



In TAHAAFE & ANOTHER V TEA & OTHERS 2002 TONGA L.R. 13, the principles applicable to strike out applications as set out in JAGROOP v SOAKAI [2001] TONGA L.R. 234 (CA) at 236 were confirmed in the following terms:

"The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way except where the claim is so hopeless that it cannot possibly succeed ... If the (Plaintiff) has a cause of action which may possibly succeed he is entitled to pursue it."

The plaintiffs had hired a container known as a reefer, to freeze and store fresh produce to be shifted to New Zealand in one of the vessels which the 2<sup>nd</sup> defendant is the agent for in Tonga. They say that the reefer is hired out for the storage of frozen farm produce.

The defendants say, in essence that the plaintiff's cargo had not been pre-frozen to the set-point temperature required, prior to loading:

- That the units were not designed to be used as blast freezers.
- The plaintiffs did not accept the defendant's advice on the container's performance.
- That the plaintiff's signed in Refrigerated Container Release form which exonerated the defendants from any responsibility where the container was sued as a blast freezer and where various temperature settings were not complied with.

It may be that the defendants have a strong case but from my reading of the pleadings I am satisfied that there are factual matters in dispute. For example there are disputes in relation to the findings of the plaintiffs electrician and the defendants electrician. There is a dispute as to whether the compressor of the container was faulty or not. I think that these are issues which can only be resolved at trial and I cannot say that the defendant's case is hopeless to the extent that it does not have an arguable case. As stated there are factual issues in dispute and in these circumstances I am not prepared to strike the action out.

The application is dismissed. Costs of the application are to be costs in the cause.

DATED: 18 February 2008



*Andrew T.*  
JUDGE