

JAMES TIKANI & OTHERS -V- AMBROSE MOTUI & OTHERS AND ATTORNEY-GENERAL

**HIGH COURT OF SOLOMON ISLANDS
(PALMER ACJ)**

CIVIL CASE NO. 29 OF 2001

HEARING: 18TH FEBRUARY, 26TH FEBRUARY 2002

JUDGMENT: 18TH MARCH 2002

J. Apaniai for the Applicant/First Defendants

G. Suri for the Respondents/Plaintiffs

J.S. Deve for the Second Defendants

Palmer ACJ: The Applicants/First Defendants ("first Defendants") filed Notice of Motion on 12th September 2001 to have the Writ of Summons of the Plaintiffs filed 9th March 2001 struck out on grounds that:

- (a) it discloses no reasonable cause of action; and/or
- (b) that it is frivolous and vexatious;
- (c) it was an abuse of the court process;
- (d) the claim was res judicata; and
- (e) that it is statute barred under the Limitations Act [Cap. 18].

On 25th October 2001 I allowed adjournment of the Notice of Motion in order to enable Plaintiff file an amended writ and statement of claim. This the Plaintiff did on 1st November 2001. The Notice of Motion was eventually listed for hearing on 18th February 2002.

The Plaintiffs Statement of Claim

The Plaintiffs represent the Makara Tribe of Isabel Province. They are the owners of the customary land known as Huhurangi. Part of Huhurangi land is registered as parcel number 089-002-2, also known as LR 689. The Plaintiffs are the registered joint owners of LR 689 on behalf of Makara Tribe.

The first Defendants are the registered joint-owners of the neighbouring land registered as parcel number 090-002-2, also known as LR 690. This land is described as Banisokeo in custom.

Plaintiffs claim that registration of part of LR 690 had been obtained, made or omitted by the first Defendants through fraud or mistake. They say that part of LR 690 belonged to them (that it was part of Huhurangi Land) and that it had been fraudulently or by mistake wrested from them. They say they were not aware of this until in or about August 2000, when the first Defendants commenced logging operations in LR 690. It was only then that they discovered it had been registered in the first Defendants names.

The Plaintiffs aver the first Defendants had committed fraud or mistake. They say the first Defendants' failed to show to the Acquisition Officer the hinterland boundary corners of their land. Secondly, the Acquisition Officer or the Surveyor failed to ascertain and mark on the ground the "*hinterland boundaries corners of the First Defendants' land*". Thirdly, they say that the drawing of straight-line

boundaries was erroneous in custom. Fourthly, the first Defendants failed to show or take into account the tabu and sacrificial sites of the Plaintiff's tribe. They say it was wrong of the first Defendants to use their eastern boundary. They allege the first Defendants assumed they could use that boundary as forming their eastern boundary. Rather the first Defendants should have informed the Acquisition Officer what their true boundary was instead of using their boundary. Fifthly, they say they were not given opportunity or notice by the second Defendant to make submissions regarding that boundary line.

No reasonable cause

The Court has power under Order 27 Rule 4 to strike out an action if the writ and statement of claim discloses no reasonable cause of action. Rule 4 reads:

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

In such an application, no evidence is admissible and the court can only look at the pleadings and particulars (*Wenlock v Moloney* [1965] 1 W.L.R. 1238). The Court should only exercise its discretion to strike out in "plain and obvious cases" (*Hubbuck & Sons v. Wilkinson* [1899] 1 Q.B. 86, 91) and where no reasonable amendment would cure the defect. Such an application is only appropriate where it is clear that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks (*Chow v. Attorney General* CC 127 of 2000). A reasonable cause of action means basically a cause of action with some chance of success or where a tenable case has been disclosed for the relief sought (*Gatu v. SIEA, Attorney General & Gold Ridge* CC 59/95; *Ma'uana v. Solomon Taiyo Limited* CC 109/97). So long as the statement of claim disclose some cause of action, or raise some question fit to be decided by trial, the mere fact it is weak and not likely to succeed is no ground for striking out (*Moore v. Lawson* (1915) 31 T.L.R. 418; *Wenlock v. Moloney* (ibid)). If however, it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out (*Drummond Jackson v. British Medical Association* [1970] 1 W.L.R. 688 at p. 692 per Lord Pearson).

Fraud

The classic definition of fraud is contained in *Derry v. Peek* (1889) 14 App. Cas. 337 per Lord Herschell at p. 374 (applied in *Robert Victor Emery and John Sullivan and Taisol Investment Corporation (SI) Limited and Toshio Hashimoto and David Hayward* CC 301/93 & CC 119/93, 26th May 1995):

"Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false."

The definition used by Lord Denning in *Barclays Bank Ltd v. Cole* [1966] 3 All E.R. 948 was also applied in *R. v. Simi Pitakaka* [1985/86] SILR 69, 73:

" 'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage... "

Fraud is closely associated with elements of dishonesty.

"... fraud... means actual fraud, dishonesty of some sort..." (*Assets Co. Ltd v. Mere Roihi & Others* [1905] AC 176 at p. 210, per Lord Lindley)

In *Waimiha Sawmilling Co. Ltd v. Waione Timber Co. Ltd* [1925] AC 101 at p. 107 per Lord Buckmaster his Lordship states:

"It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend on its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

In Black's Law Dictionary, sixth edition it is defined as:

"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether by direct falsehood or innuendo, by speech or silence, word or mouth, or look or gesture."

Mistake

The mistake stipulated in Section 229 of the LTA must necessarily refer to any mistake committed by the Acquisition Officer or Commissioner of Lands or Registrar of Titles in the exercise of their functions to effect registration. It would be wrong to rely on registration of an instrument that had been obtained through a mistake. The mistake alleged however must be set out in clear terms.

Fraud or mistake?

Paragraph 11 of the Amended Statement of Claim filed 1st November 2001 ("the Claim"), avers that the first Defendants made false representations to the Acquisition Officer. At subparagraphs (a) to (f) the particulars of fraud or mistake are set out.

Failure to show hinterland boundaries

Subparagraphs 11(a) and (b) of the Claim, allege that the first Defendant failed to show the "*hinterland boundaries corners of the First Defendants' land*". The Plaintiffs allege the first Defendants only showed the coastal boundaries. The problem with such a bold statement however is that the Plaintiffs need to show how and in what way this failure is fraudulent or amounts to a mistake. What are the circumstances, or the particulars of fraud or mistake relating to this failure? When did it occur, where, who were involved, what actually transpired, what were the representations that transpired which were fraudulent or amounted to a mistake?

The fact the first Defendants failed to show the hinterland boundaries of their land (if true) do not necessarily imply a fraud had been committed. If the first Defendants failed to show the hinterland boundaries of their land, then what did they show and what was fraudulent about that. It seems that the Plaintiffs are saying that the first Defendants committed fraud in not showing the hinterland boundaries and instead used the eastern boundaries of the Plaintiff. If that is so, then the particulars of the circumstances in which that failure was committed, which is fraudulent must be pleaded. Are the Plaintiffs alleging there was deliberate concealment by the first Defendants of facts concerning the hinterland boundaries? If so, what are the particulars of that knowledge and concealment? If the failure was by conduct or by false representation, then particulars must be disclosed, so that the first Defendants would know what they are accused of. It is not enough to simply say that there was a failure or a refusal. Respectfully, the particulars set out in paragraphs (a) and (b) are insufficient to disclose elements of fraud.

On the question of mistake, if a mistake was alleged committed by the Acquisition Officer, in failing to ascertain and mark on the ground the “*hinterland boundaries corners of the First Defendants’ land*”, then what and how was that mistake made? An allegation of mistake presumes the Acquisition Officer knew what the correct boundaries of the first Defendants’ hinterland areas were but instead of drawing the boundaries along that correct boundary, he used the eastern boundary of LR 689. If so, what are the particulars of that knowledge, when was the mistake made, how, where and by whom? Again I fail to find sufficient particulars of mistake pleaded in the said paragraphs.

Straight-line boundaries

The particulars in paragraph 11(c) aver that the first Defendants committed fraud by marking and drawing a straight line on the boundaries of LR 690. Again how and in what way that is fraudulent was not disclosed. It is an obvious fact that all registered land boundaries are drawn in straight lines, but that is not the issue. The point is that before the boundaries are determined, the Acquisition Officer has to go through specified procedures set out in Division 1 of Part V of the Land and Titles Act [Cap. 93, now Cap. 133 in the revised edition]. Fundamental to that is the publication of notice of a public hearing regarding ownership of that land and the holding of a public hearing to determine any adverse claims of ownership. Only after the procedure set out in Division 1 has been completed can the boundaries be accepted as final. So there is an enquiry conducted by the Acquisition Officer to determine ownership of the land before acquisition procedures are completed. That would give opportunity to the Acquisition Officer to determine not only the claims of the first Defendants but any other claimants as well. Obviously that had been done in this case and a presumption exists (*omnia presumuntur rite esse acta*) that his acts are regular until the contrary appears.

To say that the drawing of the eastern and western boundaries on very straight lines is contrary to customary boundaries is simply stating the obvious. What needs to be shown is the element of dishonesty or deceit regarding the marking or drawing of those boundary lines in straight lines? This allegation assumes that the first Defendants knew what the customary boundaries of the Plaintiffs were as opposed to theirs but falsely represented or deliberately misled the Acquisition Officer into drawing straight-line boundaries as the true boundaries. In that situation details of the circumstances surrounding those matters would need to be disclosed? Did the first Defendant make false representations about those boundaries? If so, what are the particulars? When were they made, by whom, where? If the Acquisition Officer committed fraud or made a mistake regarding drawing of the boundaries, what are the particulars, when, how and what?

The pleadings simply aver that this is contrary to customary boundaries but did not say how the drawing of the boundaries in a straight line was fraudulent or a mistake. Again this is insufficient.

Tabu and sacrificial sites

The fourth allegation of fraud or mistake alleges that the first Defendants failed to take into account tabu and sacrificial sites of other tribes contrary to customary traditions. They say the first Defendants should have informed the Acquisition Officer that their boundary line was outside the eastern boundary of the Plaintiffs. It seems what the Plaintiffs are saying is that the first Defendants knew about the tabu and sacrificial sites of the Plaintiffs in part of LR 690 and knew also what the correct boundaries were. Details of such knowledge however must be pleaded and how it amounted to fraud or a mistake. In other words, if the Plaintiffs allege that the first Defendants made false representations to the Acquisition Officer regarding their tabu and sacrificial sites and boundaries, then particulars of those

representations must be pleaded, when they were made, by whom, where and what the representation was? Again the particulars pleaded in subparagraph 11(d) are insufficient.

Wrong assumption?

The fifth particulars pleaded in subparagraph 11(e) allege that the first and second Defendants assumed wrongly that the Plaintiffs' registered eastern boundary line did also form the western boundary line of the Defendants' registered land. The first question that may be asked is if that is so, how did the Plaintiffs know? It may very well be that the first Defendants did not assume but knew and told the Acquisition Officer so, that the said land and boundaries were correct and belonged to them. But where fraud is pleaded, the Plaintiffs need to go further and show how and why that wrong assumption was fraudulent, or that a mistake had been made? Particulars must be stated. If the Plaintiffs allege that the first and second Defendants knew what the custom boundaries of the Plaintiffs' land were, then the particulars of that knowledge must be stated. When was it made, where, by whom and how? Simply alleging that the first Defendants knew what their boundaries were is not sufficient. The circumstances of that knowledge must be pleaded so that the first Defendants can know what they have to meet. If it was a mistake, how was it made, when and by whom? Again the particulars pleaded respectfully are insufficient.

Failure to give notice or opportunity

Finally, at subparagraph 11(f) the Plaintiffs allege that the second Defendant failed to give due notice or opportunity to their tribe regarding use of their boundary line. This assumes that there is exclusive ownership or right to the use of the Plaintiffs' boundaries, which require notice. Unfortunately, that is not correct. A boundary is merely an imaginary line, which separates two contiguous parcels of land. So there is nothing unusual about the common boundary separating LR 689 and LR 690. All it demonstrates is that there are two different parcels of land and in this case they happen to be owned by two different groups of people.

Part of the claim of the Plaintiffs as I perceive their case to be is that they were not informed or made aware of the agreement entered into by the Acquisition Officer regarding LR 690. They claim they had not been informed or made aware of the public hearing convened pursuant to section 62 of the Land and Titles Act (Cap. 93), as it was then known. If that is so, then particulars of that deliberate concealment must be pleaded. What are the particulars of the element of dishonesty or deceit associated with that omission? If it is alleged the Acquisition Officer failed to give notice to the Plaintiffs, what are the particulars of fraud or mistake regarding that omission or failure? What are the particulars of that deliberate omission or failure? If it is alleged he committed a breach of a legal duty in the discharge of his duties and functions, what are the particulars of that deliberate commission or omission? Mere lack of notice or opportunity is not a ground for rectification. Plaintiffs need to go further and state how that was fraudulent or amounted to mistake. No details had been provided and again this ground too must fail for the same reasons.

Frivolous and vexatious or an abuse of process

The jurisdiction given to the court on these grounds is to be sparingly used and only in exceptional cases (*Lawrence v. Lord Norreys* (1890) 15 App. Cas. 210 at 219 per Lord Herschell). It should be exercised only where the claim is devoid of all merit or cannot possibly succeed (*Willis v. Earl Beauchamp* (1886) 11 P.D. 59). In *Norman v. Mathews* (1916) 85 L.J.K.B 857, 859 Lush J. propounded the test as follows:

"In order to bring a case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court."

The first ground relied on by the first Defendants essentially is the same as that relied on under the ground for no reasonable cause of action. They argue the Plaintiffs have failed to disclose details of any mistake having been committed by the Acquisition Officer or the Commissioner of Lands that would warrant intervention of this Court. To a large extent the matters raised under this ground have already been dealt with under no reasonable cause of action and I do not see need to rehearse those matters.

Res Judicata

The second ground relied on for the submission that the claim is frivolous and vexatious or an abuse of process is that the matters raised therein are res judicata. The first Defendants rely on the decisions of this Court in *Frasar Patty & Isabel Development Authority v. James Tikani CC No. 197 of 2000*, judgments delivered on 29th November 2000 and 31st August 2001.

The first Defendants say that the issues now agitated before this court were the very same issues raised in *Civil Case No. 197 of 2000* but rejected by the Court. I have had opportunity to consider the issues raised in Civil Case 197 of 2000. The first Defendants are correct in their submissions. At paragraph 2 of page 3 of the Judgment of his Lordship Kabui J. delivered on 31st August 2001, his Lordship states:

"As such, title can only be defeated by proving fraud or mistake under section 229 of the Land & Titles Act. What there, if any, is the defence? There is no defence against indefeasibility of title under the Land & Titles Act. Exhibit "T6" attached to Mr Tikani's affidavit filed on 19th April 2001 cannot be a defence to the Plaintiff's claim for trespass against the Defendant because the Plaintiff through the joint owners are the exclusive owners of Parcel No. 090-002-2 and no one else. There is no evidence of a prima facie defence, which discloses a triable issue in this case. The fact is that there is no triable issue here."

Exhibit "T6" contained the very same particulars of fraud and mistake now averred in this case. His Lordship would have set aside judgement in default granted on 29th November 2000, had he felt there were triable issues raised by the Defendant. He was not so satisfied and so refused application. The proper course of action in such circumstances would have been to appeal his Lordship's decision rather than commencing new action and raising the same issues. That with respect is an abuse of the court's process and for that reason this claim should also be set aside.

Limitations Act [Cap. 18]

The first Defendants rely on section 9(2) of the Limitation Act, which provides:

"No action shall be brought, nor arbitration shall be commenced by any other person to recover any land after the expiration of twelve years from the date on which the cause of action accrued to him or, if it accrued to some person through whom he claims to that person:

Provided that if the cause of action first accrued to the Crown or a public authority, through whom the person bringing the action or commencing the arbitration claims, the action may be brought or the arbitration may commence at any time before the expiration of the period during which the action could have been brought or the arbitration could have commenced by the Crown or the public authority or before the expiration of the twelve years from the date on which the cause of action accrued to some person other than the Crown or the public authority, whichever period first expires."

The first Defendants argue that the cause of action in this case accrued from the time registration of LR 690 was completed, that was on or about 26th July 1974. Since then it has been more than twelve years to year 2000. They say the Plaintiffs therefore are time barred from bringing this action.

The Plaintiffs on the other hand argue that section 32(1), (2) and (3) provide that in the case of fraud, the cause of action shall not accrue until the plaintiff has discovered the fraud, concealment or mistake.

"32. (1) In this section, "fraud" means a false representation made knowingly, or without honest belief in its truth, or without honest belief in its truth, or recklessly without care whether it be true or false, and includes such unconscionable or blameworthy act or omission as amounts to fraud in equity.

(2) Subject to subsection (4) –

(a) where a claim in an action or arbitration is based on fraud of the defendant; or

(b) where a claim in an action or arbitration is based on any fact relevant to the plaintiff's cause of action which has been deliberately concealed from him by the defendant, or

(c) where a claim in an action or arbitration is based on a relief from the consequences of a mistake,

the prescribed period for such action or arbitration, as the case may be, shall not begin to run until the plaintiff has discovered such fraud, concealment, or mistake, or could with reasonable diligence have discovered it.

(3) For the purposes of subsection (2) deliberate commission of a breach of a legal duty in the circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

I agree with the submission of learned Counsel Mr. Suri regarding his application of section 32 of the Limitation Act on the issue of fraud. I accept that in instances where fraud is alleged, the cause of action accrues from date fraud or mistake is discovered. To that extent the cause of action commenced by the Plaintiffs would have been in time, but for the fact that they have failed to provide particulars of fraud or mistake relied on.

Orders of the Court:

1. Strike out Writ of Summons filed 9th March 2001 and Amended Statement of Claim filed 1st November 2001 on the ground that:

(a) they disclose no reasonable cause of action, and

(b) the claim is frivolous and vexatious and an abuse of the court process in that it is res judicata.

2. The Plaintiffs to pay the costs of the first Defendants.

THE COURT