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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 8 of 2023

ORDERS

Halahuni LANGI

Plaintiff

-v-

1. Kingdom of Tonga

First Defendant

2. Makaleteta 'Otani KULA

Second Defendant

3. Maile LESISITA

Third Defendant

4. Mele SIALE

Fourth Defendant

5. Falesiu LAMA

Fifth Defendant

6. Loisi Paea 'i Vahanoa KALAVI

Sixth Defendant

ORDERS MADE BY: COOPER J

DATE OF ORDER: 8 January 2024

THE COURT ORDERS THAT:

1. The first Defendant's application is dismissed.
2. The First Defendant to pay the Plaintiff's costs of and incidental to the hearing, such costs to be taxed if not otherwise agreed within 14 days.

REASONS FOR JUDGEMENT

History of proceedings

1. On 23 February 2023 the Plaintiff, a licensed money lender trading under the name of ATL Finance at Halaleva, Nuku'alofa (**ATL**) filed a Statement of Claim (**the Claim**) against the six defendants.
2. He alleges the First defendant in respect of the Ministry of Infrastructure, Land Transport Division (**the Ministry**) operated a fraudulent scheme of registering rental vehicles in the names of the hirers, the Second to Sixth Defendants. This was to falsely show they were the owners of those vehicles and to enable them to use the vehicles as securities for loans issued by ATL (**the Scheme**).
3. The total amount of loan monies paid to Second to Sixth defendant was \$130,500.00 exclusive of the \$26,100.00 interest those loans were due to incur.
4. The Warrant of Fitness Officer of the First Defendant, Sosefo Ponitini, (**the Officer**) allegedly collaborated with the other Defendants to this end. It is effectively alleged he was an agent of the First defendant and in acting in the scope of his agency provided the false Certificates of Registration of motor vehicles (**the Documents**) the co-defendants relied on.
5. The loans were defaulted upon, the Plaintiff when he took enforcement action discovered the motor vehicles were not in possession of the defendants.
6. The application on behalf of the First Defendant to Strike Out the action the Plaintiff brought against him pursuant to Order 8, Rule 8 Supreme Court Rules (**the Application**), was filed 27 March 2023.

The Evidence

7. The affidavit of Tevita Lavemai, dated 24 March 2023, employed as Director of the Land Transport Division (L.T.D.) of the Ministry, and annexed thereto certificates of registration pertaining to 11 of 14 vehicles said to be the subject of this fraudulent scheme.
8. Further, annexed thereto are letters of correspondence (**the Correspondence**) between ATL and Mr. Makasini Latu from L.T.D., dated April 2017.
9. The affidavit of Mrs. Fifita-'Aholelei, dated 24 March 2023, a law practitioner employed as a Prosecutrix at the Attorney General's Office and sometimes of the Civil, Lands and Family Division. Therein she referred to the criminal file brought against the Second, Third and Fifth Defendants and annexed thereto three police records of interview of Sosefo Pontini (**the Interviews**) wherein he "...made admissions that he acted independently, outside the scope of his employment, without the authorisation of the First Defendant and in pursuit of his own interests.¹"
10. The application is made on the basis
 - the claim is statute barred under section 16 Supreme Court Act, being brought outside the 5-year period allowed;
 - in the alternative that the First defendant is not vicariously liable as the Officer acted outside the scope of his employment so was not acting as his agent.
11. The Plaintiff has produced a memorandum setting out the repayments made by the Second, Third and Fifth Defendant, filed 9 October 2023.

¹ Affidavit Miss Fifita-'Aholelei, Paragraph 6.

12. That memorandum came in response to a direction of the Court that there be a joint memorandum filed detailing when Miss Kalavai admitted liability. There was no co-operation amongst the defendants and that direction complied with.
13. The memorandum of the Plaintiff was not being the subject of any objection by the defence at hearing 11 October 2023 and those matters being within the knowledge of the Plaintiff the Court has taken the view notice ought to be taken to it.

The law

14. Section 16 Supreme Court Act

Limitation of action

(1) It shall not be lawful to sue any person for debt or damages after the expiration of 5 years from the date on which such liability was incurred nor to sue for property which has been in the undisputed possession of any person for more than 5 years. But if any part of such liability or claim has been paid within such time or the claim or liability has been admitted in writing within such time the 5 years shall commence to run from the time of such payment or admission and if there be any deed or document between the parties covering a period of time the 5 years shall commence to run from the expiration of such period of time.

Submissions

15. These can be properly recited in this way; on behalf of the First Defendant it is stated that *Pacific Games Council v Kingdom of Tonga* [2018] TOSC 71, Paulsen LCJ at paragraph 8 ought be followed:
 - (a) "A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. This is so even though they are not or may not be admitted.
 - (b) Before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.

- (c) The jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material to safely make a decision. The case should only be precluded from proceeding where it is so certainly or clearly bad and the court must be particularly careful in areas where the law is confused or developing.
- (d) The fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction."
16. In following these principles, the First Defendant relies on following
- the correspondence to show ATL first became aware of the scheme as early as 7 April 2017. In it the Mr. Makasini Latu described the means in which the loans were made as "fraudulent registration" by the Officer;
 - in the alternative, that the evidence of the interviews demonstrates that the Officer was not an agent of the First Defendant and so the First defendant is not liable for his fraudulent acts.
17. On behalf of the plaintiff it is argued
- that some money being paid back by some defendants is critical in assessing the commencement date when considering any argument as to the time limit. That is because the defendants were joint-tortfeasors, therefore they are jointly liable.
 - as to the alternative argument, the First defendant cannot rely on the interview of a person not a party to these proceedings let alone self-serving statement therein.

Discussion

18. I note that the evidence as submitted has not been subject to cross-examination and remains untested. I have considered all the arguments upon the written and oral submissions. Ultimately the matter has resolved itself along the following lines.
19. In respect of the first argument submitted on behalf of the first Defendant, I do not consider those submissions persuade me the Plaintiff's case on this point is clearly untenable. I come to that conclusion for these reasons:

- The First defendant through their arguments implicitly concedes that as between Mr. Ponitini and the Second to Sixth Defendants there was an alleged fraudulent scheme as between them all to defraud the Plaintiff. That is to say they were joint-tortfeasors.
- There were repayments made to the Plaintiff by the Second, Third and Fifth defendants after their frauds came to light. Amongst the repayments received by the Plaintiff from, inter alia, the Fifth defendant Miss Falesiu Lama, was one for \$270.00, made 22 July 2022, a further payment for \$250.00 16 August 2022, another for \$100.00 made 21 September 2022.
- The First defendant's submission is effectively that liability between the defendants is divisible. Therefore, the payment made on 21 September 2022 by Miss Lama means that date for limitation runs for 5 years from then for her alone and should not apply across all defendants.
- The First Defendant made no payments, nor admitted any liability after the Correspondence, which was more than 5 years ago being in April 2017 and that should be when time commences to run for the purposes of section 16 as far as the first Defendant is concerned.
- I have not been pointed to any case law by the first defendant how to approach the issue of civil liability amongst co-conspirators/joint-tortfeasors and the issue of the time limit in section 16, let alone specific authority to support their contention that civil liability as between co-conspirators can be divisible.
- Conversely the submission on behalf of the Plaintiff is that amongst co-conspirators there should be a finding of joint liability. That in turn effects when time begins to run, for the purposes of section 16, whereby an individual made admissions or payments.
- That argument does not appear to be in any way untenable.

20. In respect to the First Defendant's alternative argument, that Mr. Ponitini was not the agent of the Minister at the relevant time;

- I. I am quite sure reliance placed by the first Defendant on the police interviews of Mr. Ponitini is misplaced. He is a non-party and while made under caution, were neither on oath, nor tested by cross-examination and so are of limited weight.
- II. They leave me entirely unpersuaded of the claims he made, being those of a person who admits to dishonesty and could have any manner of reasons for being not entirely frank.
- III. Prima facie the relationship between the first defendant and Mr. Ponitini, the Warrant Officer is one of principal and agent.

21. I come to that conclusion because:

- He was employed by the L.T.D. at the relevant time, as set out in affidavit of Mr. Tevita Lavemai (paragraphs 1 to 10) and in that capacity signed off the documents.
- Those documents allow the second to sixth Defendants to perpetrate the scheme against the Plaintiff.
- The denial by Mr. Lavemai that Mr. Pontini was acting in the course of his employment when he falsified the documents has, in my view, of little or no weight.
- I am quite sure it is a matter for the Court to decide upon hearing full argument; an agent's act even of a criminal nature that come within his or her ostensible authority can generate civil liability for the principal, as per *Capricorn Financial Planners Pty v Australian Securities and Investments Commission* (1993) 31 ACSR 46.

- “[O]nce an agent comes into a transaction in the ordinary course of his principal’s business...even outright theft may be ineffectual to deny he was acting in the course of his agency.”²
22. Therefore, this is a trial issue what the nature of the relationship was between Mr. Pontini and the Minister was.

Conclusion

23. I am unpersuaded I have the requisite material to form a clear view in the event of a finding of joint liability between the Defendants and the effect on the time limit for the purposes of section 16 Supreme Court Act.
24. Prima facie there is an arguable case that Mr. Pontini was the agent of the first Defendant at the relevant time and so liability may fall upon him as principal.
25. Therefore, I decline to strike out the claim as against the First Defendant.
26. The First Defendant to pay the Plaintiff’s costs of and incidental to the hearing, such costs to be taxed if not otherwise agreed within 14 days.

8 JANUARY 2024
NUKU’ALOFA



² Capricorn Financial Planners Pty v Australian Securities and Investments Commission (1993) 31 ACSR 46 at 50