IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 22/3053 CVL

BETWEEN: **Family Kaltabang Malastapu**
Claimant

AND: **Chief Simeon Poilapa**
First Defendant

Frank King
Second Defendant

Date: 17th July 2023
Before: Justice W.K. Hastings
Distribution to: Mr J Boe for the Claimant
Mr M Fleming for the Defendant

Judgment

Introduction

1. The defendants have applied to strike out the claimant's claim for damages resulting from the defendants prohibiting them from entering and enjoying "their land" at Lakenapagatau beach by erecting a "blockade" at the entrance to the beach. The claimants had until then been charging entrance fees of VT 500 per vehicle to access the beach. As a result, they also claim damages for lost revenue.

2. Mr Fleming submitted the claimant has no standing because they do not own the land, and no cause of action because they have no right to take sand or charge entrance fees in breach of s 31(1)(l) of the Public Roads Act No 35 of 2013. Mr Fleming submitted the claimant has not come to court with clean hands.

3. Relying on Cooke CJ's decisions in *Malas Family v Songoriki Family* ([1986] VULR 14, 8 October 1986), *Malas Family v Songoriki Family* ([1990] VUSC 5, 11 July 1990), and the Court of Appeal's decision in *Songoriki Family et al. v Director of Lands et al.* (Case No.

20/3101, 15 February 2021), Mr Boe submitted that the claimant owns the land concerned because the claimant falls under the rubric "other parties" in para 91(3) of the Court of Appeal judgment.

Background

4. I derive the factual background of this case from the sworn statements of Paramount Chief Poilapa IV Simeon Tivatelapa and Frank King, Chairman of the Taskforce of the Paramount Chief of Mele Village and the Mele Village Farea, both dated 27 June 2023, and both in support of the strike-out application; and the sworn statements of Kelep Malastapu and Poppet Malastapu both dated 28 April 2023, both in support of the claim.

5. It is common ground that the Shefa Provincial Council authorised the construction of a boom gate "to monitor and manage the movement of people traveling through the entrance to the beach and coastal area." This was conveyed in a letter "to whom this may concern" dated 16 June 2022. The letter refers to a decision of the Council of Ministers in 2018 banning the removal of sand at Mele. The letter states the reason for the decision to authorise a boom gate was that the Shefa Provincial Council was concerned "with the coastal environmental destruction cause[d] by people having picnic and parties along the coastal area, removing large quantities of sand, stealing, and other activities which the council does not accept." In his sworn statement, Paramount Chief Poilapa states that he made a direction "that all sand mining of the beach along what is known as Devils Point Road was to stop by all people from Mele Village (who the claimants are part of) as there is concern over the environment and what was happening on the beach." This direction is consistent with the decision of the Council of Ministers in 2018 and the Shefa Provincial Council in 2022. Paramount Chief Poilapa also states "he has no idea what the claimants refer to in the claim as a blockade over land or how it is they cannot use the beach."

6. In his sworn statement, Poppet Malastapu states that he was appointed by the claimant to collect fees of VT 500 per vehicle at the entrance to the beach until the claimant was "restricted from entering Lakenapagatau beach." Kelep Malastapu states in his sworn statement that on 26 May 2022, "without authorisation from the claimant ... the second defendant erected barricade to the entrance to Lakenapagatau beach on the claimant's land at Mele village." He refers to the two judgments of Chief Justice Cooke and the judgment of the Court of Appeal. He also refers to, and attaches, a note from Chief Justice Cooke to Rene Thebauld dated 30 April 1990 in which the Chief Justice ordered Mr Thebauld "to cease forthwith" from "removing sand from the beach of their land at Lakenapagatau without their [the Malas family's] permission." This note was made two months before the Chief Justice decided on 11 July 1990 that the land concerned was in dispute between the Malas and Songoriki families.

7. Paramount Chief Poilapa states in his sworn statement that having read the sworn statement of Poppet Malastapu, he referred the matter of collecting fees to the police "as this would be illegal as the road is a public road, with hundreds of people living along the road with resorts, bungalows and private dwellings who along with tourists have a right to freely travel."

8. In a subsequent memorandum I requested submissions on the status of the road concerned as a public road. Mr Boe clarified that the pleaded "blockade" is in fact a speed bump and a shelter on the side of the road where a security person asks people where they are going. He also clarified that the claimant only collected revenue from people going to the beach to swim. I would not normally accept what is essentially evidence from the bar, but Mr Boe has provided some context.

Strike-out

9. Rule 9.10 of the Civil Procedure Rules 2002 permits a strike out application to be made if the claimant does not take steps or does not comply with an order. It is silent on strike-out applications on other grounds. In this case, the claimant has taken steps and complied with orders, but I do not read r.9.10 as excluding strike-out applications on other grounds. Section 28(1) of the Judicial Services and Courts Act (No. 54 of 2000) states that the Supreme Court has all the jurisdiction that is necessary for the administration of justice, and r.1.7 authorises the court "to give whatever directions are necessary to ensure the matter is determined according to substantial justice."

10. An application to strike out a claim proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted (*Attorney-General v Prince* [1998] 1 NZLR 262). Before the Court may strike out a proceeding, the cause of action must be so clearly untenable that it cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317). The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641). But the fact that an application to strike out raises difficult questions of law, and requires extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

Discussion

11. I will deal with each ground for striking out in turn: first with the issue of standing and land ownership, and then with the issue of clean hands and charging fees on a public road.

Standing

12. In the second paragraph 3 of their claim, the claimants refer to their inability to enter and enjoy "their land." This raises the question of whether or not the land concerned is "their land". A strike-out application is not the vehicle by which land ownership can or should be determined. I will however, in fairness, briefly consider the judgments to which both parties referred.

13. In his 1986 judgment, Cooke CJ decided that the Songoriki family were the custom owners of the "disputed land" which was subsequently determined by the Court of Appeal to be an area of some 33 or 34 hectares. In his 1990 judgment, the Chief Justice clarified that the land granted to the Songoriki family ended at the land side of the road and did not cross the road and continue to the high water mark on the seashore. Cooke CJ found that the land on sea side of the road opposite the Songoriki family land "is in dispute between the parties," the parties being the Malas family and Songoriki family. Cooke CJ ordered both the Malas family and the Songoriki family to refrain from interfering with the sand until ownership was resolved. The Court of Appeal judgment was primarily concerned with the area of land covered by Cooke CJ's judgments, and recorded at para 91(3) that the land surrounding the 33 hectare area of land awarded to the Songoriki family was "awarded to other parties" without specifying who they were.

14. Kelep Malastapu refers to and attaches to his sworn statement a note from Chief Justice Cooke to Rene Thebauld dated 30 April 1990 in which the Chief Justice ordered Mr Thebauld "to cease forthwith" from "removing sand from the beach of their land at Lakenapagatau without their [the Malas family's] permission." On its face, the note appears to assume the Malas family owns the beach. However, the Chief Justice's note was made only two months before the Chief Justice decided on 11 July 1990 that the land concerned was in dispute between the Malas and Songoriki families. As the latter judgment purports to clarify the reasoning in the 1985 judgment, and was made after the note, the 1990 judgment of the Chief Justice to my mind is a more accurate expression of his opinion than his earlier brief unreasoned note.

15. The best that I can determine in this strike-out application from the sworn statements and their attachments is that the custom ownership of the land on the seaward side of the road is in dispute. Even if I am wrong in this conclusion, it is the second ground that determines this application.

Clean hands

16. As pleaded, the claim is so untenable that it cannot possible succeed. The claimant seeks damages on the basis that they have lost revenue from charging fees for vehicles to access the beach. In my Minute dated 13 July 2023, I asked both counsel for

submissions on the narrow point of whether the road concerned is a public road. Both counsel submitted it was.

17. Mr Boe submitted that the road falls within the definition of a "public road" under s s of the Public Roads (Prohibition of Encroachment) Act:

> *"For the purposes of this Act, the expression "public road" shall mean any road open to public use whether or not it forms part of the public domain and shall include not only the road-way but also the sides of the road within the limits of the ground occupied by such road."*

18. I agree with him. Both counsel also referred to s 3 of the Public Roads Act which states "The Minister may by Order published in the Gazette declare a road to be a public road." Mr Fleming submitted the provision is permissive and that a road may be a public road even though the Minister has not gazetted it as such. He also submitted the road satisfies the criteria in s 6 the Minister may consider to declare a road public because "it is used by many people, businesses and groups ... Farmers carry produce, residents travel to business and tourist[s] frequent it."

19. I accept that the road is a public road. As such, collecting "any toll, fee or money from road users on a public road" is explicitly prohibited by s 31(1)(l) of the Public Roads Act. As pleaded, the claimant seeks damages for revenue lost from illegal activity. The claim cannot succeed for this reason, regardless of whether or not the claimants own the land under or on the seaside of the road.

20. Further, there is nothing pleaded as to why the claimants say they are prohibited from entering and enjoying the land. Mr Boe has provided context in the sense there is a speed bump and an inquiry, but both seem to me to be consistent with the decision of Chief Poilapa which in turn is consistent with the decisions of the Shefa Provincial Council and the Council of Ministers.

21. For these reasons, the strike-out application is granted.

Costs

22. Costs follow the event. Mr Fleming is successful. He seeks indemnity costs under r.15.5.

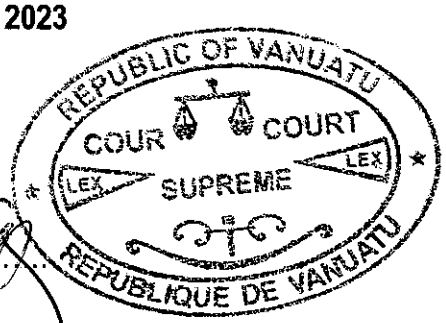
23. I am satisfied that at least two of the circumstances in *Colgate Palmolive Co and Another v Cussons Pty Ltd* (118 ALR 248, 10 November 1993), and *Iririki Island Holdings Ltd v Oakdayle Pty Ltd* [2019] VUCA 30 at [48] are present: these proceedings were commenced in wilful disregard of known facts or clearly established law, in particular s 31(1)(l) of the Public Roads Act; and these proceedings involved making allegations that ought never to have been made.

24. In his sworn statement, Mr Poilapa states he has incurred VT 320,000 (calculated as 8 hours of lawyer's fees at VT 40,000 an hour) to defend this action. Mr Fleming claims a further VT 160,000 for the time he has spent preparing submissions and to appear.

25. I award costs of VT 480,000 to both defendants.

Dated at Port Vila this 17th day of July 2023

BY THE COURT



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Justice W K Hastings