

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

**Plaint No. 105/08**

**BETWEEN            HILL COSMOS INTERNATIONAL LIMITED**  
**Plaintiff**

**AND                    OCEAN FISHERY COOK ISLANDS 1 LIMITED**  
**First Defendant**

**AND                    HANNOVER COOK ISLANDS LIMITED**  
**Second Defendant**

**AND                    SUNNUBERG COOK ISLANDS LIMITED**  
**Third Defendant**

**AND                    JONC OVERSEAS CORPORATION**  
**Fourth Defendant**

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**JUDGMENT ON APPLICATION TO ENFORCE JUDGMENT, STAY  
APPLICATION, LEAVE TO APPEAL,  
AND CONSENT TO BAREBOAT CHARTER**

Dated the 8<sup>th</sup> day of November 2010 (Cook Islands Time)

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Hearing: 15 October 2010 at Auckland

Counsel: W Akel and B J Upton for Plaintiff  
P Dale for Defendants

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**INTRODUCTION**

1. This is another step in a long saga of litigation between the parties.
2. The plaintiff seeks enforcement of judgments given in its favour. The defendants apply for a stay of execution of those judgments.
3. The defendants also seek leave to appeal an aspect of one of the judgments and a direction to the Registrar of Ships to consent to a bareboat charter.
4. It is only intended to repeat the background, as it has appeared in previous judgments, to the extent necessary on the present applications.

**ENFORCEMENT AND STAY APPLICATIONS**

5. The plaintiff seeks to enforce two judgments given on 22 April 2010 and 15 June 2010 respectively. It is effectively seeking writs of sale of two vessels and six fish meal driers.
6. The judgment of 22 April 2010 ordered the defendants to pay the plaintiff:
  - (a) interest at the rate of 6% p.a. on the sum of €3,855,000 from 2 October 2008 until the date of payment of a sum of €3,300,000;
  - (b) interest at the rate of 6% p.a. on the sum of €555,000 from the date of payment of the sum of €3,300,000 until 18 August 2009;
  - (c) the sum of US\$240,000 for costs.

7. The interest due under the judgment to 18 August 2009 totals €287,109.86.
8. The judgment of 15 June 2010 ordered the defendants to pay:
  - (a) storage/insurance costs of €22,290;
  - (b) further insurance premiums on the driers when in Peru (the plaintiff's assessment of the amount due under this order is €23,476.80);
  - (c) cable costs of US\$7,040.34.
9. The amount due at the time of the hearing under the two judgments was approximately US\$600,000. The exact amount will depend upon exchange rates at the date of payment.
10. The defendants do not challenge the amounts due or the liability to pay under the judgments but oppose the making of the orders upon the grounds:
  - (a) the plaintiff is in breach of the Settlement Deed by failing to hand over the driers;
  - (b) the defendants intend to claim damages for wrongful retention of the driers;
  - (c) the plaintiff has adequate security in the form of the wrongful retention of the driers;
  - (d) the defendants intend to appeal the judgment of 22 April 2010 on the basis of the rate of interest ordered and the commencement date of the interest;
  - (e) the defendants intend to seek costs themselves on earlier determinations;

- (f) the Registrar does not have jurisdiction to give effect to the orders sought.
11. While there may be practical difficulties, because neither the vessels nor the driers are currently located in the Cook Islands, I do not accept that the Court does not have power to make the orders sought. The Court has the necessary power under s 45 of the Judicature Act 1980-1981 (the Act) to order that writs of sale issue. Rule 246 of the Code of Civil Procedure of the High Court 1981 (the Code) sets out the form of the writ of sale.
  12. The grounds upon which the defendants seek to resist the application are not, in my view, sufficient to resist the application unless they support the stay application made by the defendants. Under s 50 of the Act, this Court may stay the execution of any judgment for such term as the Court thinks fit. Under s 58 of the same Act, an appeal against a judgment does not operate as a stay unless this Court or the Court of Appeal otherwise orders.
  13. Although the present High Court Rule in New Zealand requires a substantial miscarriage of justice to be established before a stay is granted, there is no such requirement under the provisions of the Act. However, normally a party is entitled to enjoy the fruits of a judgment in its favour. The law in other jurisdictions provides that a stay will be granted if appeal rights would be rendered nugatory. That, in my view, is only one of the factors to be taken into account. The discretion under s 50 should be exercised in a manner which, on the balance of all the factors involved, best meets the overall justice of the present case: *Phillip Morris v Liggett & Myers* [1977] 2 NZLR 41.
  14. In his submissions at the hearing, Mr Dale departed from the grounds appearing in the application. The first ground advanced

at the hearing was that the plaintiff is not judgment-worthy. It is incorporated in the British Virgin Islands with no assets in Rarotonga. Mr Akel, for the plaintiff, asserts that there is ample evidence of the standing of the plaintiff and it is part of a group of international standing. There is nothing to suggest that it is financially insolvent.

15. The dispute arose from a memorandum of understanding in which the plaintiff's parent company, China Fishery Group Limited (the parent) was the contracting party. It utilised the plaintiff as the vehicle to fund moneys to the proposed joint venture which did not proceed. These proceedings originated because the plaintiff advanced €3,855,000 towards the proposed joint venture and sought recovery of the money when it did not proceed.
16. In the circumstances, there is substance in the submission made on behalf of the defendants. If the relief sought by the plaintiff is granted, it would not be unreasonable for the parent to guarantee that if it is necessary to refund any portion of the amount paid, either because of the proposed appeal, or if the defendants succeed on the claims that they say they are going to make, the parent company should guarantee payment of any amount due by the plaintiff or at least provide adequate security for any amount which may become due.
17. The other matters raised by the defendants can be commented on as follows:
  - (a) The driers are still in the possession of the plaintiff although the plaintiff has made its position clear. They may be uplifted by the defendants. I do not see this issue as being relevant to the stay application. This Court should not order that assets, which the defendants say are

wrongfully retained, be held as security. This is particularly so when the court has no evidence as to the saleability and value of those assets.

- (b) A term of the Settlement Deed provided that the vessel SUNNUBERG be released from the Mareva injunction. This has not happened because of the plaintiff's further proceeding based on an alleged misrepresentation by the defendants in negotiations which led to the signing of the Settlement Deed. A statement of claim has been filed in that matter, as has a statement of defence and a counterclaim. The defendants have more than once indicated or filed an application to discharge the Mareva injunction, but have either not made the application or not proceeded with it when made. Against the present state of the proceedings, I do not see the failure to release the SUNNUBERG from the Mareva injunction counts against the issuing of writs of sale. The writ if it issues will be against the SUNNUBERG so there is no point in releasing it from the Mareva injunction.
- (c) The defendants say they propose to bring claims against the plaintiff for wrongful retention of the driers, wrongfully exporting them to Peru, costs on litigation, damages arising out of the breach of the Settlement Deed and damages in respect of the Mareva injunction. They have issued a counterclaim but the causes of action do not cover all these matters. Mr Dale has explained in detail some of the matters which will be raised and presumably the defendants will be amending their counterclaim. However, on the present state of the proceedings, it is apparent that these matters will not be resolved until well into 2011. The time factor favours allowing the plaintiff to have the benefit

of the fruits of its judgment at this time. The defendants have not pursued their claims expeditiously.

18. The overall justice, in my view, indicates that the relief sought by the plaintiff should be granted. The writs of sale shall be ordered under s 45 of the Act.
19. It is appropriate that security be given by the plaintiff for any judgment that may be given against it on the defendants' counterclaims.
20. I, therefore, propose to make the orders sought by the plaintiff, subject to the following conditions:
  - (a) The writs of sale will lie in court until 9 December 2010. They will issue on that date if the guarantee referred to in sub-paragraph (b) has been given and the defendants by that date have not paid the sum of US\$650,000 into a trust account approved by the Court, such amount to remain in the trust account until a further order of this Court.
  - (b) The plaintiff providing a guarantee (on terms acceptable to this Court) from the China Fishery Group Limited guaranteeing to the defendants payment of any amount which may subsequently be payable to the defendants as a result of judgments either of the Court of Appeal or this Court on the matters referred to above.
21. The amount of the security is to be US\$650,000 because of possible exchange rate and interest considerations between now and the date of any payment out.

**LEAVE TO APPEAL**

22. The application seeking leave to appeal is granted, subject to the notice of appeal being filed with the Court of Appeal no later than 9 December 2010 and security being given in accordance with s 54 of the Act by that date.

**THE BAREBOAT CHARTER**

23. The defendants seek an order directing the Registrar of Ships, Cook Islands, to consent to the bareboat chartering of the vessels to Texel Fishing S.C. The grounds for the application are that this will allow the vessels to operate and generate revenues and that the fourth defendant will suffer substantial prejudice should the registration of the vessels not be confirmed.
24. It is not necessary to go fully into the history but it is relevant to note that the fourth defendant instructed the Registrar of Ships that both vessels be deregistered on the Cook Islands Shipping Registry with the intention that they be re-flagged and registered in Peru. They did this without notice to the Court or to the plaintiff and on the face of it contrary to the terms of the Mareva injunction. The vessels were registered and re-flagged in Peru and have changed their names. The bareboat charterer appears to be to another company associated with the defendants. The Peruvian authorities, on discovering that the vessels were also registered in the Cook Islands, require that there be a suspension of the registration in the Cook Islands. This is a prerequisite to registration in Peru and if the consent is not given, the vessels will be deregistered in Peru.
25. The defendants' position is that the vessels can not commence operating until the Registrar of Ships in the Cook Islands consents to flag the vessels in Peru and provide that document



to Texel to enable it to apply to the Peruvian authorities to restore the registration of the vessels. It is the defendants' position that the fourth defendant continues to suffer extensive loss through its inability to utilise the vessels. The rights which will be gained if the vessels are reregistered must be exercised within the present calendar year.

26. The defendants make the following submissions in support of their application:
- (a) the bareboat registration of the vessels in Peru does not affect the underlying ownership of the vessels in the Cook Islands;
  - (b) a bareboat charter is an ordinary commercial transaction and does not constitute an alienation, assignment, pledge or other action that diminishes the plaintiff's security;
  - (c) if the vessels are reregistered in Peru, during the period of the charter the "primary" registration in the Cook Islands is suspended (for certain purposes) but becomes fully effective upon the termination of the charter (in this case, after 5 years);
  - (d) the "flagging out" is a concept recognised in two international law conventions;
  - (e) the defendants wish to flag out the vessels from the Cook Islands and flag them in Peru for the purposes of obtaining the rights to operate the vessels in and outside the Peruvian economic zone with consequential advantages in the employment of nationals at local rates of pay. Texel, a joint venture company in Peru, is able to take up quota and fishing opportunities if the vessels are reregistered in Peru;

- (f) the Cook Islands legislation recognises both flagging in and flagging out.
27. Many of the grounds relied upon by the defendants are accepted. There are obvious advantages to the fourth defendant in particular from allowing the consent to be given. There may well be prejudice to that same defendant if consent is not given.
28. There are, however, two fundamental issues to be overcome, namely the possible diminution of the rights which the plaintiff has under the Mareva injunction and, secondly, whether the Cook Islands legislation recognises both flagging in and flagging out.
29. Accepting that the underlying ownership of the vessels does not change does not mean that the Mareva rights held by the plaintiff are not diminished. Notwithstanding the submission made on behalf of the defendants, the consent is, in my view, a breach of the Mareva injunction. The bareboat charter is "otherwise dealing" with the vessels and as such is a breach of the second Mareva order. If the consent is given this Court's ability to make effective orders in support of the Mareva injunctions will be diminished and possibly extinguished. If the vessels are reregistered in Peru, they will fly the Peruvian flag, and the vessels will, for the period of 5 years, be under the authority and jurisdiction of the Peruvian courts. It is difficult to see that in these circumstances this Court would have any control or jurisdiction over the vessels, for a period of 5 years. While personal rights may not be affected, enforcement rights against the vessels may be.
30. On the issue of the Cook Islands statutes I accept the submission made on behalf of the plaintiff. The Cook Islands

Ship Registration Act 2007 (the Registration Act) is the relevant legislation.

31. Section 19(1) of the Registration Act permits flagging in of a foreign vessel in the case of a demise charter, (the bareboat charter is a demise charter). That section applies to vessels which are not already on the Cook Islands Register. Once a vessel has been reregistered under that section in the Cook Islands, it flies the Cook Islands flag, has Cook Islands nationality and the Cook Islands becomes the competent authority to exercise exclusive jurisdiction and control over the vessel in accordance with the laws of the Cook Islands.
32. Conversely, if the vessel is flagged out, the same consequences apply in the country which has flagged it in.
33. Section 34 of the Registration Act upon which the defendants rely does not, in my view, justify flagging out, as submitted on behalf of the defendants. It is implicit in that section that the vessel is registered on the Cook Islands Registry. The section does not apply to a vessel registered in another country and does not support the view that the Registration Act supports flagging out.
34. Nor do I accept that provisional registration permits flagging out. Section 16 of the Registration Act allows provisional registration if an application for registration of a vessel does not contain all the information required by the Registrar. This is a different situation from flagging in. Provisional registration is a holding position pending the information being supplied.
35. It follows from the legislation that, if the consent is to be given, the vessels will be reregistered in Peru and provisions similar to those which apply to a vessel reregistered in the Cook Islands

will apply in Peru. In other words, it is the Peruvian courts which would become the competent authority to exercise exclusive jurisdiction and control over the vessels in accordance with the laws of Peru. In those circumstances, any interest protected by the Mareva injunction would, in my view, be seriously eroded or even disappear. While the fourth defendant may still remain liable, the vessels would no longer be under its control and would not be controlled by the laws of the Cook Islands.

36. For these reasons, the consent should not be given if the Mareva injunction is to remain over both vessels.
37. However, it is in the interests of the defendants and probably also the plaintiff that the vessels be freed from the Mareva injunction and the fourth defendant be allowed to get on with its business and generate an income. This should not be done at the expense of weakening the security which the Mareva injunction gives to the plaintiff without a full enquiry as to whether or not that Mareva injunction is still justified. This can probably not be achieved until the current litigation between the parties is resolved and there is a final judgment.
38. I am also aware that the driers have been available to be uplifted by the defendants. If the defendants genuinely want the driers, they should uplift them, notwithstanding the VAT issue. If it incurs liability by uplifting the driers that matter can be resolved in due course.
39. On the best assessment I can make on the information before me, the balance between the parties can be achieved by directing that the Registrar consent to the bareboat chartering of the SUNNUBERG to Texel Fishing S.C. The plaintiff will still

have the benefit of the Mareva injunction in respect of the second vessel and the driers, even if they are uplifted by the defendants, and there may be some residual value in the Mareva in respect of the SUNNUBERG.

40. The orders which I propose to make will stay the writ of sale provided security is given, and consent to the SUNNUBERG charter being registered.

#### **ORDERS**

41. It is ordered that, subject to the conditions appearing below, the Registrar of this Court issue a writ of sale in the form of form 651 of the Schedule to the Code in respect of the vessels SUNNUBERG and HANNOVER and the fish meal driers referred to in the Mareva order of 12 November 2008 and cause the money received from the sale of the same to be paid into this Court pending further orders of this Court. The issue of the writ of sale is subject to:


- (a) the plaintiff, by 9 December 2010, procuring from its parent company, China Fishery Group Limited, a guarantee in a form acceptable to this Court to ensure that the plaintiff pay to the defendants or any of them any moneys which may subsequently be payable to such defendants as a result of any judgment of this Court in the current litigation between the parties;
- (b) the defendant failing, by 9 December 2010, to secure in a trust account approved by this Court the sum of US\$650,000, such account to remain in the trust account until further order of this Court.

42. The write of sale will lapse and be cancelled if the condition in paragraph 4(a) is not satisfied. If that condition is satisfied, it will also lapse and be cancelled if the defendants make the payment referred to in paragraph 41(b).
43. Leave to appeal is granted in accordance with the defendants' application.
44. If the defendants make the payment referred to in paragraph 41(b) the Registrar of Ships is directed to consent to the bareboat chartering of the vessel SUNNUBERG to Texel Fishing S:C.
45. Leave is given for either party to apply if further directions are required to implement the orders.

**ORDERS**

46. Costs are reserved.

Dated the 8<sup>th</sup> day of November 2010

  
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**B J Paterson J**