

IN THE HIGH COURT OF TUVALU 2023

CIVIL CASE NO.6/20

GROWING TALL LIMITED

PLAINTIFF

BETWEEN AND

BIOFILTA PTY LIMITED

DEFENDANT

Before Hon Judge Sir John Muria

Hearing 25th May 2023

Ms F T Nelu for Plaintiff

Mr B Nia for Defendant

JUDGEMENT

Muria J: This is an application by the defendant to strike out the plaintiff's Statement of Claim pursuant to O.27 r4 of the *High Court (Civil Procedure) Rules* on the ground that it discloses no reasonable cause of action and it is frivolous and vexatious.

Brief background

2. The brief background to this case, sufficient for the purpose of this application is as follows. Sometime in December 2016, one Andrew John Fakaua Ponton sought to launch a project called "*Future Foods*" in Tuvalu. He applied to a global support group

called "*Launch Food*" for assistance. The aim of the project was to import and set up vertical farming in Tuvalu to grow food above ground, away from the salt-water contaminated soil. Consistent with its aim, Future Foods was renamed "Growing Tall" symbolising its vertical farming approach.

3. Growing Tall sought financial support from other sources including Launch Food in January 2017. However, that was unsuccessful. Growing Tall was informed in July 2017 that DFAT could provide assistance through BioFilta which developed "*FoodWall*" and "*FoodCube*" products. BioFilta was interested in putting up its products for trial in Tuvalu and Kiribati and thereby could partner up with Growing Tall on the ground in Tuvalu.
4. On 13th July 2017, one Melissa Collins who was the Launch Food Programme Manager got in touch with Mr Ponton by email (Annexure C) informing him of the arrangements between Launch Food, DFAT and Biofilta and the possibility of ground partner in Tuvalu. There were some correspondence between Mr Ponton and Melissa and one Marc from Biofilta in July and August 2017. A teleconference meeting took place between Marc and Mr Ponton on 29th September 2017 and, among other things, discussed their possible trip to Tuvalu.
5. On 5th December 2017, Mr Ponton and Biofilta people arrived in Tuvalu. They had discussions with various authorities in Tuvalu. It was while in Tuvalu that it was said that Marc of

Biofilta made an offer and agreed to by Mr Ponton on behalf of Growing Tall. The agreement was verbal. The facts of the alleged verbal agreement are set out in paragraph 18 of Mr Ponton's affidavit which is as follows:

"18. On 7th December 2017, Marc Noyce of Biofilta made a formal offer to me. It was made clear to me that future DFAT funding of BioFilta's food-growing systems into Tuvalu depended on the success of the trial and the demand from Tuvalu for more of their systems. He told me that thousands of their food-growing systems could potentially be imported into Tuvalu. Marc offered me a lump sum payment plus a 15% fee on all future BioFilta food-growing systems imported into Tuvalu after the trial. He assured me that Growing Tall would be their agent for Tuvalu, and that this 15% fee would include aid-funded initiatives such as any that are funded by DFAT. In exchange, I would assist them by importing their food-growing systems into Tuvalu for the trial and implementing these systems across Funafuti; helping to establish BioFilta into the Tuvaluan market/community; monitoring the trial; promoting the BioFilta brand and working to help create demand for more imports of their products. I agreed to help them on this basis and we made a verbal agreement then."

6. On its part, the plaintiff imported some of the Biofilta products into Tuvalu in 2019. The defendant is said to have made no payment to the plaintiff.

7. The plaintiff issued a Writ with a Statement of Claim on 26th June 2020 and served on the defendant. Paragraph 3 of the plaintiff's Statement of Claim repeats the terms of the verbal agreement between the plaintiff and defendant as follows:

“3. That on 7th December 2017 the plaintiff and the defendant entered into a verbal contract;

Particulars of the verbal contract

(i) That the plaintiff would assist the defendant on a DFAT-funded trial of the defendant's products and help create demand.

(ii) In return, the defendant would award the plaintiff “agent” status and pay the plaintiff a 15% fee on all future BioFilta food-growing systems imported into Tuvalu after the completion of the trial. This 15% fee includes imports of aid-funded initiatives such as any that are funded by DFAT.”

8. The plaintiff's application for default judgment was refused on 22nd February 2022.

Issues

9. There is only one issue to be determined in this application. That is issue is whether the plaintiff's Statement of Claim discloses no reasonable cause of action so as to warrant the plaintiff's case to be dismissed. The other issue of whether the plaintiff's Statement of Claim is frivolous and vexatious will follow the fate of the First issue.

Consideration

10. In an application such as this where the defendant is effectively seeking a summary judgment against the plaintiff, the Court's discretionary power will be sparingly exercised, so that if it is to be exercised in favour of the defendant, the court will have to be satisfied that the plaintiff's Statement of Claim is not only that it closes no reasonable cause of action but that the plaintiff has no real prospects of success on all or part of its Statement of Claim.
11. Put another way, the plaintiff's claim is unsustainable or obviously and incontestably bad, such that it is doomed to fail if it is allowed to go to trial. If however, the defendant succeeds in showing that the Statement of Claim, as part of the pleading, discloses no reasonable cause of action, but that the defect can be cured, the court may not necessarily strike out the plaintiff's claim and dismiss the action but may still exercise its discretion to allow the plaintiff to amend its Statement of Claim. The case

continues. See *Brimson –v- Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937; *Green Stell Industry Inc. –v- Commissioner for Railways* [1964] HCA 69; (1964) 112 CLR 125. *Judah Kulabule –v- Eagon Resources Dev. Co. (S.I) Ltd* [1994] SBHC 17; HC-CC 285 of 1993 (6th July 1994)

12. The case of *Brimson –v- Rocla Concrete* also stands for the proposition that generally the plaintiff is, *prima facie*, entitled to have his case come to trial and any application to deprive the plaintiff of this right can only succeed in the clearest of cases before the court can stop the plaintiff's case from proceeding to trial by way of a summary judgment.
13. In *Kulabule –v- Eagon Rources*, the High Court of Solomon was considering a striking out application on the ground of “no reasonable cause of action” under the same rule, O.27 r 4, relied on by the defendant in this case. Referring to the Court's power under O.27 r4, the court in that case said:

“The power of the Court in this regard is discretionary and must be exercised only where the court is satisfied that there is no reasonable cause of action or that the proceedings are frivolous and vexatious. However if the pleading is defective and the case can be improved by amendment so as to disclose a cause of action, then although the court may strike out the pleadings, leave may be granted to amend the pleadings. If the court is satisfied that no amendment will cure the defect, leave should not be granted.”

14. There are two cases in Tuvalu which deal with the same provisions of the Rules. In *Telaaka & Anor –v- Nia & Ors* [2022]

a case where the plaintiff claimed damages for defamation. The defendants applied to strike out the plaintiff's Statement of Claim and to have the case dismissed on the ground that the Statement of Claim discloses no reasonable cause of action. The Court found that the plaintiff's Statement of Claim disclosed no reasonable cause of action and that the cause of action was incontestably bad resulting in the plaintiff's case being dismissed.

15. In *Mackenzie Trading Ltd -v- Transam (Tuvalu) Ltd and Ors* [2022] TVHC 13; Civil Case 16 of 2021 (12 April 2022) the plaintiff claimed damages for damaged frozen poultry which was shipped to Tuvalu in a refrigerated container on board a vessel, *Captain Queros*. The second and third defendants applied to strike out the plaintiff's Statement of Claim as against them on the ground that it disclosed no cause of action against them and that it was frivolous and vexatious. The Court held that the plaintiff's Statement of Claim discloses a reasonable cause of action against the two defendants in that there were serious issues of breach of duty raised in the Statement of Claim, the consequence of which was the fact that the plaintiff has suffered substantial damages.
16. Further, the two defendants in the *Mackenzie Trading -v- Transam* case, had filed a defence to the plaintiff's claim. In that defence, the defendants made admissions and denials of significance to the plaintiff's claim, giving rise to serious issues

to be tried. Consequently the court refused to strike out the plaintiff's Statement of Claim in that case.

17. In the present case, the plaintiff has set out the terms of the agreement between the parties in its Statement of Claim. The plaintiff claims that it performed the terms of the agreement on its part and that the defendant has failed to perform its part to the bargain. As a result the plaintiff claims that it has suffered loss and for which it now claims damages. The defendant in the present filed a Defence to the plaintiff's claim and denies paragraph 3 (i) and (ii) of the plaintiff's claim, raising the issue that it did not make any verbal agreement with the plaintiff, but that it made the verbal agreement with "Growing Tall" a Non-Government Organisation (NGO).
18. Implicit in the defendant's Defence is the suggestion that "Growing Tall" is different from "Growing Tall Limited" (the plaintiff) with whom no verbal agreement was made on 7th December 2017. The plaintiff's argument is that Growing Tall became a registered company, "Growing Tall Limited" on 17th January 2018 and had agreed to be bound by the terms of the agreement entered into between the defendant and Growing Tall. There is clearly a triable issue raised here as to the plaintiff's right to enforce the said agreement. That will have to be determined at the trial.
19. There is a further related issue of whether the emails correspondence between the parties constitute a written

contract in this case to satisfy section 33 of the *Companies Act*. This is also a major issue to be determined in this case

20. As in *Mackenzie Trading Ltd -v- Transam (Tuvalu) Ltd*, the plaintiff's Statement of Claim and defendant's Defence filed, in my view, clearly raised real serious issues to be tried. Applying the cautionary measure therefore, I would be loathed to exercise the Court's power to order summary judgment against the plaintiff in the present case. The same position is expressed in *Fancourt -v- Mercantile credits Ltd* (1983) 154 CLR 87 at p.99.
21. On the facts before the Court, it cannot be said that the plaintiff's Statement of Claim discloses, no reasonable cause of action nor can it be said that it be said that it has no real prospect of success. It must also follow that the plaintiff's Statement of Claim cannot be said to be frivolous and vexatious.
22. The defendant's application for striking out the plaintiff's Statement of Claim and dismissing the plaintiff's case is refused.
23. The case should proceed to trial. Directions have already been issued in this case and if the parties have complied with those directions, the plaintiff should request the case to be set down for trial.

Order

24. 1. Defendant's application is refused.
2. Case to proceed to trial.
3. Pursuant to paragraph 6 of the Order on Directions made on 2nd May 2022, the plaintiff to request a trial date.

Dated on the 18th of December 2023.

