IN THE HIGH COURT OF SOLOMON ISLANDS

KOREAN ENTERPRISES LIMITED
Plaintiff

JEHOVAHS WITNESSES CONGREGATIONS TRUST BOARD (INCORPORATED)
1st *Defendant*

and **Commissioner of Lands**
2nd Defendant

and **Honiara Town and Country Planning Board**
3rd Defendant.

Application to strike proceedings as disclosing no reasonable cause of action.

Charles Ashley for Applicant/1st Defendant
Jean Gordon for 2nd/3rd Defendant
Andrew Radclyffe for Respondent/Plaintiff

At Honiara
14, 15 September 2004

Brown J. This application has been brought under 0.27r.4. Power to strike is discretionary so the plaintiff says. I must say I do not accept this court has discretion in the sense understood and used in discretion to grant bail or the courts discretion to grant injunctions in civil suits. In those two instances the discretion is circumscribed by case law which guides. For "*Optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*"(the best system of law is that which leaves the least to the discretion of the judge; the best judge is he who leaves the least to his own discretion).

Mr. Radclyffe supported the plaintiff's argument by relying on Muria CJ's decision in Peter Ma'uana's case (Peter Ma'uana-v-Solomon Taiyo Ltd., unreported cc109 of 1997) when the Chief Justice said, at 3 "that the Courts power under the rule is very much discretionary." (0.27r.4)

The Chief Justice relied on a number of High Court decisions and the Court of Appeal case of Leslie Allinson-v-Monique Medlin (Court of Appeal unreported 7 of 1996). In that case the plaintiff successfully argued Palmer J's (as he then was) finding that the defence filed was

frivolous and vexatious was in error but that the defendants counter claim did not disclose a reasonable cause of action.

So far as the defence was concerned, Kapi A/President said "Basically the defence raised by the appellant is that there was a subsequent agreement between the parties which stipulate that the balance of the two accounts would be shared as set out in paragraph 2(c) of the Defence. The Defence alleges that the balance in the accounts was in fact fairly distributed between the parties. These are matters of fact and they raise serious questions to be tried. In my view the defence raised is not frivolous or vexatious."

So two issues arise on a reading of this part. The first is that the Court of Appeal has had regard to evidentiary material to better understand the argument of the appellant/defendant about the defence pleaded. Other is the issue of a "serious question to be tried." There is no suggestion in these reasons that discretion arises. McPherson & Casey Jja, adopted Kapi A/Presidents reasons on the question of the defence (for that a serious question to be tried had been shown) and referred to the *ratio decidendi* of Barwick CJ in *General Steel Industries Inc-v-Commissioner for Railways* (NSW)(1964) 112 CLR 125 at 129 on the power of the Court to terminate an action.

In the matter of the counter claim the Court was unanimous that it disclosed no cause of action. In that appeal case, the discussion by the Court over "discretion" related to the appropriate costs order incidental to the appeal.

In *General Steel Industries* Barwick CJ was dealing with the Courts power under O.26r.18 (our O.27r.4) which allows pleadings to be struck out where no reasonable cause of action is disclosed. The plaintiff in that case sought to restrain an infringement of the plaintiffs letters patent in stated circumstances which preclude the plaintiff having such a cause of action against any of the defendants. Again Barwick CJ had reference to and allowed material by way of affidavit to enable the defendant applicant to properly state its case on the issue of "a real question to be determined, whether of fact or law and that the rights of the parties' depend upon it." (Barwick CJ at para.10 supra)

Here the plaintiff pleaded particular facts which if found proved would enable a verdict for the plaintiff. In para.5 of the amended statement of claim the plaintiff says that the 1st defendant has beached a covenant, running with the land not to use the land for purposes other than residential. The 1st defendant has erected a church. Later in para.6 the

plaintiff points to an alleged failure by the Commissioner of Lands to ensure the existence of required permits and consents to such change of use before agreeing to vary the permitted use on the Land Register of the Commissioner. As well, the Commissioner did not consult with the plaintiff, a resident claiming to be adversely affected by the change of use. In para.7 of the amended statement the plaintiff further pleads that the Town Council (the 3rd defendant) did not consult with resident likely to be affected by the change of usage in that no public notice by advertisement in the local press was given presaging such change.

In its defence the 1st defendant joined issue with much of the factual matter pleaded by the plaintiff. In Court today Mr. Ashley for the 1st defendant read the affidavit of one Thomas Rudgard Cooke, the local coordinator of the Branch Office of Jehovah's Witnesses of Solomon Islands, so that evident of those factual matters was before me, going as it must, to the issues contested.

There is then, a very large amount of material in contradiction of the plaintiffs claim but it begs the question, shouldn't the plaintiff have an opportunity to answer such material by its own evidence. For the 1st defendant is in effect asking the court to presume that its evidence brooks no contradiction, its implied arguments on the law underlying the various Town Council approvals and the Commissioner of Lands actions permit no contra argument. Surely, the defendant has refuted on its face, much of the facts alleged in the initial claim of the plaintiff, but pleading do not set out or recite the evidence on which the plaintiff intends to rely. Consequently when the defendant has cogently and carefully addressed the issues raised by the statement of claim by evidence which I have allowed, so as by their nature, to identify the real questions to be determined I cannot but permit the plaintiff the opportunity to answer the material as best he might, otherwise this court will be preventing the plaintiff from putting its case.

The 1st defendants evidence is strongly reliant on document and statutory provisions affecting Town Councils planning powers, approvals and land use control. The cogent sequence of events recounted in the affidavit of the coordinator of the 1st defendant is persuasive on those issues but the plaintiff has not had its opportunity to put its case or answer this material.

The argument Mr. Radclyffe advances over the need to rely on the affidavit of Mr. Cooke is worthy of addressing. His point is that "no reasonable cause of action" must be self-evident on the pleadings and that by the very fact of the 1st defendant relying on the factual material, [in regards to] he plaintiffs claim, contained in Mr. Cookes affidavit goes to

show that there are serious questions to be tried. For Mr. Cooke annexes many documents, including letters of authority and permission, all of which may be open to interpretation of meaning and effect. His argument has echo in the comments of Barwick CJ (supra) at para.9 where he says "At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or" so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument," "so to speak apparent at a glance."

So that may be the highest but on a reasonable view of the initial pleading by the plaintiff, there is a cause of action apparent for either the defendant has acted in breach of a covenant (if it be such) running with the land or has proceeded to build its church in contravention of regulatory requirements (however ill defined) or in advance of necessary approvals. So there is clearly merit in Mr. Radclyffs argument, but that recognizes the highest test where the court should allow evidence is where to refuse would prevent a party illuminating facts or law (relied upon by the pleader) which by themselves cannot be the basis for the claimed cause of action. In this case the 1st defendant was at pains to seek to prove a negative, the absence of purported statutory regulations which in some way adversely affected the 1st defendants acts in building the church, despite no such pleading in the statement of claim. But that was not the only material in the affidavit allowed into evidence, which will of course be evidence in the cause.

The risk that a party runs (by seeking to rely on such evidence filed in support of an application to strike under O.27r.4)is that which has been made clear here, is that it affords the other party a just argument that a serious question to be tried is raised. For that affidavit of Mr. Cooke of 8 pages was dense with factual matters and annexed some 26 copy documents. It would surely be unfair for me to conclude that such factual matters effectively dispose of the plaintiffs claim as futile, without having heard from the plaintiff.

To strike out at this stage would deprive the plaintiff of its right to be heard.

The application is properly supported by affidavit material for it properly illuminates the possible failings of the plaintiff's claim, except in this case it has also illuminated the very real questions to be tried.

Orders
The summons to strike is dismissed.

Costs shall follow the event.