MILFORD BUILDERS LIMITED v WESTERN SAMOA SHIPPING CORPORATION; ATTORNEY GENERAL & ANOTHER

Supreme Court Apia
Bathgate J
23 June 1987

PRACTICE AND PROCEDURE - Notice to intended Defendant before action is commenced - Limitation Act 1975 S 21 (1)(a)

HELD: Where no notice to intended Defendant had been given before the action was commenced, leave to commence action cannot then be given, with retrospective effect.

CASES CITED:

- Hadley v Baxandale (1854) 9 Exch. 341
- Salomon v Salomon and Co. Ltd [1897] AC 22
- Moeller v New Plymouth Harbour Board [1955] NZLR 151
- Watch Tower Bible Society v The Huntly Borough Council [1959] NZLR 821
- Marsh v Attorney-General [1961] NZLR 111
- Auckland Harbour Board v Kaihe [1962] NZLR 68
- McCullough v The Attorney-General [1956] NZLR 886
- Tett v The Attorney-General (1957] NZLR 1063
- Brewer v The Auckland Hospital Board [1957] NZLR 951
- Posner v Roberts (1985) Aust. Torts Report sorts 80-726
- Ridgeway v Shire of Moora (1986) Aust. Torts Reports 80-003

LEGISLATION:

- Limitation Act 1975 Ss 21(1)(a), (2), (3), (4)
- Limitation Act 1952 (NZ) S 23
- Oaths, Affidavits and Declarations Act 1963 S 14(1)
- Government Proceedings Act 1974 S 4
- Samoan Companies Order 1945
- Companies Act 1955 (NZ)
- Constitution of Western Samoa Art 4, 15
- Goods and Services Act 1986
- Acts Interpretation Act 1974 S 5(1)

R Drake for Plaintiff
T K Enari for First Defendant
E D Lazar for Second and Third Defendants

The Plaintiff Milford Builders Limited commenced an action in this Court against the Western Samoa Shipping Corporation Limited as first Defendant, the Attorney-General sued in respect of the Government of Western Samoa as second Defendant and Toeolesulusulu Siueva as third Defendant. The statement of claim alleges that the third Defendant is and was at all material times Minister of Marine and Shipping of the Government of Western Samoa and the Chairman of the Board of Directors of the first Defendant; however it does not allege in what particular capacity, whether as Minister, Chairman, both, or as a private citizen he may have acted or omitted to act in the circumstances relevant to the action. The third defendant is described in the statement of claim as a Cabinet Minister.

The action claims relief for the Plaintiff in respect of work the Plaintiff carried out on the repair of a barge, the MV Limulimutau ("the barge") which evidently now graces the Apia Waterfront.

In the statement of claim the Plaintiff alleges that pursuant to a contract (particulars as to date, place, whether it was oral, written or both, or parties to the actual making, their capacity, and such like are conspicuous by their absence) between the Plaintiff and the first and second Defendants, evidenced, it is claimed, by a quotation of the Plaintiff of December 1985 (to whom, whether written or not, and details of the same are not stated) by both Defendants. It is alleged that under the contract mentioned (whatever its terms may have been) the Plaintiff contracted to carry out repair work on the barge for $180,000. It is not stated for whom this work was to be undertaken and who was to pay for the work. I do not know the terms and conditions of the alleged contract. The Plaintiff further claims it commenced work on the barge in December 1985, the first Defendant paid it $5,000 on 23 December 1985 as a first payment "pursuant to the contract", and in January 1986 the third Defendant "without lawful authority and in breach of the contract ordered a stop to the work and somehow (unstated) prevented the Plaintiff being paid "in accordance with the contract", whatever that may have provided. I do not know whether the third Defendant was acting in any particular capacity or for anyone other than himself.

The statement of claim alleges the first and second Defendants "acquiesced" in the third Defendant's action, whatever consequence or result in law that may imply is not stated. It is contended in the statement of claim that the first Defendant, who seems by implications from the pleadings to be the party, if anyone, responsible for payment to the Plaintiff, has failed "to reimburse the Plaintiff for work performed in pursuance of the contract". I do not know how the right "reimbursement" arose, rather than a claim for payment for work done in performance of the contract. The statement of claim then says in paragraph 12:

"That the Defendants or one or other of them have breached the said contract and have failed to reimburse the Plaintiff as aforesaid."

Not only are the particulars of the contract not given generally, or as to any term that may have been binding on the second or third Defendant, there are also no particulars of the so-called breach given, let alone the term or terms of the contract alleged to have been breached. There is no alleged failure to reimburse claimed against the Defendants, "aforesaid". other than the first Defendant. The paragraph seems meaningless so far as the second and third Defendants are concerned.

In the next paragraph in the statement of claim the Plaintiff is said to be in doubt as to the Defendant from whom it is entitled to redress and so had joined all the Defendants in an attempt to have that doubt resolved. From the pleadings, to that stage, there would appear that the second and third defendants are not liable, because there is no allegation of a breach by them of a binding term of contract. There appears to be no foundation for any such claim as to doubt on the part of the Plaintiff. The claim as to doubt does not make a Defendant liable, to give a cause of action, without some basis or foundation in law for at least prima facie liability.

There is then a claim that the Defendants owed a duty to the Plaintiff (the genesis of which duty is not stated or explained) to complete the contract by paying or reimbursing the Plaintiff for work performed thereunder. This is a further or alternative claim. Its meaning and basis is not apparent. Additional, further and alternative claims thereafter include, that the Defendants failed to exercise due care in awarding the contract to the Plaintiff in various respects. Why or how there was such an obligation is not stated. Such claims are again without apparent meaning or foundation. "Duties" are purportedly caste upon the second and third Defendants with abandon in the statement of claim. They are unspecified in origin and content. They appear in such circumstances to be no more than paper duties of no real consequence or substance. If the Plaintiff cannot state how such duties arose and the nature of them, one cannot help but wonder how the Defendants are to know what, if anything of substance, in law, is claimed against them.

There are further claims asserting knowledge of the part of the Defendants for the purposes of claiming further damages under the commonly called second branch of the rule in Hadley v Baxandale (1854) 9 Exch. 341.

The relief sought in the statement of claim against the Defendants is $170,000, general damages of $50,000, presumably the first figure is for special damages, and an indemnity for

claims or proceedings against the Plaintiff by third parties relating to work on the barge, or a declaration in respect of such indemnity.

For the purposes of the present applications the Plaintiff has cast such a wide, unprecise and vague net to try and catch up in the action the second and third Defendants, that it is not possible to say what are or may be all the relevant acts or omissions (if any) of the second and third Defendants to the claims against them. The evidence is that the third Defendant did not assume his office as Chairman of the Board of the first Defendant until January 1986. The first Defendant was the sole owner of the barge until it sold it to another person in May and June 1986. The Government is a major shareholder of the first Defendant, but that does not and as a rule cannot make it liable for the acts or omissions of the first Defendant, with regard to the Plaintiff.

The second and third Defendants have applied on notice of motion to strike out the claims against them for failure by the Plaintiff to give notice pursuant to section 21(1)(a), (3) and (4) of the Limitation Act 1975. This application is supported by two affidavits. The Plaintiff has filed an application on notice of motion supported by two other affidavits for leave to bring and/or continue its action against the second and third Defendants under S.21(2) of the Limitation Act on all of the grounds set out in that sub-section. These two applications are now before me for my decision and any order or orders thereon.

I heard Mr Lazar of the Attorney-General's Office on behalf of the second and third Defendants, Mrs Drake on behalf of the Plaintiff and Mr Enari on behalf of the first Defendant on 31 March 1987. At that stage the application to strike out was the only application before the Court. Mr Lazar made submissions in support of his application in addition to written submissions he had then already filed. Mrs Drake presented written submissions and gave oral argument opposing the application. During the course of her submissions she made an oral application for leave pursuant to s.21(2) of the Limitation Act ("the Act"). Mr Enari supported Mrs Drake's submissions opposing the application to strike out the claim against the second and third Defendants. Leave was then reserved to enable the Plaintiff to file affidavits that did not offend against the proviso in S.14(1) of the Oaths, Affidavits and Declarations Act 1963 and for Mrs Drake to make written application for leave under s.21(2) of the Act on behalf of the Plaintiff, if she so desired. The further affidavits and the application for leave have subsequently been filed. I gave two separate rulings on the adequacy of the affidavits filed on behalf of the second and third Defendants, on 31 March 1987 and 7 April 1987.

From the evidence contained in two affidavits for the Plaintiff, two affidavits for the second and third Defendants and from where I can supplement that evidence from undisputed background facts or allegations of the statement of claim, the following seems to be the chronology of relevant events for the purposes only of dealing with the two applications now before me:

1. In December 1985 - arrangements of the work on the barge by the Plaintiff undertaken after the Plaintiff gave a quotation for that to the first defendant; I do not know whether that quotation was accepted or the terms or conditions for undertaking the work. The Plaintiff commenced repair work on the barge.

2. January 1986 - work on the barge by the Plaintiff stopped, apparently by the third Defendant, although I do not know how or in what capacity he could stop the work. It seems, from a hearsay newspaper article, the work was stopped prior to 15 January 1986.

3. Thereafter, (dates are not given) the managing director of the Plaintiff, Mr Milford, regularly requested "payment" for the work of the Plaintiff on the barge from the third Defendant. The third Defendant told Mr Milford he was waiting for Cabinet authority. Mr Milford saw the Deputy Prime Minister, this person's part in the affair is not explained. The Deputy Prime Minister told Mr Milford the third Defendant "was considering the matter in depth". The barge, I think, was then above water. Mr Milford was under the impression that Cabinet knew of the requests for payment from the third Defendant. It is not explained how the third Defendant was to arrange payment for what seems to have been a liability of the first Defendant.

4. 18 February 1986 - Mr Milford approached the Plaintiff's (his) solicitors, "for advice concerning the withholding of payments pursuant to his contract with the first Defendant" There is no evidence of any contract or agreement by the second and third Defendants with the Plaintiff to pay for the work undertaken by the Plaintiff on the barge. There is no evidence that the third Defendant was approached for payment in his ministerial capacity, or any capacity. The Plaintiff's solicitors were instructed to await the outcome of talks between the Plaintiff and the third Defendant, which were evidently continuing on 18 February 1986.

5. March 1986 - towards the end of this month Mr Milford instructed the Plaintiff's solicitors to issue proceedings (against whom it is not stated), as he was getting no where with the third Defendant.

6. 1 April 1986 - the Plaintiff's solicitors wrote to the first Defendant (in the circumstances, significantly, not to any other Defendant) in which letter they stated:

> "M.V. LIMULIMUTAU - MILFORD BUILDERS LIMITED
>
> We act for Milford Builders Ltd to whom your corporation awarded the repair contract for M.V. Limulimutau in the amount of WST$180,000.00.
>
> We are instructed that the contract was awarded in consultation with the Government of Western Samoa the owner and operator of the Corporation and that the contract was approved by your Board of Directors. We are further advised that work under the contract in fact commenced and our client was paid the sum of $5,000.00 on 23rd December 1985.
>
> We are further instructed that a claim lodged in mid January for $16,525.25 in respect of work performed remains unpaid to date and that work under the contract has been stopped by order of the Minister of Transport Toeolesulusulu Siueva. We do not know under what legal authority the Minister has acted but infer due to the continued failure of the Corporation to pay claims lodged that the Corporation acquiesces in the unlawful conduct of the Minister.
>
> Our instructions are that the Corporation has breached its contract with our client and accordingly on our clients behalf we demand payment forthwith of the balance of the contract sum namely $175,000.00 WST. Failure to pay the same within fourteen (14) days will result in the issuance of legal proceedings without further notice to you."

It appears from this letter that the Plaintiff's solicitors and the Plaintiff considered the relevant contract to be between the Plaintiff and the first Defendant only.

7. 15 April 1986 - the first Defendant's solicitors wrote a letter in reply to the letter of 1 April 1986, to the Plaintiff's solicitors, in which the first Defendant's solicitors claimed there was no contract.

8. 16 April 1986 - the Plaintiff's solicitor spoke to the first Defendant's solicitor when the first Defendant's solicitor advised the Plaintiff's solicitor there was some liability (that could only be on the part of the first Defendant). He also said that there were no records or documents.

9. 5 May 1986 - the Plaintiff's solicitors wrote to the first Defendant's solicitors as follows:

> "W.S. SHIPPING CORPORATION - M.V. LIMULIMUTAU
> MILFORD BUILDERS LIMITED
>
> We acknowledge receipt of your letter of 15th April 1986.
>
> We find your assertions there was no contract let surprising against the background of
>
> (a) Board approval of the contract
> (b) Cabinet approval of the contract
> (c) Part performance of the contract
> (d) A letter dated 14th January indicating proposed revision of the contract by the Corporation's Solicitors.
>
> The instruction to commence the work and the incurring of substantial expenses for materials and labour leaves us in little doubt our client company is fully entitled to the WS$175,000.00 sought.
>
> Entirely without prejudice to our client's position we would be prepared to consider negotiation of quantum out of court should your client admit liability.
>
> Please advise us within seven (7) days of your client's position otherwise we shall proceed to issue court proceedings."

Again it is significant that there was no claim involving the second and third Defendants in the correspondence on the part of the Plaintiff. "Cabinet approval" to the contract could not in itself imply liability on the part of the Government, nor would such an approval be necessary if the Government was in fact a party to the contract. On the whole of the evidence it seems clear the Government was not a party to the contract, or if it was, it was not liable for any payment to the Plaintiff.

10. After 5 May 1986 there were some inconclusive discussions between the Plaintiff's solicitor and the Defendant's solicitor regarding a settlement of the Plaintiff's claim for its work on the barge. It appears the real difficulty was that the first Defendant had no money to meet the Plaintiff's claim. That does not make the second and the third Defendants liable directly to the Plaintiff but rather, it emphasizes that the question of liability for payment was solely between the Plaintiff and the first Defendant. The issue of liability is independent of the

question how that liability was to be met. It may be, I do not know, that the first Defendant has a claim against the second and third Defendants. The Plaintiff's solicitors and the first Defendant's solicitors discussed the issue of proceedings by the Plaintiff. The question of issuing the proceedings against the second Defendant and the third Defendant, as well as the first Defendant, was discussed. The first Defendant's solicitor indicated that he would prefer the action to be against the three Defendants. The clear implication from this is that although the contract and any liability for breach was between the Plaintiff and the first Defendant, it would assist in meeting that liability, in the way of funds, if the second and third Defendants were parties to the action. It was as if the parties were then considering how judgment would be met rather than the first issue of how and against whom the judgment would be obtained. To my mind this emphasizes that there was no right of action by the Plaintiff directly against the second and third Defendants. That is consistent with all the evidence and to me confirms that the second Defendant was not a party to the contract or liable for payment to the Plaintiff under the contract. I appreciate that I am not concerned with the question of liability between the parties at this stage. I am however concerned with the question of whether it would be just to grant leave under s.21(2), and to try to understand the nature of the claim against the second and third Defendants in relation to the question of whether or not the failure to give notice was occasioned by mistake or other reasonable cause, or that the second and third Defendants were not materially prejudiced by the failure to give notice. I am also concerned, it seems to me, where there has never been express notice in writing, whether the statement of claim gives reasonable information to the second and third Defendants of the circumstances upon which the action against them is based, in an intelligible manner, as must be required by the notice under s.21(1)(a) of the Act.

11. No notice was given by the Plaintiff to the second or third Defendants under s.21.(1)(a) of the Act.

12. 4 July 1986 - the Plaintiff filed its statement of claim in the action in the Supreme Court.

13. 9 July 1986 - the second and third Defendants were served with the statement of claim.

14. 11 August 1986 - the statement of claim was called for mention in the Supreme Court. The parties were then represented by counsel. Mr Lazer for the second and third

Defendants advised that application was to be made to strike out the claim against those Defendants under the Limitation Act.

15. 26 August 1986 - the application to strike out the claim against the second and third Defendants was filed and served. At that stage, if not previously, the Plaintiff was on notice as to its failure to comply with the provisions of s.21 of the Limitation Act. The application to strike out was not heard in 1986, evidently because there was no available fixture or Judge to hear the application because of other cases then being dealt with.

16. 31 March 1987 - the application to strike out was part heard and adjourned.

17. 2 April 1987 - the Plaintiff filed an application for leave to commence or proceed with the action against the second and third Defendants.

18. 8 April 1987 - the second and third Defendants' affidavits filed in substitution for those filed with the application 26 August 1986.

The second Defendant, the Attorney-General is sued in respect of the Government. The Government, as such, may be a party and sued as in the present claim under and by virtue of the Government Proceedings Act 1974, s.4 of which provides:

> "The provisions of this Act shall be subject to the provisions of any limitation enactment which limits the time within which proceedings may be brought against the Government."

Section 21(1) (except the provisoes) and (2) of the Limitation Act 1975 states:

> "(1) No action shall be brought against any person (including the Government) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless -
>
> (a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective Plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective Plaintiff to the prospective Defendant as soon as practicable after the accrual of the cause of action; and

(b) The action is commenced before the expiration of one year from the date on which the cause of action accrued:"

"(2) Notwithstanding the foregoing provisions of this section, application may be made to the Court, after notice to the intended Defendant, for leave to bring such an action at any time before the expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the intended Defendant under subsection (1); and the Court may, if it thinks it is just to do so, grant accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended Defendant was not materially prejudiced in his defence or otherwise by the failure or delay."

As the Plaintiff did not give notice under S.21(1) and because it commenced its action prior to filing the application for leave under s.21(2), I do not think I have jurisdiction to grant leave to the Plaintiff for its application. I think the application to strike out must succeed. I give my reasons as to jurisdiction later in this judgment. It may be of some help to the parties if I consider the merits of their respective cases although my decision on such, has no binding effect. However, the first question which arises is of relevance in any event. That is whether or not s.21 applies to the claim against the second and third Defendants.

Section 21 gives protection to certain persons only in respect of actions brought against them for any act done in pursuance or execution (or intended execution) of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of any Act, duty, or authority. The purpose of the section is to protect from stale claims (a relative concept) the Government as well as certain other persons in such circumstances. The claim is against the Government and a Cabinet Minister, although it is not clear in what capacity the Minister is sued; that is the failure of the Plaintiff, rather than the third Defendant. From his description in the statement of claim, and from the evidence, I imply he is sued as a Cabinet Minister. I think the claim against the Government is one that clearly comes within the provisions of the first part of s.21(1) of the Act. It is inconceivable how the Government, as such, could act or omit to act, other than pursuant to an Act, a public duty or authority, or neglect or default in such. The Government's duties or authorities, for its acts omissions are statutory or public. I think the section clearly applies to the second Defendant. The section must also apply to the third Defendant in his capacity as Cabinet Minister, and as an officer or agent of

the Government insofar as his acts or omissions are those of the Government. Those acts are either in execution of an Act or are of a public duty or authority type. Similarly any omissions would be a neglect or default of such statutory duty or public duty or authority. To that extent therefore the section applies to the third Defendant. If there is any liability on the part of the second or third Defendants as the Government or as a Minister, to the Plaintiff, that comes within the section. The second and third Defendants are entitled to the protection afforded by s.21 of the Act. There is no evidence of any waiver by the second and third Defendants of the requirements of s.21 or their consent to the Plaintiff not strictly complying therewith. I now move on to consider Mrs Drake's submissions on behalf of the Plaintiff opposing the application to strike out and in support of the application for leave.

The first submission on behalf of the Plaintiff was that the affidavits filed for the second and third Defendants could not be read or used by virtue of the proviso to s.14(1) of the Oaths, Affidavits and Declarations Act 1963 as they had, in the first instance, been sworn before counsel, Mr Lazar, and in the second instance, before a solicitor in the Attorney-General's Office. I had no difficulty in finding that although such affidavits could not be treated as if they were legally non-existent, they comply with s.14(1), but by virtue of the proviso thereto they could not be used and read in the present contentious proceedings between the parties. The Attorney-General's Office, or the Attorney-General and the solicitors acting on his behalf have no special privilege or rights under the proviso. I gave detailed reasons for my findings which I will not now repeat. The third lot of affidavits filed on behalf of the second and third Defendants are the same as the earlier ones but have been sworn before an independent solicitor.

Mrs Drake's second submission was that s.21 did not apply to the claim against the second and third Defendants. She contended that the first Defendant was not a person entitled to protection under S.21 and that the acts or omissions of the second and the third Defendants were only as servants or agents of the first Defendant. She argued on this basis that such acts or omissions are not those within the first part of s.21(1). That is not how the claim is framed. I have already remarked that the nature of the claim against the second and third Defendants are so vague as to be very difficult to understand their true basis and purport. I do not believe the Plaintiff can for the purposes of s.21 elect in its own interests how the second and third Defendants may possibly, if not obviously, be liable. The statement of claim itself does not satisfy any mode of liability; there is no claim that the second and third Defendants were acting for or on behalf of the first Defendant, as servants, agents or whatever. The shareholders of a company are not its servants or agents. It is a well established principle that at law the company is a

different person altogether from its shareholders and they are not liable for its acts or omissions, except as provided for in the Samoan Companies Order 1945 and the Companies Act 1955 (NZ); Salomon v Salomon and Co. Ltd [1897] AC 22 is the classical authority. I have already dealt with the other aspects of the application under s.21 to the alleged acts or omissions of the second and third Defendants. I do not accept Mrs Drake's submissions that the section does not apply to the claim against the second and third Defendants. If the Plaintiff is to somehow try to make the second and third Defendants liable otherwise than in their public or statutory capacity it should say so, and sue the persons involved in their private capacity, which it has not done.

Mrs Drake's next submission is that s.21 of the Limitation Act was inconsistent with Article 15 of the Constitution and so, she claims, it is therefore void. No authority was cited for this proposition. Counsel for the Attorney-General had no notice of such an argument. For some reason, I could not understand, he did not seem to think that was of particular consequence. I have previously stated, in another case where a similar sort of argument was put forward, as a side-wind challenging certain legislation, in that other case the Goods and Services Act 1986, that I am not prepared to make a decision on such an important constitutional issue of far-reaching consequence, without appropriate notice to the other side and without a full and detailed argument from all counsel concerned. It is easy to raise such an issue, and to leave it up in the air for the Judge to do all the necessary research, consideration and then to reach a conclusion, without the benefit or the assistance of counsels' considered arguments. I am not prepared to do that. Such a decision without full and considered argument must inevitably be of limited value. If counsel are serious in their submissions and want the Court to take proper notice of it they can either follow the procedure provided by Article 4, or argue the point properly, with reference to authorities and cases and after adequate notice to the opposition, so I can have the benefit of their full and considered arguments before trying to resolve such a far-reaching issue.

If the Plaintiff seriously considers this constitutional argument has merit then I reserve this point for counsel to bring that argument before the Court in appropriate proceedings, either under Article 4, or on written notice, with headings of arguments, cases and authorities cited, filed before the hearing and copies served on the Attorney-General's office. My judgment on the applications now before me expressly reserves this point to be dealt with by appropriate proceedings on notice. It may seem that s.21 gives unequal treatment to the second and third Defendants.

For a variety of reasons, including those of public policy, practice, historical or political, the private domestic law of independent sovereign states generally recognised and followed the maxim that "the king", sovereign, president, head of state, governor, or however the head of state was described, "could do no wrong", and such executive head or sovereign, his or her servants or agents, could not be sued or made liable under the private domestic law of that state, without the consent of such person or persons. This recognition of immunity from suit on the part of the sovereign and his servants is a reason for the Government Proceedings Act 1974, under which in Western Samoa the sovereign has consented to being sued and liable in civil proceeding, in common with other persons and citizens, but only on its terms, including the timely requirements of notice, as contained in s.21 of the Limitation Act. That provision may therefore be a reservation on the waiver of sovereign immunity from proceedings against the Independent State of Western Samoa, and its servants or agents, acting for the State.

Leave is reserved to the Plaintiff, as stated hereafter, to pursue its Constitutional argument, if it so desires by appropriate proceedings. In the event of the Plaintiff not taking advantage of the leave reserved to it for that purpose, I find that, without the thorough and necessary consideration that I am unable to undertake without proper research, preparation, argument and assistance from counsel, that the State is in a special situation and privileged position under Article 15(1) of the Constitution by reason of its sovereign immunity within the State. It has consented to the waiver of that immunity as provided in the Government Proceedings Act, which includes within the terms of that waiver or consent to action against it the reservation contained in the terms and provisions of S.21 of the Limitation Act. On that basis s.21 of the Limitation Act is not contrary to Article 15(1) of the Constitution. It may also be that s.21 is preserved under Article 15(4) of the Constitution.

Mrs Drake's next submission on behalf of the Plaintiff was that the third Defendant is the chairman of the board of directors of the first Defendant, and other members of the board of directors and management of the first defendant are servants, officers or agents of the second Defendant. Apart from the position of the third Defendant there is no evidence on this. The third Defendant became chairman in January 1986. From this Mrs Darke submitted "it was reasonable to assume", that the third Defendant would have made enquiries and investigations (whatever about I do not know) prior to his stopping the Plaintiff's work on the barge in January 1986. It is claimed the second and third Defendants would have constructive notice of matters relating to the claim against them in early 1986. As further support of this submission is the claim that the third Defendant would have known of the claim by reason of Mr Milford's calls upon him for payment to be made to the Plaintiff. There is no evidence from all this

that the second and third Defendants would have had notice of the claims against them as contained in the statement of claim. I have no idea why the first defendant stopped work on the barge, or what was done before that was undertaken, by the third Defendant. I have no idea why Mr Milford approached the third Defendant for payment except in his capacity as chairman of the first Defendant. I do not know whether or in what capacity the second Defendant is somehow involved, or whether the third Defendant is involved as an agent or officer of the second Defendant. There is no evidence that the third Defendant did anything wrong or what the consequences of his actions may result in as a matter of law.

Particularly, I could not assume that the second and third Defendants would have had any notice, constructive or otherwise, of the claims made against them prior to service of the claim upon them in July 1986. It could not be assumed they could somehow know of the vague, unprecise and unspecified duties they were supposed to have had and breached. If the Plaintiff cannot articulate such claims in an intelligible form in its statement of claim with a perceptible and understandable legal basis, it is not possible to see how the second or third Defendants could have had any prior knowledge of such claims.

Section 21(1)(a) is specific in its requirement. So-called constructive notice could not satisfy those requirements, although such notice, if proved, could be relevant to a consideration of the grounds for leave under s.21(2). There are some grounds for saying that the Plaintiff would sue if it had a contract which was improperly terminated by the third Defendant, and that the third Defendant would know something of that from the requests for payment made to him. However I do not think any such knowledge could be notice to the second and third Defendants of the actual claim made against them.

The next submission made on behalf of the Plaintiff, opposing the application to strike out and in support of the application for leave to commence or continue the action, was that there had been no unreasonable delay by the Plaintiff in commencing the action. I do not see that this is relevant to the failure to give notice under s.21(1)(a). It may be of some relevance to the application for leave under s.21(2). Mrs Drake submitted that the Plaintiff was led to believe the matter was being looked into by the third Defendant's actions and the failure to give notice by the Plaintiff was reasonable in the circumstances. Such submission could only be relevant to s.21(2). It may be that Mr Milford's negotiations with the third Defendant, and the action of the third Defendant in somehow stopping the work by the Plaintiff, may have led the Plaintiff to think that the first Defendant would pay the Plaintiff for the work it had done. But again, I am not prepared to assume or imply that that could involve claims against the second Defendant and the third Defendant as set out

in the statement of claim, or could be notice that they would be likely to be sued in the vague and unspecified manner that they have been sued, following non-payment by the first Defendant. Knowledge of what was occurring cannot be translated into knowledge of the claims against the second and third Defendants.

There was no notice on or of any claims against the second or third Defendants made until at least just under six months after the event, or any cause of action accrued to the Plaintiff. I do not see how the second and third Defendant could know of the claims against them prior to the service of the statement of claim upon them, and even then when the Plaintiff seems less than sure or unwilling to give the precise foundation for such claims. The foundation of the action taken by the plaintiff in July 1986 was I think against the first Defendant. That is evidenced by the Plaintiff's solicitor's letter of claim and their dealings with the first Defendant's solicitors. I think Mr Milford's approaches to the third Defendant can only be interpreted in the light of that, as approaches to the third Defendant as chairman of the first Defendant. That is all the more reason why the second and third Defendants could not have expected any claims to be made against them. The Plaintiff consulted its solicitors in February 1986 regarding the proposed claim. I think it would have been practical then for the Plaintiff to have issued a notice to the second and third Defendants, under s.21(1)(a) of the Limitation Act. It did not do so I think because it was then concerned only with recovering against the first Defendant, the only party, I infer, that was apparently liable to the Plaintiff under any contract. If it was ever practical to make the vague claims against the second and third Defendants I think it was as practical in February 1986, as it was in July 1986. I am concerned only with civil liability and not with how that liability may be met after any judgement is obtained.

Mrs Drake referred to the principles evinced in Moellor v New Plymouth Harbour Board [1955] NZLR 151 being applicable to her argument. The facts of that case, in which there was always only one potential Defendant, and the prospective Plaintiff only consulted his solicitor fairly shortly before any notice was given, which was in fact given, clearly distinguish that case from the present one. On the facts of Moellor's case there was a reasonable cause for not giving notice within the time specified. The same cannot be said in the present case, where no notice was ever given and no application for leave was made until seven or eight months after the Plaintiff was on notice that the provisions of s.21 of the Limitation Act were relied upon by the second and third Defendants. There is no evidence of mistake or reasonable cause for the failure to give notice or in not making application for leave in August 1986, nor, in my opinion earlier in 1986. No reason has been given by or on behalf of the Plaintiff as to why notice was not given under s.21(a) of the Limitation Act or why there was such a delay in filing the

application for leave under s.21(2). I cannot assume, in the absence of evidence, that the notice required by section 21(a) was not given by reason of mistake, or other reasonable cause, nor could I say in the circumstances that it would be just to grant leave under s.21(2) on either of those grounds.

The final and principal submission of Mrs Drake for the Plaintiff was that the Defendants were not materially prejudiced by any delay of failure to give notice. It was argued that when the third Defendant stopped the work by the Plaintiff on the barge he knew or ought to have known of all the relevant circumstances attendant thereon and no prejudice had been proved by the Defendants. This was a general submission that lacked detail. I am not concerned with the position of the first Defendant, or "the Defendants" as a group. My concern is only with the second and third Defendants and the circumstances upon which a proposed action against them was based. This submission must be considered in the context of the whole of s.21, and in particular in the context of s.21(2), under which leave may be granted to bring the action after notice to the intended Defendant, whether or not notice has been given under s.21(1)(a), where the Court thinks it just to do so, and where the failure to give the notice has not materially prejudiced the Defendant in his defence or otherwise.

The grant of leave is discretionary. This is to be exercised only where it is just. The Court may grant leave where the failure to give notice will not materially prejudice the second and third Defendants in their defence or otherwise. It should also be noted that the application for leave can only be made and granted before the action is commenced, it is for "leave to bring such an action", such as mentioned in s.21(1), although the question of the adequacy of notice given can be argued after the action has been commenced. On considering the application of the Plaintiff under s.21(2) it is for the Plaintiff to make out its case, if it does not then it could not be said to be just to grant leave or there has been no prejudice. He who asserts must prove. There is therefore in my view a legal burden of proof upon the plaintiff to meet the requirements of s.21(2) and for that purpose there is a factual burden of proof, an onus of proof, upon the Plaintiff to make out its case. This is to be distinguished from the evidential burden of proof which may shift on to the second and third Defendants once the Plaintiff has given sufficient evidence on which the Court could conclude it would be just to grant leave, and that there is no material prejudice to the second and third Defendants in their defence or otherwise by the failure of the Plaintiff to give notice.

I again stress I am not at present determining liability between the Plaintiff and the second and third Defendants. That is another issue. At the same time I cannot ignore the vague and uncertain basis of the Plaintiff's claim against the second and

third Defendants. Such a claim could be hard to meet because if the Plaintiff does not seem to clearly know the basis of its claim with certainty how can the second and third Defendants know? It would be difficult in the circumstances to see how it could be just to grant leave to the Plaintiff to commence or continue with such a vague and uncertain claim. In case that may seem to be interfering with the merits of the claim (whatever they may be) the question may be framed in a different manner. How can the Plaintiff prove the second and third Defendants are not materially prejudiced in their defence or otherwise by the failure of the Plaintiff to give notice under s.21(1)(a). If the basis or source of the duties allegedly broken by the second and third Defendants were spelt out in an intelligible manner I would have a better idea of what the relevant circumstances to the issue of prejudice were. Without that information I do not know what may be relevant and what is not relevant. I do not really know, on the balance of probability, whether the first and second Defendants have not been materially prejudiced in their defence or otherwise by the failure of the Plaintiff to give the required notice.

The second and third Defendants have positively asserted they were prejudiced by the failure of the Plaintiff to give the required notice as soon as practicable after the cause of action arose. There is a general assertion to that effect in the affidavit of the Acting Attorney-General, and a specific assertion of prejudice in the affidavit of the Acting Secretary for the Ministry of Transport. The prejudice claimed in the latter affidavit, which asserts prejudice from the delay in giving notice of the action to the second Defendant, is in being unable to locate any relevant documents in the possession of any Ministry, and that any such relevant documents may have been removed. Also, the barge was sold in May and June 1986; the second affidavit mentioned says:

> "the Defendants ability to defend this action will certainly be impaired through our present inability to inspect the vessel and document any alleged work which may have been performed by Milford Builders".

I am not in a position to question that statement. I accept what it says. I consider the second and third Defendants to have been materially prejudiced by the failure to give notice as required by s.21(1)(a) of the Limitation Act.

The Plaintiff alleges there was no relevant prejudice by any failure to give notice by reason of the constructive notice the second and third Defendants had of the claim and the third Defendant's involvement in the stopping of work and the request for payment thereafter. I accept that may be the case so far as the claim against the first Defendant is concerned, but I do not accept that is the case so far as the claims against the second

and third Defendants are concerned for the reasons I have already given. The Plaintiff has not proved that the second and third Defendants will not be materially prejudiced in their defence or other wise in respect of the claim by the failure of the Plaintiff to give notice as required under s.21(1)(a). I think the second and third Defendants were in a better position to check on any liability they may have to the Plaintiff in February 1986, than they were in July 1986. I think they were in February 1986 then in a better position to find witnesses, obtain briefs of evidence, obtain copies of any relevant documents and to check the extent of the work carried out by the Plaintiff on the barge than they were almost five months later. It is clear that there was probably some relevant documentary evidence available by reason of the papers mentioned in the Plaintiff's solicitor's letter of 5 May 1986.

I have considered the many cases cited by Mr Lazar and Mrs Drake. The New Zealand cases are relevant because of the identical section, s.23 of the Limitation Act 1952 (NZ), since repealed, which was precisely followed by our section 21 of the Limitation Act 1975. Most of the New Zealand cases relate to the claims for personal injuries by injured workmen against their employer. The question of the justice in granting leave and the question of prejudice where usually, or often, the knowledge and circumstances of the accident were with the employer, are somewhat different to the circumstances of the present case. In view of the submissions made I make brief reference to the cases and of the general purpose and intent of s.21.

There can be little doubt that the purpose and intent of s.21 of the Limitation Act 1975 is, amongst others, to protect the government and persons acting in a public, as opposed to a private capacity, from stale claims, by the requirements of a timely written notice giving details of such a claim and the commencement of an action thereafter within a year of the cause of action arising. In the present case, so far as I can ascertain, any cause of action arose in January 1986, when the third Defendant stopped work on the barge. The parties are all in or about Apia. I think it was practical to give notice of the Plaintiff's claim to the second and third Defendants in February 1986, when the Plaintiff consulted its solicitors. The wording of s.21(1) of the Limitation Act seem to be clear and unequivocal. The words "No action shall be brought .... unless ...", appear to mean exactly what they say, so that failure to give notice under subsection (1) if it stood alone, would be fatal and effectively end any action. The section however must be read as a whole, and for subsection (2) to be effective the provisions of subsection (1) must be directory rather than mandatory requirements, so that failure to give notice under subsection (1) may not be the end of the action. Subsection (1) is subject to the provisions of subsection (2); the later subsection makes that clear at the commencement by stating

"Notwithstanding the foregoing provisions of this section....". But, subsection (2) only applies if the conditions expressly applicable to an application for leave apply in the given circumstances. Whether or not notice has been given under the earlier provisions of the section, application can be made for leave to bring an action and the Court may grant leave as provided in subsection (2). Under subsection (2) there is no power given to the Court to grant leave in respect of an action already commenced for that action to continue, where no notice at all has been given, as in the present case. In Watch Tower Bible Society v The Huntly Borough Council [1959] NZLR 821 Shorland J dealt with a similar situation to that of the present case; he found that no notice under subsection (1) had been given to the Defendant, which was entitled to the protection afforded by section 23 of the New Zealand Limitation Act 1952. Proceedings had already been commenced by the Plaintiff against the Defendant for an alleged breach of contract. Counsel for the Plaintiff sought leave to bring the action under subsection (2) in the course of argument on the hearing of the case. The Judge held that he could not then grant leave. He said (p.823):

> "I was asked in the course of argument to accede to an application made in Court under s.23(2) for an order giving leave to bring the action. The subsection appears to me to require that application must be deferred until notice has been given to the other side; but, be that as it may, I am of the opinion that leave granted cannot operate retrospectively so as to give validity to proceedings already commenced, and that if I were to give leave ... it would not save the present proceedings.
>
> I hold, accordingly, that the present action must fail because of failure to give the requisite notice pursuant to s.23(1)(a) of the Limitation Act 1950".

That decision was followed in Marsh v Attorney-General [1961] NZLR 111. The Defendant in that case was also entitled to the protection of the section, but the Plaintiff had not given notice under subsection (1)(a) prior to the commencement of the action. Application for leave to commence the action was made under subsection (2) after the action had been commenced. In the absence of the consent of counsel for the Defendant (who may waive compliance with all or part of the requirements of the Act in respect of actions) the Judge observed that the Court had no power to sanction retrospectively, proceedings already commenced. The New Zealand Court of Appeal decision in Auckland Harbour Board v Kaihe [1962] NZLR 68 supports these decisions to the effect that the Court cannot retrospectively grant leave after an action has been commenced when no notice has been given under subsection (1)(a) to the Defendant, before it had commenced its action. In Kaihe's case the statement of defence claimed that the notice had not been given as soon as practicable after the

accrual of the cause of action. That point was again raised in the course of trial. It is important to note that notice had been given before the action was commenced. In the majority decision of the Court of Appeal, given by North and Cleary JJ, it was held that the provisions of subsection (1)(a) were directory only, in certain regards, and if in the course of the trial it appears that all the provisions of subsection (1)(a) had been fully complied with, the Court can if it though fit so to do, excuse the Plaintiff's partial non-compliance, by granting leave to proceed with the action after it had been commenced. In that case therefore leave was granted to proceed with the action but that was only after a notice under subsection (1)(a) had been given, which notice did not fully comply with all the subsection (1)(a) requirements. The learned Judges considered that commencing an action where notice had been given although not in strict compliance with subsection (1)(a), was a different situation to commencing an action where no notice at all had been given under subsection (1)(a). They said (p.93):

> ".... when the question is whether an intended plaintiff has complied with the provisions of para. (a) of s.23(1) as to notice, the matter may not be capable of resolution in such a ready manner. It would be if no notice at all had been given. Where, however, a notice has been given, the question whether it was given as soon as practicable may depend upon a variety of circumstances affecting the particular case....," (underlining added).

The Judges held that where only the adequacy of the timing of the notice was in issue, that was a matter that could be determined at trial, so that it could be appropriate to grant leave, if necessary, for the action to continue. That is, to grant leave retrospectively. Where no notice have been given however the clear indication was that leave could not be granted retrospectively. It had to be obtained before the action was commenced. That accords with the plain meaning of the words contained in subsection (2). Paragraph (a) of s.21(1) is to be read as directory only with regard to the sufficiency of the timing notice, in which case the Court can excuse strict non-compliance with the paragraph during the course of trial. But apart from that limited situation leave would have to be obtained, in my view prior to commencing the action, according to the clear requirements of subsection (2) and the decisions of the New Zealand Courts in the Watch Tower Bible Society case and the Marsh case.

In the present case I have found that there was no notice at all given under s.21(1)(a). The question of the sufficiency of the notice does not arise. The provisions of s.5(1) of the Acts Interpretation Act 1974 apply. The true intent, meaning, and spirit of s.21 of the Limitation Act is to protect persons in the position of the second and third Defendants, acting in pursuance

of any public duty or authority from stale claims and to ensure they have notice of the claim against them as soon as practicable after the accrual of the cause of action giving rise to that claim. For the Plaintiff to commence its action without any prior notice, and then to be able to get leave to continue with the action would in my opinion be contrary to the true intent, meaning and spirit of s.21. Except as provided in Kaihe's case the section does not authorise the Court to grant leave retrospectively in respect of the action already commenced. In my view I have no jurisdiction to grant the application now sought by the Plaintiff for leave under s.21(2) to enable the Plaintiff to continue with its action. If I did have jurisdiction, I would not grant such leave because I am not satisfied that it would be just in the circumstances of this case to do so, I am not satisfied the failure to give notice was occasioned by mistake or any other reasonable cause, or that the second and third Defendants were not materially prejudiced in their defence or otherwise by the failure to give notice. I do not therefore grant leave to the Plaintiff to commence an action. I have already given my views as to the onus of proof under s.21(2). Counsel referred me to a number of cases on this point.

In McCullough v The Attorney-General [1956] NZLR 886 Stanton J said (p.887):

> "In Moeller v New Plymouth Harbour Board [1955] NZLR 151, I had occasion to examine the question of onus in such cases and there held that the onus was initially on the Plaintiff, but if there is evidence from which it may reasonably be inferred that the defendant has not been prejudiced, then the burden of proof be shifted to the shoulders of the Defendant."

However, it is only the evidential burden of proof that may be so shifted. This is evident from subsection (2) itself, and the remarks of North J in Tett v The Attorney-General [1957] NZLR 1063, where he said after considering the decision of the Court of Appeal in Brewer v The Auckland Hospital Board [1957] NZLR 951 (at p. 1067 in Tett's case):

> "(i) In applications under s.23(2) of the Limitations Act 1950, the onus is on the applicant to show that "the delay" was occasioned either by mistake or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.
>
> (ii) In either case the burden of satisfying the Court rests throughout on the applicant and is not discharged "by raising prima facie presumptions supposed to throw the final burden on the defendant".

(iii) The Court, in the absence of evidence to the contrary, will not assume against the applicant what may be particular or specific grounds of prejudice, but it will require to be reasonably satisfied by evidence called by the applicant that there is no ground for supposing that the defendant will be materially prejudiced by the delay.

(iv) The longer the delay, and the more the essential facts are in dispute, the heavier is the burden lying on the shoulders of an applicant seeking the indulgence.

(v) In cases coming within s.23(2) the Court is required to consider the question of the effect of the failure to give the stipulated notice, and is not limited to matters of prejudice occurring after the statutory period of one year has expired.

(vi) Unless the defendant wishes to raise particular matters of prejudice, he is entitled (if he wishes) to resist the application on the grounds of general prejudice without filing any answering affidavits; and if he elects to take that course it will not be assumed against him that no prejudice exists, merely because he does not think it expedient to disclose in advance of the trial the strength or weakness of his case.

(vii) An overriding requirement is that the Court is required to exercise a discretion and should not grant leave unless it thinks it is "just" to do so. It does not necessarily follow that an order will be made granting leave once the applicant has established one or other of the conditions to the exercise of the discretion. At this stage of the inquiry, all the facts of the case, at whatever point of time they have arisen, are relevant. Consequently, if the applicant quite inexcusably has "gone to sleep" on his rights for a long time, the Court will be slow to conclude that the Defendant has not been prejudiced in his defence or otherwise by the failure or delay."

I prefer and follow the remarks made in North J's decision as the onus of proof under subsection (2) to any remarks to the contrary; if there are so, in the Australian cases referred to me by Mrs Drake, such as Posner v Roberts [1985] Aust. Torts Reports 80-726 and Ridgeway v Shire of Moora [1986] Aust. Torts Reports 80-003. I also consider North J has correctly, generally summarised the requirements of subsection (2).

Subject to the reservation of leave thereafter mentioned in respect of the Constitutional validity of s.21 of the Limitation Act, the application of the Plaintiff for leave to continue with its proceedings in the action is refused. For the reasons given

leave to commence an action in the same form of the statement of claim already filed is also refused. In the circumstances the application by the second and third Defendants is granted because of the failure of the Plaintiff to comply with the provisions of s.21(1) and because of the refusal of leave under s.21(2) of the Limitation Act. Leave is refused in regards to the third Defendant, but only in his capacity as a Minister, or as an officer or agent of the second Defendant, in respect of any relevant acts or omissions on his part. That is only refused for or in respect of his acts or omissions so far as they are within s.21(1)(a).

Leave is reserved to the Plaintiff for a period of only one month from the date of this judgment for the Plaintiff to make application, by notice of motion served on the second and third Defendants at their addresses for service, for a declaration that the provisions of s.21 or part thereof, in particular s.21(1) of the Limitation Act 1975 are void is being contrary to or inconsistent with article 15(1) of the Constitution. If such application is made within the time mentioned final judgment on the application by the second and third Defendants to strike out is deferred and reserved until the final judgment is given in respect of the constitutional issue mentioned. That may have to be done by another Supreme Court Judge. Although that issue may be raised at anytime, so far as the present application to strike out is concerned, there will be an Order giving effect to that application to strike out if the Plaintiff does not make an appropriate application in respect of the Constitutional issue within the month mentioned.

The question of costs is reserved.