

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

**PLAINT NO. 30/2011**

BETWEEN **MOTHERLAND LIMITED** a duly  
incorporated company having its  
registered office at Arorangi, Rarotonga  
**First Plaintiff**

AND **PETER ROBERTSON** of Arorangi,  
Rarotonga, Company Director  
**Second Plaintiff**

AND **ROBERT HEATHER WICHMAN** of  
Arorangi, Rarotonga, employment  
unknown  
**First Defendant**

AND **THE ATTORNEY-GENERAL** of  
Avarua, Rarotonga  
**Second Defendant**

Hearing: 26 July 2013

Counsel: Mr Mason for the Plaintiffs  
No appearance for First Defendant  
Ms Evans for the Second Defendant

Judgment: 26 July 2013

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**JUDGMENT OF HUGH WILLIAMS, J**

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[FTR 11:55:44]

[1] This is a claim which was commenced as far back as 8 December 2011. It alleges serious matters in relation to the First Defendant and against the Commissioner of Police as Second Defendant.

[2] In essence, the Plaintiffs alleged that they were wrongly dispossessed of premises, and the Plaintiff's property which was in the premises, by Mr Wichman.

[3] It is clear from affidavits Mr Wichman has filed that he regarded himself as the legitimate landlord of the premises. He alleges that the dispossession was valid and the chattels uplifted were validly taken by way of distress for unpaid rent.

[4] The affidavits filed - principally in relation to an injunction application with which the claim was initially concerned - also show that there is a background of marital discord to this matter. Mrs Robertson the Second Plaintiff's former wife, has filed an affidavit on the Defendants' behalf and there are also, it seems, allegations of another woman being involved in the matter as far as the Second Plaintiff is concerned. All of that however is no more than matters raised on the affidavits about which no findings can be made.

[5] It is clear that in order to avoid any possible breach of the peace, the Police became involved in the eviction from the premises and the uplifting of the contents to the point where the Police took custody of chattels - being stock from the shop operating on the premises and personal gear.

[6] All of that, or at least all of that which remained, was returned by the Police to the Plaintiffs, in part, at least, under an Order of this Court. But it seems that there was an allegation that some of the items were missing or damaged whilst in Police custody.

[7] The claim was proceeding much as normal until 20 November 2012 when Ms Rokoika, who had been acting to that point for both Plaintiffs, withdrew from the case when she left the Cook Islands.

[8] The matter came before the Court on 18 March 2013 and in a Minute, issued that day, the procedural history was briefly reviewed. It must be said that on that occasion there was no appearance on behalf of any party other than the Commissioner. Indeed there had been no appearance by any other party since Ms Rokoika withdrew from the litigation.

[9] The Minute of 18 March 2013 commented that the allegations of improper conduct concerning the Commissioner were serious and the Attorney-General and

the Police wished to have the matter ventilated in Court and brought to a conclusion or, in the alternative, that the allegations be struck out against them for non-prosecution.

[10] Between November 2012 and March 2013, it was expected that there would be settlement negotiations between the parties Superintendent by a Justice of the Peace but nothing eventuated in that regard.

[11] At the conclusion of the 18 March Minute the Court said this:

“The matter should either be reactivated or dismissed.

In light of that, the proceeding will be set down to be called before Her Honour Justice Potter on Friday 3 May 2013 at 9.00 a.m. The Crown is to serve notice of that time date and place of the hearing on the registered office of Motherland and on Mr George’s firm [for the First Defendant]. So far as Mr Robertson, the Second Plaintiff is concerned, the Crown will advertise once in the Cook Islands News to inform him of the time date and place of the hearing including advice to him that if he or counsel instructed on his behalf does not appear on that occasion the proceeding is likely to be struck out for non-prosecution.”

[12] The Crown complied with that direction.

[13] As a result of that Minute the claim came back before Justice Potter on 3 May 2013. At that point Mr Mason appeared for the Plaintiffs although he had only recently been instructed. It is noteworthy that Mr Robertson appeared with him on that date, so the notification requirements in the 18 March Minute had been productive.

[14] On 3 May 2013 however, Mr Mason required further instructions and as a result Justice Potter made the following directions:

“Counsel have sensibly conferred and the following arrangements are agreed. Counsel are to confer as soon as possible with a view to achieving settlement of this matter. If settlement cannot be reached, then:

- a) The Registrar is to allocate a Judicial Settlement Conference at the next sitting of the High Court in July 2013

- b) The plaintiffs are to file two weeks before the Judicial Settlement Conference and an amended Statement of Claim. The Crown is to respond with any amended Statement of Defence the Crown considers necessary or appropriate within a further period of seven days.
- c) Counsel are to file seven days before the date of the Judicial Settlement Conference a Statement of Agreed Facts and Agreed Issues. In the event that agreement is not reached counsel are each to file such a statement, indicating areas of disagreement.”

[15] Between 3 May and today’s hearing, the Crown has made a Calderbank Offer to Mr Mason. That occurred on 27 June.

[16] Mr Mason however, ever since 3 May, has been unable to get in touch with Mr Robertson and Mr Robertson has not been in touch with him. He was, on 3 May, said to be an employee of the New Zealand High Commission but the Commissioner has been unable to assist Mr Mason in locating Mr Robertson. Mr Robertson apparently does not subscribe to email but he has a cellphone, but even by that means Mr Mason has been unable to establish contact. And, importantly, despite Mr Robertson being the principal litigant for the Plaintiffs, he has not been in touch with Mr Mason, has not appeared today at the hearing and has apparently made no enquiries of the Court as to when this matter might next come before it despite Justice Potter saying it would be heard during the July sessions.

[17] Justice Potter’s procedural directions have not been complied with.

[18] It is the responsibility of a Plaintiff litigant to progress his or her litigation, at least to the point of giving instructions to his or her counsel.

[19] Mr Mason was accordingly today placed in the unenviable position of seeking an adjournment of the entire proceeding or accepting the Crown’s Calderbank Offer, though, without instructions as to the Plaintiff’s view of the adequacy of the amount said to be offered or the Commissioner are being struck out of the claim with costs reserved on the basis that the Plaintiffs have again singularly failed to prosecute their litigation.

[20] In the Court's view, the Plaintiffs, particularly Mr Robertson, have shown, at most, minimal regard for this litigation and only minimal regard in the sense of Mr Robertson turning up at short notice on 3 May. That is despite the very serious allegations Mr Robertson and his Company make against all defendants, particularly the Commissioner.

[21] Mr Robertson and Motherland (if it is still on the Register) are well aware that the matter was going to come back before the Court during the July 2013 sessions and that they had certain obligations to comply with before that time. They have done nothing in that regard.

[22] Mr Mason cannot accept the Calderbank Offer without exposing himself to criticism, even litigation, by the Plaintiffs for accepting an offer without instructions.

[23] The matter has now gone on for two and a half years and, for many months now, it has made no substantial progress at all.

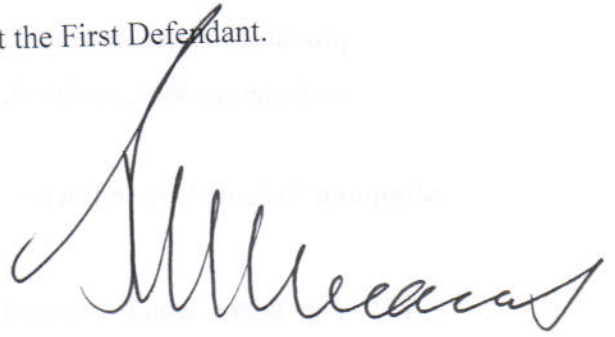
[24] Justice Potter endeavoured to reactive the matter on 3 May 2013 but her efforts have been unavailing because of Mr Robertson's lack of attention to the litigation despite the serious allegations it contains.

[25] In those circumstances, were the matter against the Commissioner to be further adjourned, the high likelihood is that the same situation would obtain whenever it came back before the Court in the future.

[26] To put it bluntly, Motherland and Mr Robertson have had every chance to prosecute their serious allegations against the Commissioner and to follow them up and, perhaps, to be paid something in order to bring the litigation to an end against the Second Defendant. They have failed to do so, and in those circumstances the only appropriate Order is that Ms Evans' application be granted, and the Second Defendant accordingly be struck out of the proceedings with costs reserved.

[27] The Commissioner is to have 28 days from delivery of this Judgment to file any application he may intend to make for costs, but given the history of the matter to date the enforcement of any Order that might be made could perhaps end up being futile, however that is a matter for the Commissioner.

[28] The litigation is adjourned sine die against the First Defendant.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

**Hugh Williams, J**