'Akau'ola & The Kingdom of Tonga v. Pohiva

Pohiva v. 'Akau'ola, Cocker & The Kingdom of Tonga
Court of Appeal
Roper, Morling and Cooke, JJ
Appeal Nos. 12 and 13/1990

4, 5, 6, 14 September 1990

Appeal – matters of practice and procedure – principles applied by appellate court
Procedure – striking out – sufficient of pleadings
Procedure – judicial review
Administrative law – judicial review – procedure
Administrative law – judicial review – standing
Procedure – further particulars of statement of claim
Procedure – admissibility of irrelevant affidarits
Statutes – English statutes applicable in Tonga – Order 53, Rules of the Supreme Court (UK)

These were three appeals from decisions of the Supreme Court with regard to proceedings issued by 'Akilisi Pohiva. The first and second appeals related to a decision of the Supreme Court to strike out certain paragraphs of the statement of claim, but not to strike out the whole statement of claim for lack of standing or incorrect procedure. The third appeal was from a decision by the Supreme Court [reported at page of this volume] not to require the plaintiff to give further particulars of the statement of claim before the defendants filed their statements of defence

HELD

Affirming the decisions of the Supreme Court:

1. Order 53, Rules of the Supreme Court (UK) relating to procedure for judicial review is not applicable in Tonga by virtue of the Civil Law Act and Order IV rule 1 of the Tongan Supreme Court Rules;
2. The appropriate procedure for instituting proceedings for judicial review is by issuing a writ of summons;
3. A plaintiff in proceedings for judicial review must show that he complies with the common law requirements for standing, i.e. his own private rights or interests are affected or he has some interest in the subject of the action, unless he has obtained the fiat of the Attorney-General;
4. A determination of whether a plaintiff has standing is a mixed question of law and fact and since more facts may emerge at the trial, the whole statement of claim should not be struck out before the trial;

5. Affidavits filed by the defendants in support of the application to strike out certain paragraphs of the statement of claim should not have been admitted as they were not relevant to the ground upon which the application was made;
6. Certain paragraphs of the statement of claim should be struck out since they alleged a breach of fiduciary duty for which there was no adequate basis in law, and also did not sufficiently clearly allege that the defendants had misconducted themselves;
7. An appeal from a decision on a matter of practice and procedure will only be allowed in exceptional circumstances and none such had been shown to exist.

Statutes etc considered:
Civil Law Act (Cap 25) sections 3, 4(a)
Rules of the supreme Court (UK) Order 18 and 19
Tongan Supreme Court Rules, Order IV rule 1

Cases considered:
Couriet v *Union of Post Office Workers* [1977] 3 All E. R. 70
Inland Revenue Commissioner v. *National Federation of Self Employed and Small* Business Limited [1981] 2 All E. R. 93
Barra v. *Bethell* [1982] 1 All E. R. 106
Ashby v. *Ebden* [1984] 3 All E. R. 869
R v. *H. M. Treasury ex parte Smedley* [1985] 1 All E. R. 589
Davis v. *The commonwealth* [1986] 61 A. L. J. R. 32

Counsel for Mr Pohiva : Dr R. E. Harrison and Mr N. Tupou
Counsel for Hon. 'Akau'ola and Kingdom of Tonga : Mr A. J. Martin
Counsel for Mr Cocker : Mr W. C. Edwards

Judgment

These are two appeals, which were heard together, from orders made by Martin C. J. on an application to strike out a writ and the whole of a statement of claim filed by 'Akilisi Pohiva (the plaintiff) in proceedings instituted by him against the Honourable 'Akau'ola, the Honourable J. C. Cocker and the Kingdom of Tonga (the defendants).

To avoid confusion we will refer to the parties as the plaintiff and the defendants hereafter. An application for extension of time to apply for leave to appeal against an order of the learned Chief Justice refusing to order the plaintiff to deliver particulars of the statement of claim was heard in conjunction with the hearing of the appeals. The plaintiff is a Tongan citizen and a Member of Parliament as a people's representative. The first defendant is the Minister of Police, responsible for the issue of passports and, so it is alleges, for the issue of letters of naturalisation. The second defendant is the Minister of Finance and Treasurer and responsible for the proper control of public money. The third defendant is the Kingdom of Tonga.

The amended statement of claim is a lengthy document but, in substance, it contains two board allegations, viz:

1. That since November 1984 the first and third defendants have purported to issue letters of naturalization and passports to persons who were not entitled to them. The plaintiff seeks declarations that the letters of naturalization and passports are invalid and orders quashing them and prohibiting the issue of any further such documents.
2. That substantial sums of money have been paid by persons to whom such letters of naturalization and passports have been issued by some or all of the defendants and that this money has not been properly accounted for as required by clause 53 of the Constitution and section 19 of the Government Act. The plaintiff seeks a declaration as to the legal status and ownership of the payments, and orders restraining the first and second defendants from dealing with or disposing of the payments otherwise than in accordance with the law.

Before filing their defences the defendants sought particulars of some of the allegations made in the statement of claim. The application was refused by Martin C. J. who held that the defendants were not entitled to such particulars before filing their defences. The defendants have sought leave to appeal against this decision. Since the decision was given on 5 October 1989, it was necessary for the applicants to obtain an extension of time to apply for leave to appeal. We shall defer consideration of this application until after we have considered the appeals.

The application to strike out the statement of claim succeeded in part. Martin C. J. held that those paragraphs in which allegations are made of failure to account for moneys did not disclose any cause of action and accordingly struck them out. He also struck out allegations that the first and second defendants owed a fiduciary duty to the Kingdom and people of Tonga in respect of moneys alleged to have been received by one or other of them or by the Kingdom of Tonga.

However, he declined to strike out the balance of the statement of claim in which allegations are made that, for a number of specified reasons, letters of naturalization and passports issued by the first and third defendants are invalid.

Before Martin C. J. a number of matters were relied upon by the defendants. It was claimed that the plaintiff has no standing to bring the action and that only the Attorney General can bring it. It was further claimed that, in any event, the proceedings should have brought by way of an application for judicial review under R. S. C. Order 53 which was said to be applicable in Tonga by virtue of section 3 of the Civil Law Act 1966.

The first and second defendants also relied on arguments that the plaintiff could not obtain injunctive relief against them as this would be an indirect way of obtaining that relief against the Crown, that the plaintiff's claim is barred by laches and that the allegations of fact in the statement of claim are not sufficiently specific.

It is convenient to first consider the first and third defendants' appeal against Martin C. J's refusal to strike out the balance of the allegations made against them. In support of this appeal, Senior Crown Counsel presented a lengthy and closely reasoned oral and written argument. Whilst it encompassed a number of points, it was founded essentially upon two propositions. First, it was said that the plaintiff's claim could only be brought by way of an application for judicial review under R.S.C. Order 53 and that, accordingly, the proceedings had been invalidly commenced

since they were commenced by writ, without the prior leave of the Court. Secondly, it was said that, in any event, the plaintiff had no standing to bring the proceedings.

It is important to bear in mind the nature of the proceedings before Martin C.J. It is trite law that the jurisdiction to terminate a plaintiff's action summarily for want of a cause of action is to be sparingly exercised and ought not to be exercised except where the lack of a cause of action is plainly demonstrated. As Martin C.J. observed the plaintiff should be allowed to continue with the action "unless his claim is obvioulsy ill-founded and doomed to failure".

The submission that the plaintiff's claim can be brought only by way of judicial review raises the question whether the current English practice applies in Tonga.

R.S.C Order 53 provides, in part, as follows:

1.-(1) As application for -

(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction under section 30 of the Act restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

(c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2 - .....

Grant of leave to apply for judicial review.

3.- (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made ex parte to a judge by filing in the Crown Office -

(a) a notice in Form No. 86A containing statement of

(i) the name of description of the applicant,

(ii) the relief sought and the grounds upon which it is sought,

(iii) the name and address of the applicant's solicitors (if any) and

(iv) the applicant's address for service; and

(b) an affidavit which verifies the facts relied on.

(3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open court; in any case, the Crown Office shall serve a copy of the judge's order on the applicant.

(4) Where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying -

(a) in any criminal cause or matter, to a Divisional Court of the Queen's Bench Division;

(b) in any other case, to a single judge sitting in open Court or, if the court so directs, to a Divisional Court of the Queen's Bench Division:

Provided that no application for leave may be renewed in any non criminal cause or matter in which the judge has refused leave under paragraph (3) after a hearing.

(5) .....

(6) .....

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

Delay in applying for relief.

4.- (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

The Civil Law Act 1966 provides, inter alia, that:

"3. Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England.

4. The common law of England, the rules of equity and the statutes of general appliction referred to in section three of this Act shall be applied by the Court-

(a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom; and

(b) only so far as the cirsumstances of the Kingdom and of its inhabitants permit and subject to such qualification as local circumstances render necessary."

Order IV, Rule I of the Tongan Supreme Court Rules provides;

"Every action in the Supreme Court shall be commenced by ... a Writ of Summons".

We agree with Martin C.J. that the English procedure for applying for judicial review is rendered inapplicable in Tonga by virtue of the combined effect of Section 4(a) of the Civil Law Act and rule 1 of Order IV of the Tongan Supreme Court Rules.

It has always been competent for an application to be made in the Tongan Supreme Court for relief of the kind referred to in R.S.C. Order 53. A party seeking such relief has been required to commence his proceedings by issuing a writ: vide Order IV rule 1. That is to say, "other provision has been.... made" in terms of Section 4(a) of the Civil Law Act for the procedure for obtaining such relief.

It was submitted by Senior Crown Counsel that even if there is no necessity to apply for leave to bring an application for judicial review, it is still necessary for a writ to be issued within the time limited in rule 4 of Order 53. We do not think this is correct. In our opinion, no part of Order 53 applies to proceedings commenced by writ in the Supreme Court of Tonga. The time limit contained in rule 4 is applicable only to an application brought in conformity with the procedure

contained in rule 3, and it is plain that that procedure can have no application to proceedings commenced by writ without the prior leave of the court.

Senior Crown Counsel argued that if Order 53 rule 4 does not apply to the present proceedings then neither does rule 3(7). We agree with this submission. We do not think it is appropriate to substitute the "sufficient interest" requirement in rule 3(7) for the common law requirement that a plaintiff who brings proceedings (without the fiat of the Attorney-General) challenging the validity of legislation or of conduct undertaken by public officials must either show that his own private rights or interests are affected or that he has some interest in the subject matters of the action. It is this common law requirement that the plaintiff must meet.

It was made plain in *Gouriet* v *Union of Post Office Workers* [1977] 3 All E.R. 70 that public rights may only be asserted in a civil action by the Attorney-General as an officer of the Crown representing the public and that except where statute otherwise provides, a private person may only bring an action to restrain a threatened breach of the law if his claim is based on an allegation that the threatened breach will constitute an infringement of his private rights, or will inflict special damage on him. Since *Gouriet's Case* was decided there has been a marked tendency exhibited in the English cases to give an expansive interpretation to the test of "sufficient interest" whilst maintaining a much more restrictive view of the common law requirements for standding. The stricter approach is illustrated in cases such as *Barrs* v *Bethell* [1982] 1 All E.R. 106 and *Ashby* v *Ebden* [1984] 3 All E.R. 869. The less restrictive approach taken to the requirement of "sufficient interest" can be seen in cases such as *R.* v *H.M. Treasury. ex parte Smedley* [1985] 1 All E.R. 589 where a taxpayer was held to have sufficient interest to challenge a decision to pay a substantial sum of British taxpayers' money to the E.E.C.

In some common law countries outside Britain there has been a tendency in recent years to relax somewhat the strictness of the common law requirement. Thus in the Australian case of *Davis* v *The Commonwealth* [1986] 61 A.L.J.R. 32 Gibbs C.J. said:-

> "[T]here has in recent years been a marked relaxation of the rules regarding standing in both England and Canada. In *Reg.* v *H.M. Treasury; Ex parte Smedley* [1985] Q.B. 657 it seems to have been accepted that an interest as a taxpayer and an elector is enough to give standing to challenge delegated legislation under which public moneys would be disbursed. That case, and *Reg.* v *Inland Revenue Commissioners: Ex parte National Federation of Self-employed and Small Businesses Ltd,* turned on the meaning of the words "sufficient interest" in 0.53, r.3 of the Rules of the Supreme Court (U.K.), although that does not mean that they are of no assistance in deciding the present question. In Canada the majority of the Supreme Court has taken the view that a person who is not directly affected by legislation may nevertheless have standing to challenge it if he has a genuine interest as a citizen in its validity and if there is no other reasonable and effective manner in which the issue may be brought before the court: *Minister of Justice of Canada* v *Browski* [1981] 130 D. L. R. (3d) 588. On the other hand, the tendency in the United States seems to be towards restricting rather than relaxing rules as to standing. see *Valley Forge College* v *Americans United* [1982] 454 U.S. 464 [70 Law Ed. 2d 700]."

Davis' Case is of particular relevance to the present case because it was one in which the defendant sought an order striking out the plaintiffs' statement of claim. Gibbs C. J. declined to make such an order, holding that the plaintiffs' status as taxpayers might arguably give them standing to challenge the validity of the legislation at issue in that case. The case assists the plaintiff's argument that he has an arguable case on standing since Gibbs C. J. was concerned with the common law requirement for standing, not the "sufficient interest" standard.

It is likely that the plaintiff will find it more difficult at the trial to prove that he has standing to bring the proceedings than he would have had if all that would have been required of him would have been to show that he had a sufficient interest in the matters raised in his statement of claim. But this is not to say that his lack of standing is so demonstrable as to warrant the making of a draconian order terminating the proceedings before they go to trial. There is weighty authority that such an order should rarely be made: see *Inland Revenue Commissioner* v *National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All E. R. 93 where Lord Roskill said at p. 115:

> "The number of cases in which it is legitimate to take such short-cuts is small and in my opinion the present was not such a case. ... [T]his course was especially inappropriate where the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary, and the exercise of that discretion and the determination of the sufficiency or otherwise of the applicants' interest will depend, not upon one single factor - it is not simply a point of law to be determined in the abstract or upon assumed facts - but upon the due appraisal of many different factors revealed by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others."

What his Lordship said is equally applicable to a case, such as the present, where an attempt is made to strike out statement of claim for want of the plaintiff's standing at common law.

Martin C. J. did not hold that the plaintiff had standing to bring the action. He did no more than express a provisional view that the plaintiff, as the holder of a Tongan Passport and a Member of the House of Assembly might be able to establish standing at the trial. The question of standing is a mixed question of fact and of law and it is possible that more facts may emerge at the trial supporting the plaintiff's standing to maintain the proceedings. We think that Martin C. J. was correct not to strike out the whole of the statement of claim.

Senior Crown Counsel further submitted that the plaintiff had no arguable claim for prerogative or injunctive relief against the Crown or Ministers of the Crown and relied particularly or section 21 of the Crown Proceedings Act, 1967. The force of this argument was recognized by Martin C. J., but as he observed, the Court can make declarations which the Crown will respect and act upon. Further, it is not possible to tell at this early stage of the proceedings whether injunction granted against the first and second defendants would necesarily operate indirectly as injunctions against the Crown Questions as to the nature and scope of any relief to which the plaintiff may be entitled are best left to the trial, especially as some of the claims for relief may not be pressed.

We turn now to consider the plaintiff's appeal.

This is concerned with the allegations made against the first and second defendants in paras 6 to 13 of the amended statement of claim. The substance of the allegations is that the defendants, or perhaps persons unknown, have received substantial sums of money in return for the grant of letters of Tongan naturalization or issue of Tongan passports to foreign nationals, such money being public funds pursuant to Clause 53 of the Constitution, and revenue of the Government in terms of s19 of the Government Act and that in breach of their duties under the Constitution and the Act and in breach of their fiduciary duty to the people of Tonga have failed to account for the money in manner required by law.

Martin C. J. struck out clauses 6 to 13 of the amended claim, and a substantial reason for so doing was because affidavits had been filed on behalf of the defendants which, taken at face value, indicated that all moneys had been properly accounted for the satisfaction of the Secretary for Finance and the Acting Auditor-General. The question arises whether those affidavits should ever have been filed and relied on by the learned Chief Justice.

Three applications to strike out the plaintiff's statement of claim were filed, the first by Senior Crown Counsel dated 17 October 1989. It purports to be an application by all three defendants, although it appears that the second defendant had been separately represented from the beginning. That application was brought under Order 18 rule 19 of the English Rules. On the 23 October Mr Edwards for the second defendant filed a separate application to strike out, relying on Order 12 and Order 18 Rule 19; and in an amended motion of the 20th October on behalf of the first and third defendants the following appears "the first and third defendants join in the application to strike out and its supporting affidavits field by Counsel for the second defendant."

Order 12 Rule 18 reads so far as is relevant:

"(1) If defendant who wishes to dispute the jurisdiction of the Court in the proceedings ... shall, within the time limited for service of a defence, apply to the Court for -

(2) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action.

(4) An application under paragraph (1) must be supported by an affidavit verifying the facts on which the application is based ...".

The applications under this Rule were filed out of time but there is a more serious objection to the admissibility of the affidavits. The only matter of jurisdiction open to the defendants was whether the Court's jurisdiction was ousted by Parliamentary privilege, but the affidavits do not deal with that issue. They deal with the merits and purport to show that all money have been accounted for and that there has been no wrong-doing by the defendants.

We conclude therefore that the affidavits were not admissible under the Rule 8 application.

Turning now to the applications under Rule 19, which reads:-

"(1) The Court may at any state of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, 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 maybe; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a)."

In their applications to strike out the defendants relied on grounds (a), (b) & (d).

In our opinion the only ground open to the defendants was (a) - that the pleadings disclose no reasonable cause of action. The proceedings could not be described as scandalous and neither are they "obviously frivolous or vexatious or obviously unattainable." (per Lindey L. J. in *AH-Gen of Duchy of Lancaster* v. *L & N. W. Ry* [1892] 3 Ch 274 at p. 277). We later consider whether paras 6-13 are vexatious for other reasons, but they are quite separate from the matter presently under consideration. It is not clear from the applications what is alleged as "abuse of the process of the Court" and it is not for us to speculate. The affidavits themselves don't assist in that inquiry.

We therefore rule that the affidavits were not admissible.

Parliamentary Privilege

Dr Harrison submitted that Martin C. J. erred in his approach to the nature of the duties owed under section 19 of the Government Act and under clause 53 of the Constitution when he stated that "both under the constitution and under statute (the second defendants) duty is to the Legislative Assembly and only to the Legislative Assembly."

Martin C. J. then concluded, on the authority of *'Ipeni Siale* v *Kalaniuvalu & Others* (Privy Council Appeals 1 & 2 of 1987), that the Court had no jurisdiction to inquire into internal proceedings of the assembly and in the present case could not inquire into the adequacy of the financial records disclosed in the affidavits. We have already ruled that the affidavits should not have been before the Court, but even if they had been admissible it is our opinion that the Court was not debarred from inquiry. The inquiry in this case was not into "internal proceedings of the Assembly", but whether the second defendant had fulfilled his constitutional and statutory obligations. If he had not it was hardly up to the Assembly to say that he had.

Fiduciary Duty

The statement of claim alleges that apart from their duties under the constitution and statute, the first and second defendants owed a fiduciary duty to the Kingdom and the people of Tonga. Martin C. J. rejected that claim. He said:

> "Constitutional law recognises no such duty. A fiduciary cannot be owed to the public at large. It is a concept which relates entirely to the field of private law and is of no relevance in this action."

We heard very little argument on this issue and presume that Martin C. J. was in the same position.

Dr Harrison submitted that public officials can, as a matter of law, be under a fiduciary duty, and that in any event a claim based on fiduciary duty should not, at this stage, be struck out while conceding that the law relating to fiduciary duty was very much in a "state of flux" at the present time. That is something of an

understatement. Our own research indicate, from a consideration of the only two texts available on the topic in the common law world jurisdiction, that fiduciary duty has no place in the present circumstances. We refer to P. D. Finn, "Fiduciary Obligations", 1977 and J. C. Shepherd "The Law of Fiduciaries" 1981. Finn sums it up in his comment that fiduciary law should not be distorted and squeezed into contacts for which it was never designed.

We agree and therefore reject the "fiduciary duty" argument.

However, we think that the parts of the statement of claim which were struck out were, in any event, objectionable for other reasons which justified the order made by the Chief Justice.

The claim which is sought to be made against the defendants qua their alleged receipt of money and failure to account is pleaded in paras 6-13 of the statement of claim. In our opinion, such a claim can only be properly pleaded if it is specifically alleged that the defendants did, in fact, receive money for which they have failed to account. Yet no such specific allegation is made in the statement of claim.

The only paragraphs from which such an allegation could possibly be inferred are paras 6 and 12 which read as follows:

> "6. In return for the said purported grant of letters of Tongan naturalization or issue of Tonga passports (or both), payments of substantial sums of money ("the payment") have been made by foreign national to the First Defendant and/or the Second Defendant and/or the Third Defendant or to some other person or persons unknown to the Plaintiff. The amounts dates and places of the Payments are at present unknown to the Plaintiff.
>
> 12. Further or alternatively, to the extent (if any) that the First and Second Defendants have either of them dealt with the payments, or permitted them to be dealt with, other than as public funds and/or moneys of the Government of Tonga, the first and/or the Second Defendant as the case may be have acted in breach of the fiduciary duties referred to in paragraph 9 hereof."

It is entirely consistent with the allegations in these paragraphs that some or all of the defendants have not received any money at all. It is one thing to allege against a number of defendants that each of them has engaged in certain conduct and to prove at the trial that only one of them has done so. In such a case the plaintiff will succeed against the one and fail against the others. But in the present case the plaintiff has been careful not to allege that any particular defendant has received and failed to account for any money. By adopting the expression "and/or" in para 6 the pleader has not asserted that all the defendants have received money, nor has he asserted that some of them have received money. Rather the assertion is that either all or some of them or some unknown person or persons have done so.

Counsel for the plaintiff informed us that the view had been taken that it would not be right to make a specific allegation that a particular defendant had received money until more facts came to the knowledge of the plaintiff and his advisers. We appreciate the correctness of this approach, but we do not think it overcomes the deficiency we have identified in this part of the statement of claim. It is not a sufficient basis for the commencement of an action or the filing of a statement of claim that the plaintiff entertains a suspicion about a defendant's conduct.

It might be said that to require a plaintiff to make specific allegations in his statement of claim in a case such as the present is to restrict his access to the Court.

In a sense this is correct, but on the other hand to permit a case to proceed against defendants when the plaintiff is unable to, and does not, make specific allegations against them would be to expose them to a vexatious proceeding.

We therefore think that paras 6-13 of the statement of claim were properly struck out. However, we were informed by Counsel for the plaintiff that he wished to rely on para. 6 in relation to the other causes of action pleaded in the balance of the statement of claim. For that reasons, and although it is ineffectual as part of the allegations in support of the first cause of action, we shall amend the striking-out order so as to confine it to paras 7-13.

It only remains to consider the application to appeal out of time against Martin C. J.'s refusal to order the plaintiff to give further particulars of the statement of claim. The application is made many months out of time but we agree with Senior Crown Counsel that, in the special circumstances of this case, delay in making the application should not of itself be fatal to it. However, the order made by Martin C. J. was in respect of a matter of practice and procedure and well within his discretion. In such a case, an appellate court will intervene only in exceptional circumstances. The Chief Justice may well order the plaintiff to give particulars at a later stage of the proceedings.

Senior Crown Counsel submitted that the absence of particulars placed the defendants in great difficulty in filing their statements of defence. We do not think any such difficulty is of sufficient magnitude to demonstrate error in Martin C. J.'s order. Since the allegations made against the defendants are framed in general terms the plaintiff will be in no position to complain if the defences are similarly framed.

In the result the appropriate order are as follows:

1. Each appeal dismissed with costs.
2. Application for extension of time to appeal dismissed with costs.
3. Costs on these applications to be costs in the cause with the observation that the hearing of the plaintiff's appeal occupied little of the total time.