

CP. 786/89

BETWEEN

FLETCHER DEVELOPMENT & CONSTRUCTION LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as builders and developers.

Plaintiff

AND

WORKS & DEVELOPMENT SERVICES CORPORATION (NZ) LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as a works and development business formerly known as the Ministry of Works and Development.

First Defendant

AND

NEW ZEALAND RAILWAYS CORPORATION, a corporation established under the New Zealand Railways Corporation Act 1981

Second Defendant

AND

HER MAJESTY'S ATTORNEY-GENERAL in and for the Dominion of New Zealand sued in respect of the Department of Lands.

Third Defendant

Hearing & Judgment

30 April 1990

Counsel

F.W. Rose for Second Defendant (Applicant)
R.W. Worth and Miss Cox for Plaintiff
J.A.L. Oliver for First and Third Defendants

ORAL JUDGMENT OF ANDERSON J.

By its amended statement of claim and answer to a notice requiring further particulars, the plaintiff alleges against the second defendant that by an agreement evidenced in written and oral communications in 1986 between the Ministry of Works and Development and the New Zealand Railways Corporation, the Department of Labour, and the Housing Corporation, a benefit was to be conferred upon the plaintiff in the form of the construction of a road by the New Zealand Railways Corporation.

The basis of the plaintiff's claim is the Contracts (Privity) Act 1982. The plaintiff alleges that the agreement or arrangement entered into as aforesaid was a contract as contemplated by that Act and that the benefit conferred or purportedly conferred upon the plaintiff thereby may be enforced in accordance with the Act. In the present application the second defendant seeks an order striking out the claim by the plaintiff against it on the grounds that no reasonable cause of action against the second defendant has been disclosed. Such an interlocutory proceeding has twice come before this Court on the application of the second defendant; once before Master Gambrill in June 1989, and once before me in August 1989. In the course of the various hearings the essential nature of the application has been distilled and has been put today by Mr Rose with clarity and succinctness.

The particular argument is that the arrangements

alleged by the plaintiff do not amount to a contract and accordingly any benefit conferred or purportedly conferred under such arrangement cannot be pursued by way of the Contracts (Privity) Act. Mr Rose refers to s.4(1) of the New Zealand Railways Corporation Act 1981 which provides as follows:

"There shall be a Corporation to be called the New Zealand Railways Corporation, which shall be an instrument of the Executive Government of New Zealand."

Counsel then submits that the various parties to the arrangement were all instruments and/or elements of the Crown and that it is fundamental that a legal person cannot contract with himself or itself. In particular it is submitted that the Executive Government of New Zealand cannot enter into a contract with itself.

Now the broad proposition so put is not comprehensive. A party can, of course, contract with himself or itself in different capacities, can sue or be sued in different capacities, but it is not on that basis that I determine that the present application ought be dismissed.

The starting point on applications such as this is the principle elucidated in Takaro Properties Limited v Rowling [1978] 2 NZLR 314 and summarised in the following portion of the judgment in that case at pages 317 to 318 of the report:

"The cause of action ought not be struck out unless, on the material before us, we are satisfied that the alleged cause of action cannot possibly succeed."

The New Zealand Railways Corporation is a body corporate with perpetual succession and a common seal and subject to the empowering Act is capable of acquiring, holding and disposing of real and personal property and of suing and being sued and of doing and suffering all other acts and things that bodies corporate may do and suffer - see s.4(10). The Corporation consists of up to seven directors appointed by the Governor-General on the recommendation of the Minister. All real property or interests in land vested or held or occupied by the Crown for railway purposes immediately before the date of commencement of the Act were assumed by the Corporation - see s.5. It is the general policy of the empowering Act that the Corporation shall stand alone for administrative and commercial purposes, consonant really with the concept of state owned enterprises and accountability of the various organs or facets of Government which has been put into practice in recent years. It is to be noted that the definition of "contract" in the Contracts (Privity) Act is an inclusive definition. It is axiomatic that arrangements which in previous times would not have been regarded as falling into any particular jurisprudential category sometimes come to be included as the common law and equity develop to meet the requirements of a contemporary society. The New Zealand public now deals with the Government through various state owned

enterprises which plainly have their own discrete staff, objectives, policies and other incidents of commercial entities.

I do not think that it is so plain that arrangements such as that relied upon by the plaintiff in this case could not be considered as "contracts" for the purposes of the Contracts (Privity) Act that, in accordance with the principles enunciated in Takaro Properties Limited, the statement of claim should be struck out against the second defendant. I come to this view recognising that the difficulty of legal propositions or the complexity of legal propositions are not an absolute indication for dismissing an application such as that presently before the Court, but in this case there are policy issues which would require to be addressed and I would apprehend that factual matters will have to be traversed in the context of the policy discussions. Those considerations render it inappropriate to attempt finally to determine in an interlocutory application whether arrangements such as that contended by the plaintiff are or are not capable of being considered contracts for the purposes of the Contracts (Privity) Act. The application is dismissed.

Counsel for the plaintiff and for the first and third defendants seek costs on the present application. Having heard counsel in the matter of costs I think it is appropriate to settle the issue of costs at this stage so

that the parties may get on with the litigation with these series of applications behind them . The amounts sought by the plaintiff and the first and third defendants are extremely modest. In all the circumstances I fix costs on the various applications in the sum of \$750 for the plaintiff, and \$750 for the first defendant and third defendant jointly. The plaintiff is entitled to disbursements relevant to the applications as fixed by the Registrar and so also the first and third defendants except it is to be noted that the first and third defendants do not seek travelling and accommodation expenses in relation to appearances of their counsel.

I am obliged to counsel for their arguments and assistance.



Solicitors for the Second Defendant
and Applicant

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Solicitors for the Plaintiff

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Solicitors for First & Third Defendant

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