IN THE COURT OF APPEAL

OF SOLOMON ISLANDS

Civil Appeal No. 10 of 1997

BETWEEN: NATIONAL BANK OF SOLOMON ISLANDS LIMITED
(Second Defendant) Appellant

AND: MBAEROKO TIMBERS LIMITED
(Plaintiff) Respondent

AND: ISLAND CONSTRUCTION MANAGEMENT LIMITED
(First Defendant)

CORAM: MASON P., McPHERSON J.A., CASEY J.A.

HEARING: TUESDAY, 9 DECEMBER 1997

JUDGMENT: McPHERSON J.A.

JUDGMENT

These are applications by the defendants for leave to appeal against a decision of Awich J. given in the High Court on 25 August 1997 refusing to strike out the plaintiff's amended statement of claim in action C.C. no. 100 of 1997. Leave is needed because the order dismissing the application to strike out is interlocutory and not final: Court of Appeal Ordinance 1978, s.11(2)(f).

The ground of the application to strike out, as it is stated in the summons issued by the first defendant on 7 August 1997, is that the plaintiff's claim fails to disclose a cause of action in fraud or conversion against the first defendant. This appears as ground 1 of the first defendant's draft notice of appeal, incorporated in the application

to this Court for leave to appeal, which is dated 7 December 1997, where it is now coupled with a further complaint in the alternative that the claims were not properly pleaded. Ground 2 of that notice of appeal complains that the learned Judge at first instance failed to consider a submission by the first defendant that notices of discontinuance filed in two other actions (C.C. 204 and C.C. 208 of 1996) estopped the plaintiff, who is the respondent in this Court, from proceeding with C.C. 100 of 1997. But, although the notices of discontinuance or their effect may have been the subject of debate at the hearing below, it is clear from the first defendant's summons dated 7 August 1997 that it was not relief of a kind which the plaintiff had formal notice at or before that hearing; and it raises issues some of which involve evidence and raise a range of questions much wider than the application to strike out the plaintiff's pleading. As a matter both of discretion and form, we do not consider it would be right for this Court now to attempt to determine it on an application of this kind for leave to appeal. As it is, we understood Mr Radclyffe of counsel for the first defendant not, in the end, to be persisting with ground 2 in his submission to this Court.

The summons dated 5 August 1997 issued by the second defendant, which was heard by Awich J. with the first defendant's summons and, like it, dismissed by his Lordship on 25 August 1997, was more broadly formulated. It sought an order simply that the plaintiff's (amended) statement of claim be struck out insofar as it related to the second defendant. However, in the associated application for leave to appeal the grounds of appeal are stated to be that the amended statement of claim insufficiently pleaded a cause of action and that the particulars of the alleged fraud and breach of duty were insufficient. Although, therefore, there are slight differences between the defendants' two summonses and the notices or applications for leave to appeal, it is

convenient to consider them as, for the most part, raising the single question whether the allegations in the statement of claim sufficiently disclose a cause of action against either or both of the defendants.

The fundamental requirement imposed by O.21, r.4 is that a pleading must contain the material facts on which a party relies for his claim to remedy or relief. It must not plead the evidence by which those matters are to be proved; or matters of law, although pleading conclusions of law can sometimes be informative and helpful to the court and the opposing parties, provided always that such conclusions are clearly segregated from allegations of material fact. So long as all the material facts are alleged, a pleader is not bound to place "a particular legal label" on allegations which otherwise disclose a sufficient cause of action. See *Shaw v. Shaw* [1954] 2 Q.B. 429, 441; [1954] 2 All E.R. 638, not. 645. The allegations ought also to be accompanied by particulars, where necessary, of dates, times, places, persons, documents and other circumstances sufficient to enable the opposing party to identify the matter or occasion that is being referred to and alleged. Order 21, r.6(1) is an instance of that requirement; and it is a rule which in the specific cases it mentions (which include fraud) is strictly insisted upon in practice. See *Wallingford v. Mutual Society* (1880) 5 App.Cas. 685, 697, 701, 709, referred to by Mr Maguire of counsel for the second defendant. Nevertheless, it remains true to say that, as a general rule, a pleading which fails to include sufficient particulars will not for that reason be struck out if it can be made good by delivering further particulars sufficient to identify matters of the kind described, which may be ordered under O.21, r.7. Failure to comply with an order for delivery of particulars gives rise to a separate and distinct ground for striking out, which

is not to be confused with striking out a pleading for failure to disclose a cause of action.

The present case is not an instance of the former kind. If the amended statement of claim has a fault, it is that the wealth of particulars and (it must be said) evidence which has been pleaded or provided in it has tended to smother rather than expose the cause or causes of action that the plaintiff relies on. That might mean that the pleading is to some extent embarrassing, but it is not the complaint that has been made against it. It nevertheless remains possible without much difficulty to identify allegations of fact which, if proved at trial, are capable of giving rise to a cause of action by the plaintiff against the second defendant, to whom it is convenient now to refer as ICM.

According to paras. 1 and 2 of the amended statement of claim, each of those two parties is involved in the business of logging. Paragraph 4 of the amended statement of claim alleges that the plaintiff was at material times the owner of 901 logs (300.350 cubic metres) which are alleged to have been exported on or about 19 December 1996. Paragraph 5 alleges that it was ICM that exported those logs (which are described as "the subject of the second shipment") at about 17.45 pm on that date from Noro in the Western Province. Elsewhere the pleading identifies the vessel on which they were shipped as the M.V. *Arktis Venture*. The tort of conversion is committed if a person does an act with respect to property which is inconsistent with the rights of the owner (and in particular the right to possession) of that property. An allegation that ICM exported the plaintiff's logs is therefore a sufficient pleading of a claim for conversion (by depriving the plaintiff of its right to possession of the logs) of the plaintiff's property. Particulars sufficient to identify the times, dates and occasions

of these events are given in paras. 4 and 5. Loss or damage is alleged to have resulted, which is pleaded, in para.16.

There is therefore no substance in the complaint by ICM that the plaintiff's pleading against it fails to disclose a cause of action in conversion. It may be that ICM can justify its export of those logs. That would ordinarily be a matter for it to plead by way of defence. The plaintiff's pleading in para.4A does, however, reveal that ICM purported to sell the logs under the authority of an interim order of the High Court made on 28 October 1996 in another action (C.C. 244 of 1996) between the plaintiff and ICM. It authorised ICM to sell logs the subject of the second shipment, which in the particular circumstances presumably meant that it was also authorised to export them. But the order required that "the proceeds" be paid into a joint account of the solicitors for the parties. The plaintiff asserts that this has never been done. It must be acknowledged that a precise allegation to that effect is not altogether easy to identify in the pleading; but, in any event, it appears to be common ground; and if (as may yet be averred by ICM) there never were any proceeds of sale to pay into the account, it is again a matter which one would expect ICM to plead by way of justification in its defence. If its authority for selling and exporting (and so converting) the plaintiff's logs rests on the court order, it is a matter which it is for ICM to allege and to prove at the trial.

So much for the allegation of conversion against ICM. As against the second defendant, which is the Bank, the pleading is not nearly so clear. Not without some justification, Mr Maguire of counsel for the Bank submitted that there was no allegation against his client that it had done any act amounting to a conversion of the logs. But careful scrutiny of the amended statement of claim reveals that the plaintiff's allegation (para.6) is that the Bank participated in the process of exporting the logs by advising

the Ministry of Finance on 19 December 1996 that it held a letter of credit LC 673724 to cover the export duty payable on the logs, and further (para.7) that it confirmed that advice on 9 January 1997. In addition, para. 4B alleges that at about 1530 p.m. on 19 December 1996 the second defendant Bank represented to the Customs and Excise Division of the Ministry of Finance that a letter of credit LC 673724 was in place as an assurance that export duty would be paid; and para.14(k) is to similar effect. Without that assurance, the Ministry would not have permitted the logs to be shipped from Solomon Islands. That is capable, if proved, of having the consequence that the Bank itself became a party to ICM's alleged act of conversion and so liable as a joint tortfeasor with ICM. Much may, in the end, depend upon whether that allegation is proved at the trial, or whether it is satisfactorily explained by the Bank; but for present purposes it is enough to say that the statement of claim contains an allegation of an act which, on one view of it, is sufficient to constitute an act on the part of the Bank of participating in the conversion of the plaintiff's logs.

The amended statement of claim cannot therefore be struck out. It contains a sufficient allegation against both defendants of the conversion of the plaintiff's logs, and to that extent at least it discloses a cause of action against both defendants. The allegation of fraud that is made against them is a different matter. Essentially the pleading of this cause of action appears in para.14 of the amended statement of claim. It alleges that the actions of the defendants "herein" were jointly and severally "calculated to defraud and in fact defraud(ed)" the plaintiff "from receiving the proceeds of the shipment of 901 logs" exported on the M.V. *Arktis Venture* (which is the consignment exported from Noro on 19 December 1996). The allegation is not happily phrased; but it is nevertheless capable of being understood as an allegation that the

two defendants conspired to deprive and deprived the plaintiff of its share of the proceeds of sale of the 901 logs. Read in this way, it may be considered as disclosing a good cause of action in the plaintiff. Cf. also *Brown Jenkinson & Co. v. Percy Dalton Ltd.* [1957] 2 Q.B. 621; [1957] 2 All E.R. 844.

We might perhaps have had some difficulty in placing such an interpretation on para.14 were it not that it is plainly the sense in which Mr Wyatt of the defendant Bank has read and understood it. In para. 8 of his affidavit sworn on 16 June he says, referring to the plaintiff's action C.C. 100/1997, that the plaintiff "alleges that the first and second defendants conspired to defraud the plaintiff from receiving the proceeds of the shipment of 3000.350 cubic metres". In the following paragraph of his affidavit Mr Wyatt goes on to state his belief that there was no conspiracy of any kind between the first and second defendant. But that is a matter for determination at the trial, and the fact that Mr Wyatt was able to understand the pleading as raising a claim of conspiracy against ICM and the Bank is good reason for supposing that such a cause of action is sufficiently disclosed in the amended statement of claim. When attention was drawn to this paragraph in Mr Wyatt's affidavit, Mr Maguire frankly disavowed any challenge to para.14 as insufficiently pleading a cause of action based on a conspiracy to defraud.

Paragraph 14 is followed by a series of particulars in sub-allegations which appear under the heading "Particulars of fraud or in the alternative conversion". With one exception each of them alleges that both defendants knew a particular fact, and in many instances that they knew it on or by a particular date. The exception is sub-para(k), which alleges as a matter of fact, and not merely of knowledge, that on 19 December 1995, the Bank assured payment (which, it is said, was not, in any event,

received by the Bank) of a particular letter of credit "in order to satisfy the Customs and Excise Division to clear the cargo of M.V. *Arktis Venture* of its cargo of 3000.350 cubic metre of logs". It is perhaps not altogether easy to be sure precisely what function these particulars are designed to perform; but it may be that they are relied on in the character of overt acts or possibly reasons for inferring the existence of the conspiracy, agreement or understanding by the defendants to defraud the applicant that appears as a general allegation in the body of para.14 itself. The fact that each of them is pleaded as an assertion of jointly held knowledge on the part of both defendants tends to support such a conclusion.

The particulars to para.14 are also related to earlier allegations in paras. 4(1) to 4(9) of the amended statement of claim, which refer to various letters of credit that were forwarded to the second defendant, as advising Bank, to be drawn upon in paying the price of consignments of logs being exported to buyers overseas. The plaintiff's allegation is that proceeds of one or more of these letters of credit were wrongly applied in satisfying another liability of ICM instead of being available for and paid to or on account of the plaintiff as the price, or as its share of the price, of the 901 logs exported on 19 December 1996. The process by which it is alleged that this happened is complex and may at the trial ultimately prove to be a figment of the plaintiff's suspicion or imagination; but it cannot be said either that the pleading as a whole fails to allege a conspiracy to defraud, or that it fails to provide particulars of what is alleged by the plaintiff to be the conspiracy or agreement by the defendants to defraud the plaintiff of those proceeds.

The remaining matter meriting discussion relates to para. 15A in the amended statement of claim. It is an alternative allegation that the second defendant, "being the

plaintiffs' bank", owed a duty to the plaintiff to ensure that the proceeds of the second shipment were received; that the Bank had breached that duty as particularised in para.14; and that the plaintiff had suffered loss and damage. Some further elucidation is plainly desirable in the form of particulars of the contractual relation between the plaintiff and the Bank, and of the circumstances in which the alleged duty is said to arise; but again it cannot be said that, even in its present form, para.15A fails to disclose a cause of action against the Bank. What is missing from para. 15A is the detail of some of the matters that would make the existing very general allegation more specific, so as to enable the Bank to know what case it has to meet when it comes to trial; but that is not a ground for striking out the statement of claim as a whole, or, at present, the allegation in para.15A, which in the respects mentioned may yet be capable of being properly particularised.

We were urged by Mr Maguire for the Bank to grant leave to appeal because it raised important questions of practice where fraud, breach of duty or conversion is alleged. But, as is shown by the authorities cited by Mr Maguire, there is no real doubt about the principles or practice governing the pleading of fraud. Rather the question here is one of the application of settled principles to a particular pleading (to which the defendants have already filed defences), which is not a matter ordinarily sufficient to attract leave to appeal from an interlocutory order. A decision not to strike out a pleading is one in which the element of judicial discretion is prominent, from which, involving as it does a matter of practice or procedure, appeals are not readily entertained: see *Adam P. Brown Male Fashions Pty. Ltd. v. Philip Morris Inc.* (1981) 148 C.L.R. 170, 171, applying what was said by Jordan C.J. in *Re the Will of Gilbert* (1946) 46 S.R. (N.S.W. 318, 323). In the present case, we have examined the pleading

more closely than is usual on an application like this for leave to appeal; but, having done so, we are not persuaded that Awich J. was wrong in exercising his discretion by refusing to strike out the amended statement of claim on the grounds relied on in either of the two summonses which brought the matter before him.

The applications for leave to appeal should be dismissed with costs.

President, Court of Appeal

Judge of Appeal

Judge of Appeal