IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA 1/08

IN THE MATTER	of the Property Law Act 1952
AND	
IN THE MATTER	of **AREMANGO SEC 7A1A2** Ngatangiia
BETWEEN	**TAAKOKA ISLAND VILLAS LIMITED**
	Applicant
AND	**RUTA TERORA TUPANGAIA** and others to be named, being landowners of the above land
	Respondents
	MISC No 18/08
IN THE MATTER	of Section 336 of the Companies Act 1970-71
AND	
IN THE MATTER	of an application by **KENNETH WHALEY, KEITH CLARK** and **ROGER LYNN** to restore Taakoka Island Villas Ltd to the Register of Companies
	Applicants
AND	**RUTA TUPANGAIA**
	Objector

Counsel: Mr Morley and Ms Rokoika for Taakoka Island Villas

Mr Vakalalabure for Mrs Tupangaia

Hearing: 2 October 2008 (Mr Morley by telephone from New Zealand)

Judgment: 7 October 2008

JUDGMENT OF WESTON J (IN RELATION TO APPLICATION FOR LEAVE TO APPEAL)

[1] In this Judgment I deal with two applications. First, an application for leave to appeal a Judgment of Grice J given on 23 July 2008. Secondly, an application for a stay in relation to that Judgment. There are various consequential matters that I must also address.

[2] The two applications arise against a complex procedural history and I will need to explain some of that background during the course of this Judgment.

[3] It is common ground that the application for leave to appeal is governed by Article 60(2), The Constitution of the Cook Islands. I now set out relevant portions of Article 60(2).

> *"Subject to the provisions of this Constitution... an appeal shall lie to the Court of Appeal from a judgment of the High Court –*
>
> *[a] As of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution...*
>
> *[b] ...*
>
> *[c] ...*
>
> *[d] As of right, from any judgment of the High Court involving any question as to the interpretation or application or effect of any provision of Part IVA of this Constitution.*
>
> *[e] With the leave of the High Court in any other case, if in the opinion of that Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest effected, or for any other reason, ought to be submitted to the Court of Appeal for decision."*

[4] The original application for leave to appeal was filed on 23 July 2008 but has been superseded by an amended application dated 6 August 2008. This amended document sets out a general ground of appeal followed by five specific grounds. This application does not refer to any specific provision in the Constitution. The references to the Constitution can be found in the submissions lodged by Mr Vakalalabure on 8 September 2008. In those submissions there are references to Articles 60(2) and 65(1)(d) of the Constitution. In terms of Article 60(2) reliance is placed on subclauses (a) and (e). There is also a reference to subclause (d) but that appears to be entirely misconceived because there was no issue before Grice J in relation to Part IVA of the Constitution.

[5] The upshot of the above is that, as I understand it, Mr Vakalalabure places the following matters before the Court:

[a] By reference to Articles 60(2)(a), 60(2)(e) and 65(1)(d):

- failure to allow an adjournment;
- refusal to allow cross examination;
- the perception of bias;

[b] By reference to Article 60(2)(e):

- error of law in relation to the Development Investment Act 1995-96 so far as it impacts upon an application under section 336, Companies Act 1955;
- failure by the Judge fully to consider the principles in *Re Saxpack Foods Limited* [1994] 1 NZLR 605.

[6] Mr Vakalalabure's submissions also raise a procedural objection by reference to the Chief Justice's Minute dated 25 July 2008 which formed the background of the subsequent Minute that I issued dated 2 September 2008. It is quite apparent from the submissions that there has been some confusion in relation to the Chief Justice's Order so far as it referred to CA 4/08. As I understand the position, technically there is no appeal until and if I decide to grant leave. In any event, I take the view that the procedural issues were superseded by the timetable set out in my subsequent Minute. The parties have now exchanged submissions in terms of that timetable. I do not think there is anything to be gained by reopening the procedural dispute and I propose to say nothing more about it in this Judgment.

[7] In order to provide the necessary context for addressing the application for leave to appeal I need to explain the history of the matter. I will then briefly describe the substance of the matters addressed by Grice J.

[8] On 4 March 2004 Taakoka Island Villas Limited filed an application seeking relief against forfeiture under number OA 5/04. Nicholson J gave his decision on 3 February 2006 and on 27 April 2007 the Court of Appeal dismissed an appeal against that decision.

[9] On 27 May 2006 Taakoka Island Villas Limited was struck off the Register of Companies although that was not realised at the time. Indeed, it was not appreciated until early 2008 that this had occurred.

[10] On 6 December 2007 the second termination notice was issued in relation to land associated with the business of Taakoka Island Villas Limited. A second application for relief against forfeiture was brought under number OA 1/08. It was then learned that Taakoka Island Villas Limited had been struck off the Register. Following that realisation an application was made (on 12 March 2008) for it to be reinstated to the Register. The file number was Misc 18/08. That was the matter decided by Grice J in her decision on 23 July 2008.

[11] In the meantime Mrs Tupangaia had been adjudicated bankrupt in New Zealand. There was an application made to annul that bankruptcy, due for hearing on 23 July 2008. The Judgment of Grice J was a matter relevant to that application. Ultimately the application to annul the bankruptcy was declined. Consequently, and as I understand it, Mrs Tupangaia remains a bankrupt in New Zealand.

[12] The Judgment of Grice J is now the focus of my consideration. If my decision is to grant leave to appeal it would be inappropriate to give reasons for that as determination of the matter would be for argument and decision in the Court of Appeal. However, because my decision is to refuse the application for leave (see below) I believe it appropriate to give brief reasons in case the matter goes further. I will do so by reference to the five grounds raised by the applicant.

[13] Before doing so, I say something about the nature of the application determined by Grice J. The application for reinstatement to the Register was lodged initially by one applicant, subsequently three applicants, pursuant to section 336, Companies Act 1955 (NZ), which is part of the law of the Cook Islands. Mrs Tupangaia was the sole objector to that application.

[14] In my experience, such applications are very common in the Cook Islands. They are normally treated as a matter of routine and, indeed, Grice J noted that as well. I have made many such orders during the time I have been a Judge. None of these has been opposed, unlike the present case. The relevant threshold for reinstating a company to the Register was addressed by Grice J. It is in the following terms:

> *"... If satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the Register."*

[15] Such an application is not an adversarial proceeding with the Court determining the respective rights and issues of two or more parties. Rather, the applicant carries the burden of satisfying the Court in terms of the statutory threshold. Mrs Tupangaia, as objector, was entitled to oppose that application but she did not have rights or interests beyond that right to object. She did not file any affidavits in her name although her agent did so.

[16] I now address the five grounds raised by the applicant.

Refusal to adjourn

[17] This matter is addressed by the Judge at paragraphs [29]-[31] of her Judgment. Mr Morley, in his submissions, makes the point that there was no real change to the application and thus no proper basis to adjourn. He describes the two applications as *"virtually identical"* and on my reading that appears to be correct. It appears to have been, also, the view of the Judge.

[18] While Grice J refused the adjournment, Mrs Tupangaia was given the opportunity to provide an affidavit to the Court and that opportunity was taken up by her agent.

[19] The question of an adjournment is highly discretionary. It is commonly the case that such applications are refused. The present circumstances do not, in any way, lead to the conclusion that the right to a fair hearing was denied. In these circumstances, I could not provide a certificate that the case involves a substantial question of law as to the interpretation of the Constitution. Equally, I do not think there is an important question of law raised which ought to be submitted to the Court of Appeal for decision. I reject this ground.

Refusal to allow cross examination

[20] Much of what I have said above by reference to the refusal to adjourn applies here.

[21] In a case like this, there is no expectation of cross examination. This was not an adversarial matter. And, even if it was, that is not necessarily conclusive. For example, there is no automatic right to cross examine in relation to a judicial review application. In the present case, too, the application for leave to cross examine was brought late and, if granted, would have derailed the hearing.

[22] Mr Morely, in his submissions, has made the point that he is not aware of any cases where this issue has been determined in favour of there being a right to cross examine. I am not surprised. I reject this argument.

Perception of bias

[23] Mr Vakalalabure, in his submissions, put the matter thus:

> *"The third ground of appeal relates to the issue of the appearance or perception or apprehension of bias. This is not an allegation of bias against the Learned Judge, but rather that the circumstances under which the communication took place between counsel for the respondents and the Trial Judge could cause the apprehension or appearance of bias to a reasonable observer."*

[24] I am satisfied that the argument is entirely misconceived. I accept what Mr Morely says in his memorandum of 10 September 2008. What he says there, as to how these communications occurred, is confirmed by registry staff. Mr Morely accepts, in paragraph 10 of that memorandum, that the memorandum he sent to the Registrar should also have been served upon Mr Vakalalabure. I agree it was a most unfortunate oversight. But I do not think it fundamentally makes any difference. It is not uncommon for there to be communications between counsel and registry staff including as to when a Judgment might issue. In most cases these will occur on notice but that is not invariably the rule. If registry staff choose to liaise with the Judge that is a matter for them and not for the parties.

[25] In the present case I am satisfied that Mr Morely had no direct communication with the Judge and there is nothing in the events as I understand them to be which raises any relevant issue of bias. I am satisfied that there is nothing in either of Articles 60(2)(a) or 60(2)(e) which is triggered by the argument.

Development Investment Act 1995-96

[26] This topic is addressed by Grice J at page 12 et seq of her Judgment. The argument appears to have been put on the basis that the Court's jurisdiction was effectively excluded. Unsurprisingly, she rejected that argument.

[27] Mr Vakalalabure said nothing about this argument in his written submissions. In the amended application he put it in the following terms:

> *"That the Learned Trial Judge erred in law in failing to properly consider the application of the Development Investment Act 1995-96 with respect to "activity" and "carrying on business" in the Cook Islands and its direct implications on an application under section 336 of the Companies Act 1955."*

[28] At the hearing before me I invited Mr Vakalalabure to add anything to this. He confirmed the Judge's summary of his argument (for example, as set out in paragraph [22].) He disagreed with her conclusion.

[29] I am satisfied there is nothing in the point. Mr Vakalalabure has had the opportunity to spell out why such an argument potentially falls within the terms of Article 60(2)(e). Nothing he said satisfied me that that is the case. I reject the argument.

Re Saxpack Foods Limited [1994] 1 NZLR 605

[30] In the amended application, Mrs Tupangaia alleged:

> *"That the Learned Trial Judge erred in fact and in law in failing to fully consider the principles in Saxpack Foods Limited, resulting in a miscarriage of justice."*

[31] The argument is raised in the context of Article 60(2)(e).

[32] Her Honour dealt with this case by reference to Mr Vakalalabure's submissions at paragraph [21] et seq of her Judgment. Mr Vakalalabure's written submissions made no reference to this argument. At the hearing before me I invited him to expand upon his argument. He accepted this was another way of arguing the previous point and that it would stand or fall on that same argument.

[33] I am satisfied there is nothing in the point and certainly nothing that comes within Article 60(2)(e).

Conclusion on application for leave to appeal

[34] For the reasons set out above I refuse to provide a certificate in terms of Article 60(2)(a) and I decline leave in terms of Article 60(2)(e) of the Constitution.

[35] In those circumstances it is strictly unnecessary for me to address the terms of any application for leave but I now set out some observations in case this matter is taken further.

Terms if leave to appeal is granted

[36] If leave had been granted, contrary to my decision as above, I would have been inclined to order a sum of $5,000 by way of security for costs. This is higher than usual but I believe such would be necessary to recognise the particular circumstances of this case. That reflects the procedural history and the substantial amount of costs presently outstanding in relation to the earlier litigation.

[37] Furthermore, I would have ordered that Mrs Tupangaia prepare the case on appeal within 28 days. This would have been subject to an unless order with the result that the appeal would be automatically struck out if the deadline was not met.

[38] If leave had been granted I would have stayed the hearing of OA 1/08. In the circumstance I do not need to do so.

Consequential matters

[39] Because leave to appeal has been refused, there is no reason why the application for relief against forfeiture (OA 1/08) should not proceed to a hearing in the November sitting. I ask the Registrar to make appropriate arrangements to set this down for hearing at that time.

Weston J