

**CIVIL JURISDICTION**

**NEIAFU REGISTRY**

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**BETWEEN:                      JONATHAN TRAISTER                      -                      PLAINTIFF**

**AND:                              SCOTT MICHAEL PERCY                      -                      DEFENDANT**

**BEFORE HON. JUSTICE CATO**

The plaintiff in person

Mr. William Edwards for the defendant

**J U D G M E N T**

Thus is an application to strike out the plaintiff's pleadings as showing no cause of action, and, or as frivolous, scandalous, vexatious, or an abuse of process under Order 8, Rule 8 of the Supreme Court Rules 2007. The application is resisted by the plaintiff. The plaintiff seeks orders to require the defendant to plead to his second amended statement of claim, and or judgment by default.

I have considered an extensive application by Mr. Edwards to strike out the proceedings, and a written response by the plaintiff.

I heard the plaintiff in person on Tuesday the 16<sup>th</sup> October and Mr Edwards for the defendant. It became clear to me that there were some serious issues in relation to the plaintiff's pleadings.

It has taken me a very long time to absorb the pleadings and the various documentation on the file. I have considered a file containing pleadings and

documents which can only be described as cumbersome, if not unwieldy. The allegations made in various documents filed by the plaintiff are becoming more expansive on Mr. Traister's part. It has become obvious to me that this litigation has become unruly and is likely to become even more so unless some firm direction is given to it. Because the plaintiff is unrepresented and the case involves factual legal issues of some complexity, I have set out my reasoning at greater length than would have otherwise been the case.

## **Background**

Mr Triaster alleges he entered into an agreement by way of partnership relating to the establishment of a Christian community in Vava'u together with a Mr Thomas Jefferson and a third party, a Mr Stein. Mr Jefferson, an American, who represented himself to be a real estate agent in Tonga, was to be responsible for acquiring the property. In order to acquire the property and pursuant to the partnership, the plaintiff and Mr Stein injected a substantial sum by way of capital into the partnership amounting to TOP\$282,854.97. It seems that a certain amount was legitimately applied to partnership business by Mr Jefferson; however, it is alleged that he misappropriated the balance.

Mr Jefferson and his wife deposited the balance of the partnership funds into various private accounts. They left Tonga on or about the 5<sup>th</sup> June 2010. On or about 26<sup>th</sup> November 2010, the ANZ bank on the instructions of Mrs Jefferson transferred TOP \$128, 450.00 from her personal account to the ANZ bank account of Scott M Percy, the defendant and his wife. She had previously attempted to get this money transfer sent to the United States but was not able to do so because Tongan Reserve bank consent had not been obtained. Later, a sum of TOP \$40,000 was sent to Mr Jefferson from the Westpac bank account of Mr Percy in New Zealand. This sum seems to have been met by a payment of a sum of TOP \$39,069.40 to an account associated with Mr Percy overseas. The basis for this, as alleged by Mr Percy in an affidavit filed in earlier proceedings to release funds in his bank accounts that had been frozen pursuant to an application made successfully by the Attorney- General under s 57(2) of the Money Laundering and Proceeds of Crimes Act 2000, was to satisfy a commission he believed he owed Mr Jefferson for his services as an agent in selling in Vava'u a resort owned by Mr Percy and others.

The police at the time the restraining orders had been obtained consequent upon complaints by Mr Traister and Mr Stein were inquiring into the activities of Mr and Mrs Jefferson and others. It should be added that the application to restrain was not directed personally at Mr and Mrs Percy, as far as criminal activity was concerned and nor has any prosecution been commenced against them.

Mr Percy alleged, in a sworn affidavit filed in connection with the freezing of his relevant bank accounts and in support of an application to have them released that in or about mid 2010 he used the services of Mr Jefferson to attempt to find a buyer for the resort he was a part owner of, Toula Harbourview Resort. In November, 2010, an agreement was concluded and signed by Mr Woolard as purchaser, Mr Jefferson as agent and Mr Percy as owner for the sale of the property. In this agreement, there was provision that, should the buyer not be able to pay the balance of the purchase price on or before December 1<sup>st</sup>, he would forfeit the deposit as the sole property to the owner and Mr Jefferson. Under this agreement, the agent Mr Jefferson was entitled to TOP \$40,000 commission, and was to retain the full balance of the deposit of TOP \$128,450.00. On the 30<sup>th</sup> November, 2010, Mr Jefferson wrote to Mr Percy indicating that Mr Woolard would not be able to complete the transaction and understood his deposit would be forfeit. In that letter, Mr Jefferson indicated he would transfer the TOP \$128,450 to the ANZ account at 1607504 which was controlled by the defendant but he required his commission of "TOP \$ 40,000 ASAP as it will come in handy in the issues we are facing with my grandmother and the like." The money in fact was credited to the Percy account on the 29<sup>th</sup> November and Mr Percy allegedly paid him shortly after.

It was not until the 13<sup>th</sup> December 2010 that Tongan police directed Mr Percy not to deal in any way with the funds he had received from Mr Jefferson. A holding account was opened by Mr Percy and funds were transferred to it representing substantially all the moneys that were left from the Jefferson misappropriation after commission had been paid.

It seems likely that the sale of the resort was a bogus transaction contrived by Mr Jefferson to allow him to have transferred under the pretence of commission part of the money derived from the partnership that his wife had been unable to send out of Tonga because of Reserve bank restrictions. The

plaintiff, is of the view that Mr Percy was party to a bogus arrangement, if that is what it was but whatever may have been the case from Jefferson's perspective, this is denied by Mr Percy. The correspondence sent to Mr. Percy by Jefferson advising him that the purchaser was unable to continue exhibited in Mr. Percy's affidavit, suggest that if the transaction was bogus that Mr Percy may also have been a victim of Mr and Mrs Jeffersons' frudulent actions, so as to enable them to secure part of the moneys deposited by Mrs. Jefferson in the Percy account.

### **The Pleadings**

The plaintiff filed documentation initially under CR 11/2011 seeking the release of moneys paid into the frozen accounts that is TOP \$89,380.50 and foreshadowed a claim to the balance namely TOP \$39,069.40. Later, he filed proceedings by way of statement of claim CV 78/2011, alleging the return of the total sum and incorporating the earlier proceedings. He had a senior lawyer act for him in relation to the proceedings commenced by writ of summons on the 24<sup>th</sup> August, 2011. That statement of claim claimed the return of the money still in the account \$89, 380.60, and the moneys paid out by Mr. Percy being the balance of the moneys deposited by Mrs Jefferson. The balance Mr. Percy asserts was the commission he believed he owed Mr. Jefferson for acting as agent in the sale of the resort. Mr Traister also claimed various heads of consequential damage namely;

- Mental stress and financial loss;
- A loss of TOP \$41,025.00 on a gold investment;
- The cost of rental accommodation \$8100.00 over ten months attributable to him not being able to afford to build on leased land;
- Delay in payment meaning he was not able to pay customs duties for various goods contained in those containers and various consequential losses relating to these items of \$13,725.00;
- Spoiled fish and human food total estimated of TOP \$2,000.00
- The purchase of household items to the value of \$650.00 because his were held up with those containers.

- Travelling expenses for her and his family amounting to TOP \$27,778.00 (hotel accommodation, food transfer etc.).

In total, the claim was for the moneys held in the accounts totaling, TOP \$89,380.60, the money transferred overseas TOP 39,069.40, and consequential losses of TOP \$93,278.00

### **A claim to Restitution**

The statement of claim as pleaded was, in my view, adequate to at least provide the basis of an arguable cause of action based in restitution. It is plain enough from the facts pleaded that the partnership capital was stolen by Mr and Mrs Jefferson and applied to the defendant's bank account. I do not agree that in order to sustain the cause of action against Mr Percy the Jeffersons have to be joined as parties as Mr. Edwards appeared to argue in his application to have the proceedings struck out in his original application. It is enough if the material facts alleged demonstrate a basis for the claim. That claim is for the return of moneys, derived as a result of Mr. Jefferson's breach of partnership duty and his wife's apparent complicity, that was paid into Percy account.

It would appear from the police affidavit accompanying the application to freeze the accounts that the only signatories on the accounts opened on the 13 and 23<sup>rd</sup> April 2010 were Mrs Jefferson and a third party apparently unrelated to the partnership. The statement of claim contends that the bank accounts of which there were five were set up as partnership accounts, but, if this were so, it is strange that the only signatories to the accounts into which the capital was paid by Mr Traister and Mr Stein were Mrs Hillary Jefferson and a third apparently unrelated person, neither of whom were partners.

It seems that the signatory on the various withdrawals from these accounts was also Mrs Hillary Jefferson. The moneys, if they were paid directly to Jefferson for reasons of the partnership, should have been paid into a genuine partnership account. In fact, they were it seems applied by Mr Jefferson into various accounts to which he or his wife had contributed a hundred dollars which were then controlled by his wife and one other non- partner as signatories. From those accounts, Mrs. Jefferson over a short period in May 2010, appears to have paid a large part of the fund into her private account in Tonga, where even if the capital had formerly retained its identity as

partnership property, it is likely to have been mixed with her private money if there was any in her account. She left Tonga with her husband in June 2010. An attempt to withdraw the money and send it to the United States had failed because Tongan Reserve bank approval had not been obtained.

On the basis that Mr Jefferson misapplied the capital funds by paying them into private accounts apparently controlled by his wife, I consider those moneys can arguably be traced through the Jefferson bank accounts into the defendant's account. That would constitute a claim for the return of money in restitution but it is a proprietary rather than a personal claim based on tracing the misapplied partnership moneys into the Percy account. Re Hallet's Estate (1880) 13 ChD 696

The principles and distinction between the common law personal claim for moneys had and received and the equitable tracing claim both being assumed under the overarching umbrella of "Restitution", have been explained by Lord Goff in Lipkin Gorman v Karparnale Ltd (1992) 4 ALL ER 512, at 527-8. In that case, the claim of the solicitors was a personal claim for moneys had and received based upon the fact that money paid to the defendant club for wagers was stolen partnership property. The House of Lords held that because the plaintiff was able to maintain title or property in the funds stolen from the firm's client trust account, the action for moneys had and received would allow the plaintiff to recover the stolen money paid over to the defendant as illegal wagers. However, a change of circumstances defence was upheld to the extent that the defendant had paid out on winning wagers so that it was able to partly resist a claim for the restitution of all the money.

I consider the claim here, whilst not clearly pleaded, is sufficient to maintain a cause of action based in restitution and that can incorporate a common law claim for money had and received, and, or a tracing claim in equity based on the theft of partnership funds. Whether the claim can be sustained in restitution at law or in equity will depend upon an examination of the bank accounts including the various Jefferson accounts through which money was applied to the Percy account. These matters can be pursued and argued more fully at trial. It is sufficient for these purposes that I consider the original statement of claim and the amended statement of claim convey the substance of an arguable cause of action.

The first amended statement of claim filed on the 23<sup>rd</sup> September 2011, adds the words “and the defendant knew that this was the reason that this money was put in to his account.” It is claimed Mr Percy did not bona fide receive the moneys. However, by that stage Mr Percy had agreed to return the \$88, 450.00 leaving only the small sum of TOP \$930 the plaintiff alleges as still unpaid from the relevant Percy account. The terms of this settlement and payment did not preclude the plaintiff addressing other claims that did not relate to the payment of the TOP \$88, 450.00 and he proceeded in the first amended statement of claim for TOP\$930.00 which he alleged was the shortfall of the money retained in the account, TOP \$39,069.40 being the payment said by the defendant to be a commission and claims for consequential damages of \$164,246.00, general damages for pain and suffering of \$250,000, and interest. Additionally to the earlier consequential loss, he claimed for building timbers, wharf fees fro containers, use of credit card, and his legal fees in the United States expended in order to secure the return of his money.

### **The Claim in Restitution and Consequential damages**

Whilst I consider the terms of the indemnity given to the defendant when he agreed to return the \$88, 450.00(having attempted to arrive at a compromise earlier with the plaintiff) did not preclude the plaintiff proceeding with claims other than those that related narrowly to the payment of the \$88, 450.00, I do not consider that the pleadings which were based in restitution could support the damages claimed for consequential loss. The most that can be claimed in restitution in my view is the money stolen by Mr Jefferson subject to the success of any available defence and any interest on the outstanding money.

### **Other Pleadings**

The defendant had indicated after payment of the TOP \$88,450.00 that the claim would have to be amended. That had led to the amended statement of claim of the 23<sup>rd</sup> September 2011 to which I have made reference. Shortly after that the plaintiff’s counsel withdrew.

The plaintiff then filed an application for default judgment claiming that the defendant had been involved in serious criminal misconduct in regard to the acquisition of the money and his subsequent dealings with it and with the plaintiff. An additional application was made to freeze all the defendant’s

assets. This application was filed by the plaintiff in person. Mr Edwards for the defendant on the 26<sup>th</sup> April 2012 replied that he intended to move for the proceedings to be struck out. He had apparently filed such an application earlier on the 21<sup>st</sup> September but I have not been able to locate a copy of this application.

On the 25<sup>th</sup> May 2012, the plaintiff filed what was described as an updated civil and criminal complaint. He also indicated he was unable financially to afford counsel. In this document, he again makes very serious allegations of criminal misconduct by Mr Percy and others.

The fact these allegations were not made in earlier pleadings crafted by a senior and experienced practitioner is of concern. Allegations of this kind should only be made after very serious thought and on the basis of solid proof.

On the 28<sup>th</sup> May 2012, Mr Traister also applied for what he described as a “thorough police investigation into the defendant as well as a certain lawyer” who had become involved in the matter at an earlier stage. He repeated the allegations of serious criminal behaviour.

On the 24<sup>th</sup> May 2012, the defendant applied for the proceedings to be struck out. It was contended there was no reasonable cause of action, that the pleading or part of it was scandalous, frivolous or vexatious, or an abuse of Court. A very detailed memorandum was filed by Mr Edwards.

Meanwhile, Mr Traister realised that the documents he had filed being “thorough Police investigation” and a “verification of updated and criminal complaint” were not in accordance with any Tongan law and he withdrew these on the 29<sup>th</sup> May, 2012.

Mr Edwards also sought further and better particulars of the amended claim and Mr Traister provided him with these, on the 9<sup>th</sup> July 2012.

In his answers to further and better particulars of the defendant seeking answers to the alleged wrong that the defendant was alleged to have committed in relation to the deposit of funds by Mrs Jefferson in November 2010, the plaintiff gave as his reasons; conspiracy/collusion, conversion and obtaining financial gain through false representation.

On the same day as he gave these particulars, the plaintiff sought leave to amend the statement of claim. Leave was granted by Scott CJ to file an amended statement of claim within 28 days. When leave was sought it does not, however, appear to have been included a draft amended statement of claim as is required by the rules; order 8, rule (7) (3). On the 20<sup>th</sup> September 2012, the plaintiff wrote personally to the Chief Justice seeking the case to be put in the call - over for the 6<sup>th</sup> October 2012 in Vava'u. He also submitted a motion to compel the defendant to answer the second amended statement of claim or default judgment be entered.

Mr Edwards responded to this Court by indicating that he wanted to press for the statement of claim meaning the second statement of claim to be dismissed.

### **The Second Amended Statement of Claim**

The second amended statement of claim may be described as a prolix, largely unstructured pleading containing numerous paragraphs of fact and matters of opinion and evidence. It asserts also that the defendant in placing affidavits before the Court in relation to the earlier restraining order proceedings, advanced falsehoods, and the plaintiff made other serious allegations of criminal behaviour. The document is generally argumentative, and the plaintiff maintains as he did in his answers to further particulars of the first amended statement of claim there were four causes of action; conspiracy, conversion, obtaining financial gain through false representation, and deceit. He claims damages of the nature already specified in the sum of \$183,248 which he described as special damages, and \$250,000, and interest.

The second amended statement of claim contains no cause of action which could be broadly categorised as a moneys as a claim to restitution.

In my view, as a pleading it is seriously deficient in almost every respect. I do not consider there is any substance in the causes of action additionally pleaded by the plaintiff.

The basis of the conspiracy is obtaining money by false pretence. There is, however, no false pretence or representation alleged in the pleadings either attributable to Mr Jefferson or the defendant. On the plaintiff's case, he placed money in the hands of Mr Jefferson in order to procure a property for the partnership. Those moneys are traceable into a bank account belonging to the

defendant. There is nothing in the pleadings that is even suggestive of a false presence whatever may have been Mr Jefferson's motive or intentions after the funds had been acquired. At the hearing, Mr Traister attempted to say that the false pretence was the representation Mr Percy advanced that he had been involved in a real estate transaction with Mr Jefferson and had received the funds in good faith and expended part of them subsequently. Plainly, this cannot found a cause of action since it is conduct arising subsequent to the disputed transaction, and then by way only of explanation or justification for retention of the money.

In so far as the claim for conversion of the partnership funds is concerned, such a claim cannot be advanced where payments have merged into currency as where the plaintiff paid over money to Mr Jefferson with the intention it be placed in a bank account, and it passes through an intermediate account before it reaches the defendant. Conversion does not lie because there is no property in currency. Miller v Race (1758) 1 Burr 452 Lipkin Gorman v Karpnale Ltd [1992] 4 All ER 512, at 520 per Lord Templeman. That is why the equitable tracing claim in restitution in cases of this kind is so important. It allows in appropriate cases tracing.

A further cause of action, obtaining financial gain through false representation, is based on the allegedly fraudulent documents namely affidavits filed in the earlier restraining order proceedings being false in relation to these proceedings. I consider they do not support an independent cause of action either. They are mere statements by way of explanation or justification, the truth of which can be tested at trial.

Although to date the defendant has not filed a defence, it is to be anticipated that his defence will constitute a denial of any wrongdoing by him and indeed that he was the victim also of the fraudulent Mr Jefferson and or his wife in relation to what may have been a bogus or sham real estate transaction. The plaintiff may well dispute this and endeavour to show that the defendant did not receive or pay over moneys in good faith. He is not, however, in my view entitled to attempt to adduce an entirely independent cause of action on the deceit founded on the same matter must also fail.

Indeed, If the defence is that the defendant bona fide paid the \$39,069.40 to Jefferson in good faith as his commission, then the defendant may well be

able to bring himself within the change of circumstances defence to claims in restitution (whether common law or in equity) considered by Lord Templeman and Lord Goff In Lipkin Gorman. I gave both parties a copy of this decision prior to the hearing.

**Special or consequential loss.**

I have already ruled on special and consequential losses alleged. In my view, there is no basis upon which they can be claimed. In my view, the only cause of action the plaintiff could possibly succeed in is for restitution of the balance of the money and interest. That cause of action does not entitle the plaintiff to claim damages as consequential loss. In any event, most of the claims, in my view, even if some tortious basis could be divined, would encounter problems relating to remoteness or foreseeability.

I have no doubt Scott CJ would not have granted leave had he seen a draft of the plaintiff's second amended claim attached to the application for leave.

I, accordingly, have no need to consider whether the proceedings are scandalous or vexatious, although certain of the allegations made in the pleadings are strongly suggestive of this and are immaterial, argumentative and follow no sensible form of pleading and to that extent are oppressive.

Because I considered he had an arguable cause of action under his original and first amended pleading in restitution, I gave the plaintiff the option whether to discontinue the second amended statement of claim, (in which case I would vacate the application for leave to amend those pleadings) and proceed with the first amended statement of claim including a claim for interest but without any of the other consequential relief by way of damages. I indicated to him that in my view the second amended statement of claim did not support any arguable cause of action and were he to proceed with this I would be likely to entertain Mr Edward's application and strike the proceedings out altogether. Mr Edwards fairly did not dispute this approach he candidly asserting that he welcomed form or definition being given to the proceedings. Mr Traister agreed that rather than strike the second amended claim out which would eliminate his claim entirely, I should vacate the leave for the approval of the second amended statement of claim and effectively reinstate the first amended statement of claim.

He did not, however, concede that I should strike out the consequential damages claim, but I did foreshadow that is what I intended to do should I reinstate the first amended statement of claim

I am mindful of the fact that the plaintiff is not represented and in my view, because he has an arguable case in restitution for reasons I have given, I decline to strike out the second amended Statement of Claim. Rather I vacate the leave given and allow the plaintiff to proceed on the first amended statement of claim, ordering, however, that the claims to consequential loss be struck out. Ultimately, whether or not further money is judged payable will depend on a resolution of factual issues relating to the receipt and will depend on a resolution of factual issues relating to the receipt and payment of moneys by Mr Percy. Those issues are not triable now. Had Mr Traister been represented, I would have been minded to entertain fully Mr Edward's application but, as I have said, I do consider that the second amended statement of claim drafted by an experienced counsel discloses an arguable cause of action.

I order that the trial is to proceed on the issues I have outlined only in so far they relate to issues relating to restitution of the balance of the moneys paid by Mr Jefferson into the account of the defendant together with interest if the plaintiff is successful. I accordingly rule that the claims set out in paras 10 - 20 inclusive of the first amended statement of claim and the prayer for relief of C and D inclusive cannot proceed, and are struck out.

I accordingly do not have to proceed to rule or consider the further applications of the plaintiff.

It seems to me appropriate that the plaintiff pay to the defendant the costs of the defendant's application to strike out the second amended statement of claim. If the parties cannot agree on a suitable sum within 10 days hereof, the amount is to be fixed by the Registrar on application by the defendant and the plaintiff is to pay those costs to the defendant within one month of their being fixed. I certify for clarification that the costs are to be assessed on the basis that the defendant is successful on his application to have the proceedings struck out.

I have not reserved costs in the cause because the defendant has been put to considerable expense in having to bring this application and retain counsel to

argue the application in Vava'u. I am also aware that the plaintiff has informed the Court he has insufficient funds to retain counsel, so that his ability to be able to pay costs may now be in question.

Further, the plaintiff is not to bring any further application in this Court, nor apply for a trial date until the costs on this application have been paid.

Once costs on this application have been paid, I set the following timetable.

The defendant is to file a defence to the first amended statement of claim within fourteen days of his costs being paid by the defendant.

I order both the plaintiff and the defendant to complete full discovery and inspection within two months after the defence has been filed.

**DATED: 22 OCTOBER 2012**

**J U D G E**