession or acquisition -*

⁴ *Christopher Columbus Abe-v-Minister of Finance and Attorney-General – Civil Case No. 197 of 1994.*

- (i) *for the payment of reasonable compensation (the valuable consideration of which may take the form of cash or some other form and may be payable by way of lump sum or by installments) within a reasonable period of time having due regard to all the relevant circumstances; and*
- (ii) *securing to any person having an interest in or over the property a right to access to the High Court, whether direct or on an appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the reasonableness of the compensation and the period of time within which it shall be paid."*

Section 18 is entitled "Enforcement of protective provisions" and Subsection (1) is in these terms –

"(1) Subject to the provisions of Subsection (6) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

On any such application for redress, the High Court, by section 18(2), may –

"...make such orders, issue such writs and give such directions, including the payment of compensation as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of the Constitution.

Provided that the High Court may decline to exercise its power under this section if it is satisfied that adequate means of redress for contravention alleged are or have been available to the person concerned under any other law."

Having set forth the relevant provisions of the Constitution which have bearing on the action by the Plaintiff, it is now convenient to deal with the contentions by the Defendant in relation to sections 3 and 8 of the Constitution. The first of such contentions is that, section 3 is a mere preamble which established no independent rights of its own.

My view on this contention is that, section 3 is not a mere preamble, but that it recognized and established the rights and freedoms set forth in its paragraphs (a), (b) and (c). This is evident from the wording of section 18(1) above, where if a person whose rights and freedoms under section 3 are breached, may apply to the High Court for redress, and who may under section 18(2), obtain compensation for the breach of his rights and freedoms under section 3. This contention cannot be supported.

The Second contention by the Defendant is that section 8 merely applies to compulsory acquisition of property, but does not apply to deprivation of property or taking possession of property. It is clear that section 8 applies to compulsory taking of possession as well. That is obvious from the wording of the section. Section 8 sets out the situations in which the

right to deprivation of property may be set aside but that it does not limit the ambit of section 3.

In *Societe United Docks v. Government of Mauritius*⁵, the Privy Council had occasion to construe sections 3 and 8 of the Mauritius Constitution which are very similar to sections 3 and 8 of our Constitution. Lord Templeman delivering the judgment of the Board said, at 841, *"Their Lordships have no doubt that all the provisions of Chapter II, including section 8, must be construed in the light of the provisions of section 3. The wording of section 3 is only consistent with an enacting section, it is not a mere preamble or introduction. Section 3 recognises that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it does not curtail the ambit of section 3. Prior to the Constitution, the Government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognized and declared to exist is the right to protection against deprivation of property without compensation. A constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies. Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition. If by the sugar Terminal Act the appellants were deprived of property without compensation they are entitled to claim redress under the constitution."*

The Plaintiff complains about the effect of the Regulation on its property or interest in property. It alleged that it was compulsorily deprived of its property or interest without compensation, contrary to sections 3 and 8. My view is that a victim of coercive powers exercised by the Government is entitled under our Constitution to redress by way of an award of damages just as under the Constitution of Mauritius.⁶

A company is also entitled to compensation at common law where an Act deprives the company of its business. In *Manitoba Fisheries Ltd v. The Queen*⁷, *"It was held that the Corporation had not taken or acquired the business of the company but the Act had deprived the company of its business and for such deprivation the company was entitled to compensation at common Law. The Supreme Court of Canada rejected the argument that compensation was only payable where a business had been compulsory acquired."*⁸

Section 3 of the Constitution recognizes the right to protection against deprivation of property without compensation. This section recognizes the right to compensation for deprivation of property in accordance with Law. But the use of law to take away property can be set aside if that law does not provide for the payment of compensation.

These facts appear in the statement of claim. The Plaintiff obtained approval from FIB to export Marine Mammals. On 28th April 2005, it obtained a licence to collect and hold marine

⁵ *Societe United docks-v-Government of Mauritius* [1985] LRC 836.

⁶ *Societe United Docks v. Government of Mauritius* [1985] LRC 836 at 843.

⁷ *Manitoba Fisheries Ltd v. The Queen* [1979] 1 RCS 101.

⁸ Referred to in *Societe United Docks v. Government of Mauritius* [1985] LRC 836 at 843

mammals in sea pens. That licence also authorized the Plaintiff to export up to 80 dolphins per annum. On 8th June 2005, it entered into a contract with the Buyer to sell 25 dolphins. In September 2005, it applied for a permit to export the 25 dolphins to the buyer. The permit was never issued ^{it} even though the relevant fee was paid. The Plaintiff is the only business which carried on the export of dolphins in Solomon Islands. In October 2005, the Plaintiff filed civil case No. 511 of 2005 for mandamus to compel the Director of Fisheries to issue the permit. But on 24th November 2005, the Minister responsible for Fisheries and Marine Resource made and published the regulation. The Regulation banned the export of dolphins. The Plaintiff alleged that the Regulation is ultra vires, invalid and deprived the Director of Fisheries of his power to grant the export permit to it. The Plaintiff also alleged that the effect of the ban will destroy its business and will cause economic loss and damage to it. The Plaintiff further alleged that as a result of the Regulation, it has been compulsorily deprived without compensation in breach of sections 3 and 8 of the Constitution of its property or interest in property in relation to: the Contract for Sale of the 25 dolphins to the Buyer; Licence No: FPL-32/2005 and FIB Certificate No. 10/07.

I have considered the submissions made by Counsels and the facts disclosed in the Statement of Claim in this case.

I find that the facts in the Statement of Claim disclose Cause of Action and questions which should be considered by the court.

The result is that the application by the Defendant to strike out the Plaintiff's action is refused. The Defendant is to pay the Plaintiff's costs in this application. I order accordingly.

Francis Mwanosalua
Puisne Judge