IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLT 18/11**

BETWEEN	**YUH YOW MARINE LIMITED** a duly incorporated company having its Registered office in Kaohsiung, Taiwan First Plaintiff
AND	**CHEN JIN-TYAN** Businessman of Taiwan Second Plaintiff
AND	**NORTHERN COOK ISLANDS FISHING COMPANY LIMITED** Defendant

Hearing date: 28 August 2012

Counsel: Ms L Rokoika for Plaintiff
Mr A Manarangi for Defendant

Judgment: 28 August 2012

JUDGMENT OF THE COURT (DISCOVERY)

The Pleadings

[1] This claim was issued in June 2011. At that time the plaintiffs put forward a simple claim seeking to have certain monies, which had been paid by them to the defendant, returned to them. The total figure was some $340,000 plus interest.

[2] That claim was met by a defence and counter-claim. The most recent form of that can be found in an Amended Statement of Defence dated 1 August 2012.

[3] As argument has developed in front of me today, neither the Statement of Claim nor the Amended Statement of Defence can be said accurately to capture the essence of the dispute between the parties.

[4] I have started this Judgment by talking about this topic because it is relevant to determining the application for Discovery that I must resolve today.

[5] The nature of the dispute between the parties can be summarised as follows:

[6] The plaintiffs own some 30 fishing vessels between them. They were interested in fishing in Cook Island waters. Many other fishing vessels were also interested in doing that. In the relevant period the Ministry of Marine Resources which controls fishing would issue only some 40 licenses per annum.

[7] The Ministry also required foreign fishing boats to make license applications through a Cook Islands company. Against this background the parties entered into various joint venture agreements concerning 15 vessels owned by the plaintiffs. The defendant would apply for the licenses; the plaintiff would pay some $40,000 per vessel to the defendant for this to occur.

[8] In this case, the defendant applied for 15 licenses of which only 8 were granted. However, it had received payments from the plaintiffs in relation to all 15. It did not pay back the monies it had received in relation to the 7 licenses that were not granted.

[9] When the plaintiffs issued their claim they sought repayment of those monies relating to the 7 unsuccessful license applications. The defendant, as it has now developed, seeks to expose the entire nature of the joint venture agreement. There are before the Court two written heads of agreements relating to those fishing boats pleaded in paragraphs 6 and 7 of the Statement of Claim. The Statement of Claim then assumes that there were another three fishing vessels which were the subject of an oral agreement.

[10] The written terms of the agreements are sparse and do not really help us focus on the issues that are in dispute. Some of those issues will need to be dealt with as implied terms or by reference to the good faith obligations that are normally assumed to be part of a joint venture agreement. As things presently stand, none of this detail is pleaded (or, if it is, not sufficiently). Moreover there has been no reply by the plaintiffs to the counter-claim filed by the defendant.

[11] The discussion today has focussed upon the real nature of the matters in dispute. It is quite clear that both sides will need to re-plead their cases more fully. They will need to capture the essence of the arrangements between the parties which I have tried to summarise above.

The Discovery Application

[12] Ms Rokoika raised several procedural points at the outset in objection to the claim for further and better discovery. I am satisfied, however, that these need not stand in the way of further and better discovery should I otherwise form the view that the documents are relevant.

[13] Both counsel addressed me in relation to the law of Discovery but there was nothing controversial in their submissions and I think it will suffice if I focus simply upon whether the claimed discovery is relevant in terms of the dispute summarised above and which, at least in part, is captured in the current pleadings.

[14] The first category of document relates to communications between the parties. There seems to be little doubt that such communications must be relevant. There is no suggestion that the parties had dealings one with the other, except in relation to the joint venture. On the face of it then all of this material must be relevant and Ms Rokoika did not seriously suggest otherwise. Her main concern was that there would now be real difficulties in identifying such documents. In part, at least, I understand this relates to whether her client can locate these documents or whether electronic records are still extant. This is a reasonably common problem in discovery. The obligation on the plaintiffs in this case is either to list the documents which are in existence or, if they cannot be found, to describe what has happened to them. If documents are stored electronically I would expect an IT expert to endeavour to retrieve such documents. If they can be retrieved then they should be discovered. If not, the IT expert should swear an affidavit explaining the process followed and the outcome.

[15] The second category concerns bank records. I cannot presently see that these are relevant and I do not order discovery of them. I accept that in a narrow sense there may need to be discovery at some future time of particular bank records however it is too early to say what those specific bank records would be. I have suggested to the

defendant that some of its case may be proved by way of interrogatories. It is possible that once interrogatories have been asked and answered that we will need to reconsider whether particular bank statements are relevant in relation to answers given.

[16] Therefore I adjourn the application so far as it concerns bank records, reserving leave to the defendant to bring that on if it needs to.

[17] The third category concerns documents relevant to the actual catch made by the plaintiffs presumably in relation to the 8 vessels that achieved licenses. This category is too broad as Mr Manarangi accepted under questioning from me. In the end the focus came back to documents relevant to the by-catch, that is in relation to Yellow Fin tuna and Big Eye tuna in particular. The written JV agreements referred to an amount of not less than six tonnes per year per vessel being sold to the defendant. There is an unresolved issue as to whether, contractually speaking, this was a maximum or a minimum. Whatever the correct position on that, however, it is clear that there must be records that are relevant to whether six tonnes of by-catch was caught per vessel per year. Moreover, it seems to me that details of by-catch would relevantly include records as to the disposal of the by-catch including by way of sale.

[18] I questioned both counsel as to how we might more precisely identify these documents and both counsel said they would need to take further instructions as to how such documents could be designated. I think the best approach is for Ms Rokoika, armed with this judgment, to seek further instructions from her client as to the sort of documents they hold that fall within the broad description I have given. This should then be submitted to Mr Manarangi or his instructing solicitor Mr Hooker for discussion and clarification. If agreement can be reached then discovery should proceed on the basis of that. If not, I reserve leave to remit the matter to me for further consideration. I would like to think that parties would act co-operatively to give effect to what is the clear and intended spirit of the form of Discovery that I intend should be made.

[19] The fourth category concerns communications between the plaintiffs and the Ministry of Marine Resources. Again, as this is put, it is too broad. However I believe that the defendant is entitled to have documents discovered to it that concern the transitional

period between 2009 and 2010 when the plaintiffs obtained their licenses directly from the Ministry rather than through the defendant. I understand Ms Rokoika to say that there are no such documents. As with the documents referred to in the first category above, the plaintiffs can deal with this by filing an affidavit explaining that there are no documents or, if there previously were documents, what has happened to them. Also, if these were held electronically, the same process as I have described above should be utilised to answer the request.

[20] Mr Manarangi has raised the possibility that my reference to "transitional documents" is not sufficiently precise to capture all possible documents that fall within such a label. I accept that. He made the point, for example, that it needs to be clear whether this includes the new licenses that were issued directly to the plaintiffs. My understanding of what I have ordered is that these would be included. I accept, however, that the label may leave scope for unnecessary argument. In those circumstances the best approach is specifically to reserve leave to seek further clarification on them. I want to make it clear however that while leave is reserved in all respects I would expect counsel in the light of the discussion we have had in Court this morning to be able to work cooperatively together to endeavour to agree any disputes.

Confidentiality

[21] I also deal with the question of confidentiality. I understand that those documents in the third category above are confidential. In that case I make orders now that inspection of those documents by the defendant is limited to counsel and experts only. If the defendant wants to have anyone else look at the documents then a formal application on notice will need to be made to widen the pool of people who can look at these documents.

[22] If, in the course of listing other documents in the affidavit, Ms Rokoika is instructed that they are confidential also, then that should be identified in the affidavit and similar orders will apply in relation to those.

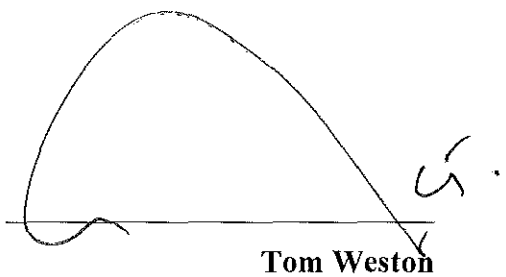
The Future Conduct of this Claim

[23] In this judgment I have not expressly dealt with the pleadings other than to note that on both sides they need to be improved and there needs to be a reply to the counter-claim. I think the parties now have a much clearer idea of the ambit of the dispute and what they need to do to re-plead. I suggest they get on and do that as soon as possible. I do not make formal timetable orders in relation to that because I apprehend that attending to discovery is the first priority. However, as soon as possible thereafter Ms Rokoika should file an Amended Statement of Claim. The defendant should meet that with an Amended Statement of Defence and Counter-claim which more fully sets out the nature of its claim, whether it brings a claim in relation to facilities that it has paid for and how it has calculated the sum of $2m which is the basis of its by-catch claim. Once that has been filed Ms Rokoika should then file a Statement of Defence to that.

[24] All of this process should be able to be undertaken over the next few months and I direct that this file will be called before Justice Grice in the November session for further consideration and if necessary timetable orders. I would like to think that this claim could be disposed of in the first half of next year and I direct that counsel should take all reasonable steps to work to that end.

Costs

[25] I have raised the question of costs with counsel. Although Mr Manarangi's application has been substantially successful this is against background of the pleadings being unfocussed. Ms Rokoika has quite properly pointed to the difficulties she has had in identifying what is relevant and what is not in the pleadings. In these circumstances it does seem to me perfectly sensible to reserve costs and I do so reserve them.



Tom Weston
Chief Justice