1647

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP14/02
CIV 2003-416-000010

BETWEEN	APIRANA TUAHAE MAHUIKA First Plaintiff/First Counterclaim Defendant
AND	AMOHAERE HOUKAMAU Second Plaintiff/Second Counterclaim Defendant
AND	LUKE DONNELLY First Defendant/First Counterclaim Plaintiff
AND	TIRA MANA HAPU Second Defendant/Second Counterclaim Plaintiff
AND	TE RUNANGA O NGATI POROU Third Counterclaim Defendant

Hearing: 4 December 2003

Appearances: J Miles QC and D Campbell for Plaintiff
H Rennie QC for Defendant

Judgment: 11 December 2003

JUDGMENT OF HON JUSTICE JOHN HANSEN

---

[1] The Plaintiffs commenced defamation proceedings against the Defendants. The first cause of action alleges that in a letter forwarded to the First Plaintiff words were used which had the following meanings:-

a) The Plaintiffs displayed a contempt for its hapu.

b) The Plaintiffs engaged in discussing an unprofessional conduct.

c) The Plaintiffs are guilty of abuse of powers and deliberately lying to Te Runanga O Ngati Porou (TRONP) beneficiaries.

d) The Plaintiffs activities in the meeting in question amounted to a form of "ethnic cleansing".

The First Plaintiff apparently circulated the letter.

[2] The second cause of action is founded on a letter written by Mr Donnelly on 17 October 2002 and forwarded to Mr Shane Jones, the Chairman of Te Ohu Kai Moana in Wellington. It was copied to the Chief Executive Officer and Fisheries Commissioners of Te Ohu Kai Moana and also to a number of members of Parliament. It is said that the words used in the letter have the following meanings:-

a) The Plaintiffs are parties to misappropriating $1.9m of hapu money.

b) The Plaintiffs are parties to a serious fraud.

c) The Plaintiffs' conduct justifies criminal charges being laid against them for theft or fraud or misappropriation of trust money.

[3] The third cause of action alleges that similar statements have been made by the Defendants at named maraes.

[4] The First Plaintiff is the Chairman of TRONP and the Second Plaintiff, its Chief Executive Officer.

[5] The Defendants filed a Statement of Defence and also a counterclaim against the Plaintiffs. TRONP is named as a Third Counterclaim Defendant. Essentially, what is alleged is that the Third Defendants authorised payment of legal bills in these proceedings for the First and Second Plaintiffs and also agreed to indemnity them for the cost of the proceedings. It is alleged that TRONP is not empowered to pay those costs on behalf of the First and Second Counterclaim Defendants and that TRONP has not brought proceedings itself and nor could it pursuant to s6 of the Defamation Act 1992. The Counterclaim goes on to allege that the expenditure of trust monies in

these proceedings is *ultra vires* and unlawful and that not less than $65,000 of trust monies has already been expended. Mr Donnelly alleges the beneficiaries of TRONP have been injured by the use of the trust monies in this proceeding because TRONP has incurred and continues to incur expense in the defence of the proceedings. He further alleges that in common with other beneficiaries he has sustained injury in that the trust is unlawfully dissipating trust assets held for their benefit. Finally, the Counterclaim maintains that the Counterclaim Defendants have unlawfully combined in their agreement for the use of trust monies in the proceedings against the Counterclaim Plaintiffs.

[6] Declarations are sought ordering TRONP to make no further payment to or for the benefit of the First and Second Counterclaim Defendants in relation to the proceeding. Secondly, for an order that the First and Second Counterclaim Defendants forthwith repay all monies expended by the Third Counterclaim Defendant by way of restoration of trust funds. Finally, an application is made for costs.

[7] The Counterclaim Defendants have applied for summary judgment against the Counterclaim Plaintiff.

[8] The principles applicable to a Defendant's application for summary judgment can be found in the headnote of *Bernard v Space 2000 Ltd,* 15 PRNZ 338 (CA). It reads:-

> Held, (1) the Courts should not permit defendants' summary judgment applications to circumvent the restrictions on adducing evidence in applications to strike out. Nor should they be allowed to create an issue estoppel unfairly against the plaintiff. There must be a clear answer to the plaintiff's claim which cannot be contradicted. It is not enough to show that the plaintiff's case has weaknesses. (p 342, paras 20-21; p 344, para 27)
>
> (2) The question of causation was unsuitable for resolution in an application by the defendant for summary judgment. A full grasp of the facts would be imperative for a proper decision by the Court. (p 343, para 24)
>
> (3) There was no obligation on Mr Bernard to produce evidence of adverse consequences at this stage. The plaintiff will only be required to respond where the defendant supplies evidence to satisfy the Court that the plaintiff cannot succeed. An application for summary judgment is inappropriate where there are disputed issues of material fact; it should not be converted into a mini trial. (p 343, paras 26-27)

> (4) There was no prejudice in allowing Mr Bernard to amend his claim. He would be entitled to amend if he thought it appropriate. (p 346, paras 37-38)
>
> (5) The appeal would be allowed, and the summary judgment set aside. (p 346, para 41)
>
> Obiter, where defendants apply for summary judgment in situations which do not comply with the principles, they can expect short shrift from the Courts. In appropriate cases solicitor and client costs may be awarded. (p 346, para 39)

[9] Such principles are equally applicable where a counterclaim defendant seeks summary judgment against a counterclaim plaintiff, as here.

[10] On behalf of the Applicants, Mr Miles submitted that TRONP had acted properly and within its legal powers at all times. The submission then goes on that the Counterclaim and relevant paragraphs in the Statement of Defence should be struck out which seems to confuse the application for summary judgment with a strike out. Nothing turns on this and I presume the Counterclaim Defendants seek judgment on the relevant cause of action.

[11] Firstly, Mr Miles cited the classic statement, as to how the doctrine of *ultra vires* should be applied, in *Attorney General v Great Eastern Railway Company Co* (1880) 5 App.Cas.473 from the judgment of Lord Selborne:-

> ...This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislative has authorised, or not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.

[12] The statement was specifically adopted in *New Zealand in Automobile Association (Wellington) Inc v Daysh and Ors [*1955] NZLR 520, 534. He also referred to *Finnegan v New Zealand Rugby Football Union* [1985] 2 NZLR 159, 178 and *Walker v Mt Victoria Residents Assoc. Inc* [1991] 2 NZLR 520, 523 which indicated that the more rigid approach adopted in applying the doctrine to companies was not appropriate where the organisation was primarily concerned with promoting a certain activity rather than profits per se. He referred to the Te Runanga o Ngati Porou Act 1987 and submitted it was clear that the board had not acted *ultra vires* that Act.

[13] Mr Rennie argued that s6 of the Defamation Act 1992 was a significant barrier to TRONP bringing proceedings in its own right as it would have to demonstrate actual or likely pecuniary loss. He said further difficulties confronted TRONP. Firstly, if it is a statutory body or public body which is not a trading corporation it may not be able to bring defamation proceedings (*Darbyshire County Council v The Times Newspapers Ltd* [1993] AC 534 HL). Whether TRONP's status within Ngati Porou precludes it from bringing such proceedings against the beneficiary (see *Goldsmith v Bhounul* [1998] QB 459). And finally whether any imputation raised in the causes of action reflect on the board as opposed to individuals (*South Hatton Coal Co Ltd v North Eastern News Association* [1894] 1 QB 133 CA).

[14] Mr Miles's response was to accept that TRONP was not bringing, and presumably could not bring, proceedings in its own right. However, he maintained that it had an interest in protecting its own reputation and, more particularly, that of its Chairman and Chief Executive Officer. As I understood the submission, what was being argued, was that TRONP had some vested or ancillary interest in the proceedings that made grant of the indemnity to the Chairman and Chief Executive Officer lawful.

[15] I perceive some difficulty in the pleadings with that submission. In the first cause of action, paragraphs 10 and 11 of the Statement of Claim read:-

> 10. As a result of those defamatory statements the First and Second Plaintiffs have been damaged in their business reputation and have suffered or are likely to suffer pecuniary loss.
>
> 11. As a result of those defamatory statements the First and Second Plaintiffs have been seriously damaged in their personal reputation.

In the second cause of action, paragraph 19 reads:-

> 19. As a result of those defamatory statements the First and Second Plaintiffs have been seriously damaged in their business and personal reputations and have suffered or are likely to suffer pecuniary loss.
>
> 21. In consequence of the allegations set forth in this second cause of action the First and Second Plaintiffs' character, reputation and mana in Maoridom and nationally has been seriously damaged by the distribution of

the 17 October 2002 to key officials of Te Ohu Kai Moana and at least eight influential cross party members of parliament

[16] The Chairman and the Chief Executive officer claim general damages of $250,000 in an injunction ordering the Defendant to cease making similar statements.

[17] Notwithstanding those pleadings in the Amended Statement of Claim, with specific reference to their personal reputation, the pleading in response to the Amended Statement of Defence and Counterclaim and Mr Parata's affidavit presented a different position. As Mr Rennie's written submissions put it:

- The resolution as minuted (Parata, Exh B) was stated in section 4 of it to be that the Board *"approve that any legal proceedings initiated against Luke Donnelly/Tira Mana Hapu be in the name of the Chairman and Chief Executive Officer of Te Runganga o Ngati Porou for themselves on behalf of the Te Runanga o Ngati Porou Board".*

- The resolution further provided in section 5 that the Board approved that *"Te Runganga o Ngati Porou agree to fully indemnify the Chairman and Chief Executive Officer in relation to any legal proceedings initiated against Luke Donnelly/Tira Mana Hapu".*

- Mr Parata in paragraph 2 and 3 of his affidavit deposes that the Runanga (which from his para 1 seems to equate to the Board of the Runanga) has a need "to protect the reputations of the Chairman and the Chief Executive Officer of the Runanga and thereby the reputation of the Runanga itself from the defamatory attacks by the Defendants".

- Paragraph 43.2 of the statement of counterclaim is admitted. This confirms a statement by the First and Second counterclaim defendants, through solicitors, that "the proceedings were brought by the plaintiffs in their capacity as representatives of the Board".

- Paragraph 43.3 of the statement of counterclaim is admitted. This confirms a statement by the Second Counterclaim Defendant that *"she and the first counterclaim defendant are acting on behalf of Te Runanga o Ngati Porou and not in a personal or private capacity."*

[18] It seems to me that the resolution of the conflict between these statements and the Amended Statement of Claim by the Plaintiffs requires determination at trial. Certainly, in the light of those conflicts it cannot be said the Counterclaim could not possibly succeed.

[19] I also consider there is a further ground that makes summary judgment inappropriate. A Tui Mona Takarangi swore an affidavit in support of the Counterclaim Plaintiff's Notice of Opposition to this application. She is a trustee of TRONP. She notes that while she declared a conflict of interest on the relevant agenda item and took no part in the discussion or voting, she remained in attendance throughout. She disputes the accuracy of the Board's minutes, in particular to the reference to agenda item 6. She says the Second Plaintiff, the CEO, badgered her to register the conflict of interest. But more importantly, states that the First and Second Counterclaim Defendant remained throughout the period of discussion when it was resolved that the Board move into committee. Indeed, they moved the motion.

[20] She continues in the affidavit to dispute the accuracy of the Board's minutes and the resolutions in a number of respects. She said both the First and Second Counterclaim Defendants led and took a full part in the discussion along with Mr Parata, and when it came to voting she alleges the First Counterclaim Defendant and Mr Parata voted as well. She does go on to say "at least the minutes do not record that they registered any conflict of interest or that they retired from the room or otherwise abstained because in fact they did none of those things". She goes on to say her vote against the resolution was not recorded.

[21] She states that a subsequent Board meeting she started to raise concerns about the inappropriateness of the resolutions but when she did the husband of the Second Counterclaim Defendant, Mr Parata, challenged it as out of order and the Chairman, the First Counterclaim Defendant, ruled in favour of Mr Parata denying any opportunity to discuss the matter. Only after some difficulty was she able to have a record made of her filing the motion.

[22] It seems to me in those circumstances it must be at least arguable that the resolutions were outside the terms of, and accordingly *ultra vires*, the empowering provisions set out in s24(1) of the Maori Trust Board's Act 1955. That allows for the applying of money towards (a) the promotion of health; (b) the promotion of social and economic welfare; (c) the promotion of education and vocational trading; (d) such other or additional purposes as the Board from time to time determines.

There is nothing to suggest that (d) applies in this case and it is arguable that it does not fall within the other categories.

[23] Under 24A additional grants and payments may be made from time to time by the Board but they may not aggregate more than the sum of $400 in any financial year for any purposes not otherwise specifically authorised by the Act. Finally, s37 provides that no money should be applied by a Board whether by way of grant or loan or any other manner for the exclusive benefit of any member without the prior written approval of the Minister. Resolution 5 is plainly an indemnity granted by the Board to the First and Second Counterclaim Defendant and is an exclusive benefit. There is a proviso to that section which precludes a member of the Board from taking any part in the discussion or vote on such an exclusive application of monies. Exhibit D to Mr Parata's first affidavit shows that the First Counterclaim Defendant was present and moved the preliminary motion on the matter.

[24] It was accepted that the powers of Maori Trust Boards are to be interpreted strictly on the principle that they relate to the administration of trust funds in a trust which is a statutory charitable trust. It must also be interpreted on a purposive basis (s5 Interpretation Act 1999).

[25] Mr Rennie also submitted, correctly in my view, that the ultimate determination of the present matter will require consideration as to whether the matter is authorised or not by the statute and was connected with the purpose of the trust. The scheme of the Act is directed to the Board:-

> Administering its assets in accordance with the provisions of this Act for the general benefit of its beneficiaries, and, for that purpose, a Board may, in its discretion, provide money for the benefit or advancement in life of any specific beneficiary, or of any class of beneficiaries.

[26] A payment may be made for the exclusive benefit of one person only if that person is a beneficiary (s24(3) and if the person is a member of the Board only with the prior consent of the Minister.

[27] Also, as Mr Rennie pointed out, an agreement to fund, or to indemnify, which is made *ultra vires* a contracting party, is void (*Caberet Holdings Ltd v Meeaney*

Sports and Rodeo Club [1982] 1 NZLR 673 CA. All of those matters satisfy me that the causes of action alleged may succeed. The Counterclaim Defendants has to satisfy the Court that they cannot succeed, and in my view, has failed to do so.

[28] While I accept that the Counterclaim may impose certain difficulties in the conduct of the trial, I do not consider this is a matter appropriate for summary judgment.

[29] Accordingly, the application is dismissed. Memoranda as to costs to be filed within 7 working days of the handing down of this decision.

J. W. Thomson J.

Delivered at 3.54 ~~am~~/pm on 11TH DECEMBER 2003

Solicitors:
Rainey Collins Wright & Co, P O Box 689, Wellington
Phillips Fox, P O Box 2791, Wellington
Counsel:
J G Miles QC, P O Box 4338, Auckland
H Rennie QC, P O Box 10-242, The Terrace Wellington