IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 26/03**

BETWEEN **COOK ISLANDS AQUARIUM FISH LIMITED**

Plaintiff

AND **TUTAKIAO TUTAKIAO**

Defendant

Appearances:	**C A McCarthy**	**for Plaintiff**
	T P Arnold	**for Defendant**
Hearing:	**10 November 2003**	
Judgment:	**10 December 2003**	

RESERVED JUDGMENT OF DAVID WILLIAMS J

CONTENTS

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The Nature of the Proceedings

[1] This case relates to a written rental agreement ("the agreement") executed on the 21st of January 2003 between the plaintiff as tenant and the defendant as the property owner. The agreement related to the northern half of the Matavéra Packing Shed and the rental area included the land around the packing shed to the boundaries of the section. The rental period was ten years beginning on 1st February 2003 and ending on 1st February 2013. The rental amount was $200 a month to be paid monthly for the term of ten years. Importantly in respect of the dispute which subsequently arose and has now lead to this litigation, the agreement provided that rental payments were to begin "after installation of new roof on packing shed, to be completed within the first month of this agreement". The rental agreement also provided for a lump sum payment of $20,000 in two lots of equal payments, the first $10,000 due on 1 April 2005 and the second $10,000 on 1 April 2006. Among the additional written contract details was clause 3 which provided as follows:

> "Tenant will replace current rusted roofing with new corrugated roofing material on rented section of packing shed. Cost of this replacement will be the tenant's and will not be deducted from the rental payable to the property owner".

[2] Cook Island Aquarium Fish Limited executed the agreement through Mr Charles Boyle and his partner Ms Claire Mishihara who are the directors and sole shareholders of the plaintiff company. The defendant signed the agreement on his own behalf. The witness to the signatures was Mr Julian Dashwood, a friend of Mr Boyle. The land in question was "Native Freehold Land" within the meaning of the Cook Island Act 1915. It was accepted that the execution of the rental agreement had not been accompanied by the formalities required by section 475 of the Cook Islands Act 1915 nor had the rental agreement at any time received the approval of the Leases Approval Tribunal nor had it been confirmed by the High Court of the Cook Islands. The central questions in the case are first, whether the absence of such formalities prevents enforcement of the agreement and, if so, secondly whether an alternative cause of action based on a pre-contractual misrepresentation can succeed.

The Post-Agreement Events

[3] Doubtless because of the requirements under the agreement that the new roof had to be installed by the 21st of February 2003 the plaintiff immediately ordered materials

from Australia through Omaha Exports Limited of Orewa, Auckland, New Zealand at a cost (including freight) of $10,211.22. Such materials were ordered on or about the 21st January being the same day the agreement was signed by both parties.

[4] On about 5th of February 2003 the plaintiff received a letter from the defendant's solicitor dated 4th of February 2003 purporting to cancel the agreement as it was "invalid as not being in accordance with the requirements of the Cook Islands Act 1915 as to form and execution formalities". The letter in question frankly acknowledged that the defendant had received a more favourable offer for the property so that from a commercial point of view the bargain represented by the rental agreement was not in his best interests. The letter acknowledged that the plaintiff had ordered building materials from Australia for the shed roof and expressed sympathy for the plaintiff's predicament in relying upon the agreement and ordering the material. However it went on to say that:

> "...one never pays money to the landowner of native freehold land before confirmation because there is simply no certainty as to the outcome of the confirmation procedure and before that is finalised there is neither equal rights or equitable rights which may be asserted by a lessee. On that basis, regrettably, I believe your lawyers will confirm my view of the matter, i.e, that you can have no legal rights against Tutakiao in respect of the premature ordering of the roofing materials."

[5] The letter suggested that the plaintiff might contact the alternative purchasers with whom the defendant was now dealing to see whether they might be able to take over the obligations of the plaintiff in respect of the roofing materials which had been ordered.

[6] Faced with this unhappy news, the plaintiff through its solicitor tried to settle the matter. Settlement proved impossible. Thereafter in an attempt to mitigate the plaintiff's losses it entered into negotiations with Omaha Exports which resulted in the plaintiff paying the sum of $3,000 in full and final settlement of all amounts owing to Omaha Exports Limited.

The Pleaded Claims

[7] In August 2003 the plaintiff commenced these proceedings. After reciting the agreement the first cause of action in reliance on the agreement claimed judgment in the sum of $3,000, interest, and costs.

[8] There was a second and/or alternative cause of action based on misrepresentation. For this cause of action it was pleaded that the defendant had represented to the plaintiff that he was the sole owner of the land and therefore authorised to enter into the agreement. The pleading recited that following a search of the land records the plaintiff had ascertained that the piece of land where the northern part of the packing shed was located did not belong solely to the defendant. It reiterated that the defendant had represented to the plaintiff that he was authorised to enter into the agreement as owner of the property and asserted that in reliance on the representation the plaintiff had entered in the agreement including condition that the roof would be installed within one month. The pleading went on to allege that the defendant was not the sole owner of the land, was not authorised to enter into the agreement and that as a result of the misrepresentation the defendant had suffered a loss of $3,000.

[9] In the course of the hearing, after some mild encouragement from the Court, the plaintiff applied for leave to add a third cause of action which alleged an oral agreement entered into between the plaintiff and the defendant in or about mid to late January 2003 to the effect that the plaintiff agreed to re-roof the packing shed in return for the defendant's agreement to rent the packing shed to the plaintiff. It was asserted that the terms and conditions of the oral agreement were duly incorporated into the rental agreement and that it was pursuant both to the oral agreement and to the rental agreement that the plaintiff had ordered the roofing materials. In a similar way it was pleaded that as a result of the cancellation of the oral agreement the plaintiff had suffered the loss of $3,000. Leave was granted.

[10] There was no challenge to the quantum of the loss claimed for each cause of action and it was accepted that the plaintiff had taken appropriate steps in mitigation.

Written Rental Agreement

[11] It is convenient to deal first with the causes of action based on the written rental agreement and the oral agreement. For reasons which are explained below the defences based on non-compliance with the Cook Islands Act apply equally to both agreements.

[12] The Cook Islands Act 1915 contains various protective provisions concerning native land. These provisions are broadly similar to those which existed under the Native

Lands Act in New Zealand and in particular the Native Lands Act 1909. The relevant provisions of the Cook Islands Act 1915 are as follows:

> "Section 2. Interpretation- (1) In this Act, except where a contrary intention appears, -
>
> "Alienation" means with respect to Native land the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust, or other disposition, whether absolute or limited, and whether legal or equitable, of or affecting customary land, or the legal or equitable fee simple of freehold land or of any share therein; *and includes a contract to make any alienation* (emphasis added).
>
> Section 475
>
> Alienations must be in writing –
>
> (1) Every alienation of Native land by a Native [or descendant of a Native] shall be effected by an instrument in writing signed in duplicate by that Native [or descendant of a Native] and in conformity with the provisions of this section.
>
> (2) The signature of the Native [or descendant of a Native] shall be attested by a Judge or Registrar of the High Court or by an officer of the Land Court approved in writing for the purpose of he Secretary of Justice or by a Senior clerk, Collector of Customs, or Medical Officer [or by a Solicitor of the Supreme Court of New Zealand].
>
> (3) The attesting witness shall at the same time certify in writing on the instrument that the effect of the instrument was explained to a Native [or descendant of a Native] before the execution thereof by him, and that the Native [or descendant of a Native] understood the effect thereof.
>
> (4) Every such instrument shall describe the land affected thereby by reference to a plan endorsed or otherwise drawn on the instrument before the execution thereof by the Native [or descendant of a Native].
>
> (5) No witness shall attest the signature of a Native [or descendant of a Native] to any such instrument unless the date on which the instrument is executed by that Native [or descendant of a Native] is stated in the instrument.
>
> (6) Subject to the operation of a confirmation by [the Land Court], no alienation by a Native [or descendant of a Native] of any Native land shall have any validity or effect unless made in conformity with this section.
>
> (7) No alienation of Native land by a Native [or descendant of a Native] by way of contract shall, unless that contract is in conformity with this section, be enforceable against that Native [or descendant of a Native] by reason of part performance or otherwise.
>
> (2) Nothing in this section shall exclude the jurisdiction of the High Court, in any case in which an instrument of alienation has been confirmed by [the Land Court], to order the rectification of that instrument in accordance with the true intent of the parties in the same manner as if the instrument had been made

between Europeans, and in such a case no further confirmation by [the Land Court] shall be required."

[13] In the course of the defendant's submissions I referred to subsection 475(6) which appears to allow for the possibility that the Land Court may approve alienation which has not been made in conformity with this section. I raised this possibility because the actions of the defendant in repudiating the rental agreement had perhaps foreclosed the opportunity for the parties to apply to the Land Court for confirmation notwithstanding the absence of the required formalities. Mr Arnold relied upon *Wilson v Herries* (1913) 33 NZLR 417 CA in supporting the proposition that the Land Court cannot grant confirmation in such circumstances. Section 215 of the Native Land Act 1909 NZ in subsection 6 provided that "subject to the operation of a confirmation by a Maori Land Board or the Native Land Court, no alienation by a Native of any Native land shall have any validity or effect unless made in conformity with requirements of this section."

[14] Mr Arnold's submission is not entirely supported by *Wilson v Herries*. That case is authority for the proposition that section 215(6) precludes an instrument of alienation from being the basis of any cause of action unless and until the Maori Land Board of the district of the Native Land Court confirms it. However, the decision does not interfere with the plaintiff's right to seek confirmation under section 220(2). Every instrument of alienation duly executed creates an inchoate right, which becomes perfect upon confirmation, and section 220(2) gives the person claiming under such an instrument an absolute right to an order confirming the alienation provided the conditions of confirmation are met.

[15] The effect of section 475(6) is therefore that no rights can arise under a contract which is not in conformity with section 475 unless the contract is later confirmed by the Court. The fact that it is possible for the Court to confirm an alienation which does not comply with the formalities is demonstrated by section 482(4). Section 482(4) permits the Court to confirm an alienation which is not in conformity with section 475 ("notwithstanding any informality or irregularity in the mode of execution of the instrument") if it is satisfied that the informality or irregularity is immaterial, having regard to the interests of all the parties, and that all the parties consent to such confirmation.

[16] Section 475(7) eliminates the doctrine of part performance; a plaintiff cannot assert that, by virtue of his or her part performance of a contract which is not in conformity with section 475, the contract has any validity or effect.

[17] Mr Arnold's letter to the plaintiff on behalf of the defendant dated 4 February 2003 stated:

> It seems that Tutakio has received a more favourable offer for the property and realises that from a commercial point of view the bargain represented by the rental agreement which he signed was not in perhaps his best interests. It is for circumstances just like this that the process of Court confirmation is designed.

This policy argument, which was carried through to the defendant's submissions, is also not entirely correct. While one of the purposes of the Act is to ensure that the Court only confirms contracts which are fair to the native landowner, the Court is not required to confirm only those contracts which are in the "best interests" of the landowner. The legislature has set minimum statutory safeguards set out in the requirements of section 482. Pursuant to subsection (2)(c) of that section, the court is only concerned with the *adequacy* of consideration, which will involve measuring the comparative value of the defendant's promise with the act or promise given in exchange for it (Burrows, Finn & Todd *Butterworths Contract Law of New Zealand,* (8th ed, 1997). Provided adequate consideration is furnished, and the other conditions set out in section 482 are met, a landowner may be precluded from frustrating an otherwise valid contract by arguing that a 'better deal has come along' after the initial contract. This point is made in *Wilson v Harries* at pages 424-425 where it was held that the Court's enquiry as to confirmation is limited to the matters set out in section 220(1) and not the intentions of the native or the effect of confirmation on third parties. The Cook Island statutory regime also prevents a native from frustrating confirmation of alienation of native land by permitting *either* party to the instrument of alienation to apply to the Court for confirmation (section 478).

[18] If the execution had been in compliance with the provisions of the Act, and if, as the plaintiff submits, the rental offer was reasonable, there could have been a valid claim for damages under the heading of part performance. However the failure to comply with section 475(7) is fatal to this cause of action. To hold otherwise would be contrary to section 475(7) which clearly precludes the doctrine of part performance of a contract that does not conform with section 475 forming the basis of a cause of

action, and section 475(6) which precludes an instrument of alienation from being the basis of any cause of action unless and until it is confirmed by the Court.

Oral Agreement

[19] Turning to the oral agreement, I accept that this may be validly considered as a separate cause of action. Counsel for the plaintiff submitted that should the Court not find in the plaintiff's favour under the written agreement, consideration must be given to the separate oral agreement to re-roof the packing shed. Both parties confirmed in their evidence the existence of an oral agreement regarding the re-roofing of the packing shed. The evidence was that without the agreement to re-roof, there would not have been the subsequent written agreement to rent. This was a key factor for the plaintiff, who would not have been able to lease the property without the roof being fixed. Earlier possible tenants had not lived up to their promise to re-roof. The argument for the plaintiff here was in summary that the ordering of roofing materials amounted to part performance of an oral agreement that existed between the parties, and it was made on reliance on the oral agreement, and caused the plaintiff to suffer loss.

[20] The inescapable problem with this argument is that the definition of alienation cited above concludes with the phrase "and includes a contract to make any such alienation". It seems clear that the essence of the bargain was that if the plaintiff agreed to fix the roof he would be granted a rental agreement, ie an alienation. For this reason the same insurmountable problems applies to this argument based on the oral agreement.

Misrepresentation – Pleadings

[21] It remains to consider the third cause of action based on misrepresentation. I have already referred to the plaintiff's pleadings in this respect at paragraph [8].

[22] It is important to examine the overall state of the pleadings on this matter. Paragraph 12 of the statement of claim as amended provided as follows:

> "The defendant represented to the plaintiff that he was sole owner of the land and therefore authorised to enter into both the oral agreement to re-roof the packing shed and the rental agreement on the above terms and conditions."

[23] The corresponding provision of the statement of defence is in the following terms:

> "The defendant denies paragraph 12 of the statement of claim but acknowledges that he did represent to the plaintiff that he was entitled to deal with the property. He says further this was not a misrepresentation, and that it was his intention (since realised) to seek and obtain an occupation right so as to constitute him a sole owner of that part of the land in question".

[24] In paragraph 13 of the statement of claim it was further pleaded that the plaintiff had discovered that the northern part of the packing shed did not solely belong to the defendant. It is there asserted also that the defendant represented to the plaintiff that he was authorised to enter into the agreements as the owner of the property. The reply in paragraph 13 states as follows:

> "As to paragraph 13 of the statement of claim the defendant says that:
>
> (a) at all material time his claim to sole enjoyment of the northern part of the packing shed was informally recognised by the other land owners of the land in question;
>
> (b) that informal recognition has since been formalised by the grant of an occupation right to the defendant;
>
> (c) that although he was not aware of the matter at the time, he has since been advised by a solicitor that as a tenant in common of the property, he was entitled to represent himself as an owner of the property and was entitled to deal with it, subject to the provisions and protections of the Cook Islands Act 1915 and the Leases Restrictions Act 1976."

Misrepresentation - Evidence

[25] In the pleadings of the defendant he acknowledged making a representation that he was entitled to deal with the property. Mr Boyle said in his evidence that there was no mention of co-owners in his discussions with the defendant. He added that if he had known the defendant did not own outright the property to be rented he would not have proceeded with the arrangements. I accept Mr Boyle's evidence in these respects as truthful and accurate. He was an impressive witness who did not exaggerate nor did he evade the difficult questions in cross-examination. In my view the defendant's representations plainly carried with it the additional representation that since he was entitled to deal with it there were no other family members who would have the right to intervene and prevent the formalisation of the rental agreement. At the time of the representation this was not the case, even if as a tenant in common he had a right to deal with the property as one of the owners. That would be a materially different thing to a situation where the plaintiff had to deal with several owners instead of one person.

[26] Section 425 of the Cook Island Laws Act 1915 provides that:

> "When 2 or more persons are named in any freehold order as entitled to land they shall hold the same as tenants in common in the shares expressed in the order."

The defence's contention that as a tenant in common Mr Tufakiao was entitled to represent himself as owner of the property is only true as to his undivided share: "A tenant in common is, as to *his own undivided share,* precisely in the position of the owner of an entire and separate estate" (Williams *Principles of the Law of Real Property* 23rd ed, 1920, 148-149, emphasis added). *Butterworths Land Law in New Zealand* at 9.048 notes that while tenants in common may agree between themselves to divide the land they hold in co-ownership in to separate parts to be held in individual ownership, this will only be carried into effect by the registration of a memorandum of transfer, whereupon the co-ownership comes to an end and each former co-owner becomes the registered proprietor of the parcel of land allotted to him or her. Such agreement for partition must be in writing to comply with the Contracts Enforcement Act 1956, s 2. The customary arrangement between the defendant and his late sister does not comply with the Torrens system, which was adopted by virtue of the Land Transfer Act 1870 (NZ) and applies in Rarotonga, or the Contracts Enforcement Act as it was only an oral arrangement. There were no words of severance on the register of title. Therefore, the allegation that as a tenant in common he was entitled to represent himself as sole owner of the northern part of the property is incorrect.

[27] The fact that a grant of a formal Occupation Right was later required to recognise the defendant's claim to an "informally recognised" entitlement to sole enjoyment of the northern part of the packing shed (mentioned in paragraph 13 of the statement of defence) also underscores the importance of the misrepresentation.

What Kind of Misrepresentation?

[28] It has to be acknowledged that the pleading in the representation cause of action does not specify that a negligent misrepresentation was being asserted. Rule 70 of the Code of Civil Procedure of the High Court 1981 provides:

> "(1) The Statement of Claim shall specify particulars of the claim which the Plaintiff seeks to establish including such particulars of time, place, names of

persons, dates of instruments, and other circumstances as may suffice to ensure that the Court and the opposite party are fairly informed of the cause of action."

The equivalent New Zealand High Court Rule is Rule 108 which requires that:

"108. The Statement of Claim –

(a) Shall show the general nature of the plaintiff's claim to the relief sought; and

(b) Shall give such particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action..."

[29] It is well established that it is not necessary to state the principles of law on the basis of which it is said the facts entitle the plaintiff to relief. While it is necessary to state the facts, it is not necessary to state the legal result of those facts: see Lord Denning MR in *re Vandervell's Trusts (No 2)* [1974] 3 All ER, 205, (CA) 213:

"*The pleadings*

Counsel for the executors stressed that the points taken by counsel for the trustee company were not covered by the pleadings. He said time and time again: 'This was of putting the case was not pleaded'; 'No such trust was pleaded'. And so forth. The more he argued, the more technical he became. I began to think we were back in the bad old days before the Common Law Procedure Acts, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment (see *Bullen v Leake* [1974] 1 All ER 47). All that has been long swept away. It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that counsel for the trustee company put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So it was quite open to him."

[30] The overriding requirement is the interests of justice, one aspect of which is the need for the Court and the Defendant to know the nature of the claim made. In this case, especially in view of the fact that a representation was admitted, I do not think that it was necessary to specifically plead negligent misrepresentation.

Can Damages be Awarded for Negligent Misrepresentation?

[31] The remaining issue is whether the plaintiff can recover damages for a negligent misrepresentation. The Contractual Remedies Act 1979 (NZ) does not apply in the Cook Islands and therefore the common law position governs this issue. In *Heilbut*

Symons & Co v Buckleton [1913] AC 30, 51 Lord Moulton held that damages could not be awarded for innocent representation:

> "It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form, the attack is made."

[32] However, in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465; [1963] 2 All ER 575 the House of Lords expressed the view that damages could be awarded for negligent misrepresentation. Lord Morris at 502-503 held:

> "...if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or his ability to make a careful enquiry, a person takes it on to himself to give information or advice to, or allows his information or advice to be passed on to another person, who, as he knows or should know, will place reliance on it, then a duty of care will arise."

The New Zealand Law Reform Commission *Report on the Law of Contractual Remedies* (Wellington, March 1967) at 17 summarised the common law position as follows:

> "(a) If fraudulent, the aggrieved party may elect to rescind or affirm the contract, successfully resist any claim to enforce it (except where he has affirmed it), and obtain damages.
>
> (b) If not fraudulent, the aggrieved party may elect to rescind or affirm the contract and successfully resist any claims to enforce it (except where he has affirmed it) but he cannot recover damages (except, possibly, where he can prove that the misrepresentation was made negligently)."

[33] In the present case there was no evidence of fraud in the sense required to support the common law action for deceit (see Lord Herschell's speech in *Derry v Peek* (1889) 14 App. Cas. 337,339), nor was fraud alleged by the plaintiff.

[34] As to negligent misrepresentation it is necessary to briefly set out its critical components. Lord Oliver in *Caparo Industries plc c Dickman* [1990] 2 AC 605 at 638 extracted the following principles from *Hedley Byrne*:

> "...the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where
>
> (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;

(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;

(3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent enquiry; and

(4) it is so acted upon by the advisee to his detriment."

Analysis of Negligent Misrepresentation

[35] First, I find that Mr Tutakiao knew, or should have known, at the time that he made the statement, that its purpose was to assure the plaintiffs that he was the sole legal owner of the property and that he was legally able to enter the agreement without consent being required from the co-owners. Secondly, I find that he communicated the statement to Mr Boyle knowing that it would be used by the latter in his company's decision to enter into the agreement. Thirdly, Mr Tutakiao knew or should have known that his statement would have been likely to have been acted on by the plaintiffs without independent enquiry as it is reasonable to assume that a person in the defendant's position would have known whether he was the sole owner of the property or not. Fourthly, as testified by Mr Boyle, the statement was relied upon in the sense that he would not have entered into the agreement on behalf of Cook Islands Aquarium Limited if the true state of affairs had been revealed at the time of negotiations. Reliance on Mr Tutakiao's false statement ultimately caused financial loss in the sum of $3,000.00.

[36] The misrepresentation made in this case was negligent. A reasonable person in the position of the defendant would have known that he was not entitled to deal with the land unilaterally. Mr Tutakiao knew that he was not the sole owner and that there were others on the register of title. It does not take an indepth understanding of the law to grasp that if land is owned in common, consent is required from the other landowners before a lease is granted and those landowners are effectively excluded from entering that part of the property.

Result - Costs

[37] The plaintiff succeeds on the basis of a negligent misrepresentation and is entitled to judgment for $3.000.00, costs, and also interest at the statutory rate on $3,000.00 from

the 18th of June 2003 to the date of this judgment. The parties are requested to discuss the question of costs and to try to agree costs. Failing agreement each party shall file a memorandum on costs no later than one month from the date of Judgement. The Court will decide costs on the basis of the memoranda.

SIGNED at Auckland on the 10th day of December at 4.00pm

David Williams J

David Williams J