PROGRESSIVE RESOURCE LIMITED –v- THE COMMISSIONER OF LANDS, THE PREMIER OF TEMOTU PROVINCE AND THE REGISTRAR OF TITLES

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Civil Case No. 341 of 2003

Date of Hearing: 9th July 2004
Date of Ruling: 9th July 2004

J. Sullivan for the Plaintiff.
G. Deve for the 1st Defendant.
C. Hapa for the 2nd Defendant.
Toito'ona for the 3rd Defendant.

RULING

Kabui, J. The 2nd Defendant/Applicant is the Premier of Temotu Province, (the Premier). He filed a summons on 1st July 2004 seeking costs against the Progressive Resources Limited, (PRL), the Plaintiff, in the main action. The summons prayed that costs, if awarded, are to be taxed if not agreed. Alternatively, the Premier asked the Court to disallow or strike out the amended Statement of Claim filed by PRL on 18th June 2004 in the event that costs were not awarded as requested by him. At the hearing, Counsel for PRL, Mr. Sullivan, applied by summons (unfiled) seeking that leave be granted nunc pro tunc from 18th June 2004 to file and serve the amended Statement of Claim. The ground for making that application, according to Mr. Sullivan, was that his client was out time by two days but nevertheless the amended Statement of Claim had, as a matter of fact, been filed on 18th June 2004. He asked the Court to ratify that fact in retrospect by invoking the nunc pro tunc principle. The nunc pro tunc principle was discussed in **Reef Pacific Trading Ltd & Joan Marie Meiners v. Price Waterhouse, Richard Anthony Barber & William Douglas McCluskey,** Civil Case No. 164 of 1994. That is, a procedural error committed on an earlier date can be corrected at a later date by ratifying it in retrospect. The application having received no objection from the Premier and other parties, I granted leave as requested. I also ordered that costs to be reserved as requested in that application.

The brief background.

During the course of pleading, the Solicitor for PRL discovered in paragraph 15 (b) of the Premier's defence an allegation that the document as defined in the defence and counter-claim had not existed at the time of first registration and therefore could not constitute an overriding interest under section 114 of the Land and Title Act (Cap.133). Secondly, the Premier's counter-claim in paragraph 21, as in the alternative, threatened to extinguish the document referred to above under section 183 of the Land and Titles Act cited above. For these reasons, PRL decided to amend its Statement of Claim to protect its interest in the dispute. The Statement of

Claim was amended accordingly and filed on 18th June 2004 together with the reply and answer to the 2nd Defendant's defence and counter-claim.

The issue.

The Premier claimed that he was entitled to his costs under Order 30, rules 2 and 13 of the High Court (Civil Procedure) Rules, 1964 "the High Court Rules." The issue therefore is whether the Premier is entitled to his costs to be taxed if not agreed, following the amendment effected by PRL without the consent of the Premier or the leave of the Court. The Premier also applied in the same summons that if his costs were not paid, then the amended Statement of Claim by PRL should be struck out for that reason or be stayed until costs had been paid.

The Premier's case.

Rule 2 of the Order 30 of the High Court Rules cited above allows PRL as the suing party to amend its statement of claim without the leave of the Court within 14 days from the delivery of the defence. Rule 13 of Order 30 above also allows costs arising from any amendment effected under rules 2 and 3 of that same Order to be borne by the party effecting the amendment. The Premeir said that rules 2 and 3 did apply to his case and so he was entitled to his costs occasioned by the amendment to the statement of claim without leave of the Court. This was the case put forward by Counsel for the Premier, Mr. Hapa. Counsel argued that the fact that the amended statement of claim had been served on Counsel at 12.20pm on 18th June 2004 had not been consented to by him, the Solicitor for the Premier. Counsel argued that the Premier did not agree to the amendment wanted by PRL though the amendment had indeed been served on him, the Solicitor for the Premier. Nor had the Premier been made aware of PRL having obtained leave, if any, by the Court to effect that amendment.

The case for PRL.

The following was the case as argued by Counsel for PRL, Mr. Sullivan. Leave having been granted in retrospect by the Court on the date of the hearing, the question of leave not being sought by PRL and granted by the Court in the first place no longer arose. That is, leave to effect the amendment of the statement of claim had been granted nunc pro tunc from 18th June 2004 so that lack of granting leave no longer was an issue in this case. The real issue was whether or not PRL should bear the costs of the amendment effected by itself. In this respect, Counsel argued that the decision to amend the statement of claim was taken to protect PRL's interest following discovery of the allegation the Premier made in his defence that the document was not in the correct form for registration of a profit under section 181 of the Land and Titles Act and that in any case, the document was not in existence at first registration. The Premier made the second allegation in his counter-claim wherein he said that the document could be extinguished under section 183 of the Land and Titles Act. These two allegations, argued Counsel, did raise fundamental points which, if not properly pleaded by PRL, could affect the outcome of PRL's case.

Was the amendment necessary from the point of view of the Premier?

By not objecting to leave being granted nunc pro tunc on 18th June 2004 to the amended statement of claim at the hearing, the Premier had acknowledged that the amendment was necessary. The concern of the Premier, as I understood his case, was far more to do with costs of work required to be done as a consequence of the amendment. This concern is contained in

paragraphs 19 and 20 of Mr. Hapa's affidavit filed on 1st July 2004. Paragraph 14 (a) (b)(c)(d) in the amended statement of claim are the legal deductive consequences of the Premier's position as set out in paragraph 15(b) of his defence. That is to say that if as stated by the Premier in his defence that PRL's profit cannot be an overriding interest under section 114 of the Land and Titles Act (which PRL denies), then in lieu of that, paragraph 14 (a) (b) (c) (d) in the amended statement of claim is the case pleaded for PRL. Paragraph 15 of the amended statement of claim also says that if the position is as stated in paragraph 21 of the Premier's counter-claim, then PRL is entitled to compensation to be assessed for loss of interest in the land. The facts as pleaded in the original statement have not been changed or new facts introduced by the amended statement of claim. Nevertheless, as a consequence of the introduction of paragraph 14 (a) (b) (c) (d) and paragraph 15 above, paragraph 3 of the original statement of claim had been expanded by amendment to reflect the effect of the amendments in paragraph 14 (a) (b) (c) (d) and paragraph 15 above.

Should the Premier be entitled to the costs occasioned by the amended statement of claim?

I do not see any need for seeking further instructions and filing any further defence as a consequence of the amended statement of claim. What is needed of course is preparation to argue the legal points posed therein at trial. There is no evidence to show that the amendment effected was a result of an oversight or shoddy pleading or for any other reason than to put the issues as proper issues for the determination by the Court. There might have been the opportunity to consider the application of Order 27, rule 2 (raising points of law) or Order 37 (stating a special case) but that is another matter. Having accepted the amendment being necessary by consenting to it in retrospect, the Premier must now justify why the amendment has occasioned costs. There is no evidence that the amendment has indeed occasioned costs. There is indeed evidence that costs are envisaged on the ground that it was necessary for costs to be occasioned. This was the view held by the Solicitor/Counsel for the Premier, Mr. Hapa. In my view, that stand is a mere speculation at this stage on the part of the Premier. If, indeed, costs have been occasioned of whatever nature whether justifiable or not, let that issue be decided at the end of the trial. It is reasonable that the costs at this stage be reserved for that reason. In fact, PRL took that position through its Counsel, Mr. Sullivan, who suggested that reserving costs was the appropriate thing to do in this case. I agreed with him and made that order accordingly. I do have the power under Order 30, rule 13 of the High Court Rules to reach this decision. This ruling sets out the reasons for making that order on 9th July, 2004.

F.O. Kabui,
Puisne Judge