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National Court of Papua New Guinea

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Niule No.16 Ltd v National Housing Corporation [2015] PGNC 246; N6157 (16 November 2015)

[N6157](#)

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS 1136 of 2014

BETWEEN:

NIULE NO. 16 LIMITED
Plaintiff

AND:

NATIONAL HOUSING CORPORATION
First Defendant

AND:

NATIONAL HOUSING ESTATE LTD
Second Defendant

AND:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

Waigani: Hartshorn J
2014: 12th December
2015: 16th November

Application for dismissal for non-compliance with s. 5 Claims By and Against the State Act

Cases cited:

Badastal Ltd v. Dr. Puka Temu (2011) [SC1092](#)
Paul Eddie v. Bill Kirokim (2012) [N4932](#)
PNG Power Ltd v. Augerea (2013) [SC1245](#)
Public Curator of Papua New Guinea v. Kara (2014) [SC1420](#)
Simon Ekanda v. Francis Potape (2012) [N4930](#)

Counsel:

Mr. R. J. Webb SC and Mr. D. Mel, for the Plaintiff
Mr. T. Dawidi, for the First and Third Defendants
Mr. C. Gama, for the Second Defendant

16th November, 2015

1. **HARTSHORN J:** This is a decision on an application to dismiss the proceeding for a purported non-compliance with s. 5 *Claims By and Against the State Act (Claims Act)*. It is brought by the first and third defendants, the National Housing Corporation (**NHC**) and the State and is supported by the second defendant, National Housing Estates Limited (**NHEL**). The plaintiff, Niule No. 16 Ltd (**Niule**) opposes the application.

Background

2. The substantive claim of Niule is that it entered into a joint venture agreement with NHC and NHEL to construct 30,000 residential homes in Port Moresby. A deed of guarantee and a supplementary joint venture agreement have also been entered into. Niule now claims that NHC and NHEL have breached the two agreements and the deed. Niule seeks amongst others, orders that the two agreements and the deed have been breached, that they are enforceable and that they be specifically performed. Damages are also claimed.

This application

3. It is submitted by NHC and the State that the purported notice given by Niule pursuant to s. 5 *Claims Act* (**s. 5 Notice**) does not constitute a valid notice as it fails to state the dates of the relevant contracts and when they were allegedly breached by NHC, NHEL and the State, thereby failing to identify when the cause of action against NHC, NHEL and the State arose. Reliance is placed upon the Supreme Court decision of *Badastal Ltd v. Dr. Puka Temu* (2011) [SC1092](#). Consequently, it is submitted that the proceeding should be dismissed.

4. Niule submits that the proceeding should not be dismissed as even if the s.5 Notice is defective, it only concerns Niule's claim against the State. Its claims against the other defendants would remain.

5. As to its s. 5 Notice, Niule submits that it is not defective as:

a) There is no dispute that its s. 5 Notice was given in time;

b) Notwithstanding that the s. 5 Notice does not state the dates of the relevant contracts and the alleged breaches it is sufficiently detailed and complies with s. 5 *Claims Act*;

c) s. 5 *Claims Act* does not specify what particulars are to be included in a section 5 notice;

d) the relief sought in the statement of claim includes orders that are in the nature of declarations that the relevant agreements are valid. A section 5 notice is therefore not required to be given when such relief is sought.

Consideration

6. As to the submission that a section 5 notice was not needed to be given as some of the relief sought is in the nature of declarations; from a perusal of the relief sought, an order is claimed that NHL and NHEL have breached the two joint venture agreements and the guarantee. Further, damages are sought for the breaches. This relief is in essence in respect of an action that is founded in contract. Consequently, I am of the view that notice pursuant to s. 5 *Claims Act* is required to be given. In this regard I refer to my decisions of *Paul Eddie v. Bill Kirokim* (2012) [N4932](#) and *Simon Ekanda v. Francis Potape* (2012) [N4930](#) which are on point.

7. As to the particulars that are to be specified in a valid s. 5 notice; Counsel referred to *Badastal v. Temu* (*supra*). In that decision, after considering s. 5 *Claims Act*, the Court stated at para 11:

"In our view it necessarily follows that in giving the notice the date when the alleged occurrence giving rise to claim (sic) or the alleged breach of contract must be provided in the notice. Otherwise, how else can time be computed to determine if the claim is within the stipulated time limit?"

8. Counsel for Niule submitted that to impose such a requirement that the relevant date must be included in a s. 5 notice, was to impose an unnecessary gloss as such a requirement has not been stipulated in s. 5 *Claims Act* by the legislature. That is as may be, however this court is bound by this decision of the Supreme Court. Consequently, as the dates of the relevant contracts and of the alleged breaches are not stated in the s. 5 Notice, it is defective and the proceeding against the State should be dismissed.

9. As to the claims against the other defendants; the Supreme Court case of *PNG Power Ltd v. Augerea* (2013) [SC1245](#) which has been followed by *Public Curator of Papua New Guinea v. Kara* (2014) [SC1420](#) has in essence revisited what entities are to be included in the definition of "State" in the *Claims Act*. The NHC and NHEL would now be included in the term "State" and so a section 5 notice is required to have been given. Again, this court is bound by these Supreme Court decisions. Consequently, the claims against the NHC and NHEL should also be dismissed.

Orders

10. The Orders of the Court are:

a) The relief sought in paragraph 4 of the Amended Notice of Motion of the first and third defendants filed 9th December 2014 is granted;

b) This proceeding is dismissed;

c) The plaintiff shall pay the defendants' costs of and incidental to this proceeding;

d) Time is abridged.

Steeles Lawyers: *Lawyers for the Plaintiff*
Dawidi Lawyers: *Lawyers for the First and Third Defendants*
Gagma Lawyers: *Lawyers for the Second Defendant*

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