

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 87/97

BETWEEN J W HARTNELL

Plaintiff

AND THE NEW ZEALAND MEAT
PRODUCERS BOARD

Defendant

Hearing: 24 September 1997

Counsel: R Squire, QC, for Plaintiff
J E Sutton, for Defendant

Judgment: - 2 DEC 1997

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Gresson Dorman & Mill, Timaru
Rudd Watts & Stone, Wellington

The defendant applies to strike out the plaintiff's statement of claim on the grounds that it is an abuse of process of the Court, is frivolous and/or vexatious and discloses no reasonable cause of action. Rules 186 and 477 are relied on.

The plaintiff sues the defendant for delay from 1993 in granting the plaintiff's company, J W Hartnell & Company Limited, a licence to export meat and which was not granted until 7 November 1995. As a result the plaintiff claims loss of income and loss of business and loss of good will for which he seeks damages. The history of the relevant events I take from the defendant's submissions.

HISTORY OF RELEVANT EVENTS

1991 J W Hartnell & Company Limited ("Hartnell & Co") was granted a franchise by the Meat Planning Council ("MPC") to export meat to the European Community. In terms of the Meat Planning Council Agreement ("MPC Agreement") a performance bond of \$100,000 was put up by Hartnell & Co by way of a standby letter of credit.

October 1994 by this time Hartnell & Co had exported product resulting in an overuse of EU VRA by October 1994 of an estimated 86.2 metric tonnes.

February 1995 In respect of the overuse of quota the MPC claimed \$218,195.75 from Hartnell & Co pursuant to clause 6.8 of the MPC Agreement. Hartnell & Co failed to pay.

The MPC requested the Board draw down on the letter of credit which was about to expire.

Hartnell & Co issued proceedings to prevent the Board from drawing down on the letter of credit on the basis that it should not be drawn down pending determination of the dispute as to whether the sum of \$218,195.75 was payable. (The statement of claim is exhibit "AD1" to the Dometakis affidavit).

- June 1994 Mr Hartnell, as trustee for a company to be formed, applied to the Board for a meat exporter's licence.
- 9 August 1994 the Board's position was that a condition of any licence being granted was to be that the EU BRA overuse by Hartnell & Co would have to be remedied. (Refer letter dated 9 August 1994, exhibit "AD7" to the Dometakis affidavit).
- April 1995 Mr Hartnell filed judicial review proceedings in respect of the Board's decision to impose this condition. (The statement of claim in CP 78/95 is exhibit "AD4" to the Dometakis affidavit).
- September 1995 Mr Hartnell did not satisfy the requirement until September 1995 when EU VRA dispute was settled by a payment by Hartnell & Co of \$50,000.
- 7 November 1995 Mr Hartnell was advised by the Board that a meat exporter's licence would be granted to him without the condition regarding the EU VRA overuse as the EU VRA overuse had been settled (refer exhibit "A" to the Gresson affidavit).
- Post September 1995 Correspondence between Board's solicitors and solicitors for Mr Hartnell, regarding the discontinuance of the judicial review and MPC proceedings.
- March 1996 The Hartnell & Co proceeding and Mr Hartnell's judicial review proceeding were discontinued. (The respective notices of discontinuance are exhibits "AD3" and "AD6" to the Dometakis affidavit).
- 17 February 1997 Letter of demand for claim for damages received by Board from Mr Hartnell's solicitor. (The response is exhibit "AD8").
- 30 April 1997 This proceeding was issued.

I think that Ms Sutton correctly paraphrased the main issues in her submissions when she submitted that in essence the plaintiff's claim turns on two matters -

- a The Board's decision in August 1994 to grant a Meat Exporter's Licence to Mr Hartnell (as trustee of J W Hartnell Ltd - a company yet to be formed) on the condition that Hartnell & Co remedy its liability to the Board - which liability arose from the company's overuse of EU quota allocated to it by the Board; and
- b An allegation that the Board had received legal advice that its decision was unlawful.

The defendant submits that the critical issue which arises in respect of the strike out application is whether the plaintiff is entitled to base his entire proceeding on a pivotal, and the defendant submits untenable allegation, contained in paragraph 28 of the statement of claim, which I set out:

"28 THAT on a date not known to the plaintiff before discovery the Board received legal advice to the effect the withholding of or refusal to grant a meat exporters licence under the Act on condition an issue of overuse of VRA be resolved or that the granting of a meat exporters licence under the Act subject to that condition or a condition of that kind was unlawful and/or invalid and/or beyond the lawful powers of the Board."

All of the causes of action in this proceeding the defendant says turn on that allegation, or allegations which flow from it, and in general terms the plaintiff contends that the Board refused to grant the licence despite having allegedly received legal advice that its refusal was unlawful. The defendant further submits that the plaintiff has not, despite the existence of this application, provided any basis for that serious allegation so that the discovery of legal advice would be allowed. Accordingly it must follow that the proceeding

discloses no reasonable causes of action is vexatious, scandalous and/or an abuse of process. Expanding on that submission the defendant further submits that:

- a The plaintiff's claim is premised on the basis that the Board received legal advice to the effect that its decision was illegal (paragraph 28 of the statement of claim). That allegation will be denied; and in any event the plaintiff will not, as he suggests, be entitled to discovery of any legal advice the Board may have received as that is subject to legal professional privilege. The Board should not be required to disclose any legal opinion. Thus the allegation in paragraph 28 is in itself baseless, untenable and indeed scandalous.
- b Without the allegation contained in paragraph 28 (or the allegations which flow from it) the proceeding discloses no reasonable cause of action as:
 - (i) in respect of the claim of misfeasance in public office the requirement of "malice" or knowing abuse of power would not be met by the pleading;
 - (ii) in respect of the purported claim of negligence there would have been no breach of duty.
- c Without the allegation contained in paragraph 28 (or the allegations which flow from it) damages would not be an available remedy as an invalid administrative decision is not in itself a sufficient foundation for an action for damages. (*Gregory v Rangitikei District Council* [1995] 2 NZLR 208; McGechan J).

The defendant submits that the plaintiff will not be able to establish the allegation in para 28 by reason of legal professional privilege. No basis has been proffered, the defendant says, for it to be denied its right to claim legal privilege and the Board should not be required to disclose any legal advice it may have received. The defendant says privilege cannot be got rid of merely by making a charge of fraud; there must be some prima facie evidence that such allegation has a foundation in fact. (Halsbury's Laws of England, 4th ed, vol 13, para 82; *O'Rourke v. Darbishire* [1920] AC 581 at 604 (HL)). Thus it would be an abuse to allow Mr Hartnell to require production of documents which are protected by legal-professional privilege. The Board should not be required to disclose the nature of such communications even if the allegation in the statement of claim is false. The defendant says the plaintiff has no basis to suggest the alleged advice exists. It is submitted that what the plaintiff is conducting is a fishing expedition, which is in itself an abuse of process.

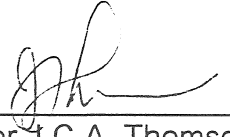
In response Mr Squire rightly submitted that the strike out application has to be argued and determined on the basis that the plaintiff can prove his statement of claim. He said the Court should not and cannot simply accept for the purposes of the strike out application Ms Sutton's submission that the defendant's claim of legal privilege must necessarily be upheld. He said such question will have to be dealt with after discovery has been made and privilege for any documented legal advice properly claimed. Further, that as the Court was invited by Ms Sutton on the basis of submission only, to conclude that the legal privilege argument must succeed, and be conclusive, whenever raised, Mr Squire

considered that he was entitled to tell me from the Bar that the plaintiff's claim, made in para 28 was not made lightly, and that there is evidence to support it and which is not dependant of obtaining information from the defendant. Such statement of course, immediately put in issue the question of whether or not the defendant had in fact received any legal advice or not for which privilege could be claimed. In submissions in reply Ms Sutton informed the Court that she was not in a position to say whether legal advice had been given or not.

Given that state of play I must accept Mr Squire's submission that this strike out application must be determined (like any other such application) on the basis that the statement of claim and in particular 28 is capable of proof and once Mr Squires statement from the Bar is accepted (and I do accept it), then of course it is inevitable that the strike out application must fail.

There is the subsidiary claim that the proceeding has been compromised as a result of the previous litigation having been settled and discontinued. The defendant says there has been accord and satisfaction. However that is denied by the plaintiff by the affidavit of Mr Gresson. In my view if the defendant wishes to raise accord and satisfaction then it must do so by so pleading in its statement of defence. It can then if it wishes have that issue disposed of by a pre-trial hearing as was recently done in. *J J Harrison & Anor v. M B Laws & Ors* Cp 9/96, Napier Registry.

However the strike out application is dismissed. Costs reserved.

A handwritten signature in black ink, appearing to be 'J.C.A. Thomson', written in a cursive style.

Master J.C.A. Thomson