

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CIVIL APPEAL NO.ABU 0064/2022
High Court Civil Case No. HBC236/2006

BETWEEN : **SULTAN MOHAMMED KHAN**
Appellant

AND : **THE OFFICIAL RECEIVER**
1st Respondent

AND : **FIJI ISLANDS MARITIME SAFETY ADMINISTRATION**
2nd Respondent

Coram : Prematilaka RJA
Jameel JA
Andrews JA

Counsel : Mr D Sharma, Ms N Choo and Mr S Wally, for the Appellant
Ms A Harikishan and Ms S Kapoor, for the 1st Respondent
Mr T Kilakila, for the 2nd Respondent

Date of Hearing : 7 February 2024

Date of Judgment : 29 February 2024

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Andrews, JA and agree with reasons and conclusions.

Jameel, JA

[2] I am in agreement with the reasons and findings and proposed orders of Andrews, JA.

Andrews, JA

[3] The Appellant (“Sultan Khan”) has appealed against the judgment of Justice A.L.B. Brito-Mutunayagam, given in the High Court at Suva on 2 September 2022, dismissing Mr Khan’s claim for damages against the First Respondent (“the Official Receiver”) and the Second Respondent (Fiji Islands Maritime Safety Administration) (“FIMSA”).¹ Sultan Khan’s claim arose out of the winding up of Khan’s Shipping Company Limited (“KSC”). Mr Khan alleged that the Official Receiver had wrongly assumed that KSC owned a shipping vessel of which he was in fact the owner, and wrongly obtained an order vesting ownership of the vessel in the Official Receiver. Mr Khan further alleged that the Official Receiver then sold the vessel at undervalue. Against FIMSA, Sultan Khan alleged that FIMSA had failed to register his ownership of the vessel. He claimed to have suffered losses totalling \$1,005,000.

The High Court judgment

[4] The grounds on which Justice Brito-Mutunayagam dismissed Sultan Khan’s claim were, in essence, that KSC had been wound up by the High Court at Suva on 7 February 2005, and that the transaction whereby Sultan Khan became the registered owner of the vessel occurred after that date, when KSC was prohibited from transferring any of its assets. Accordingly, the Judge held that at the time the transfer took place, the vessel had lawfully vested in the

¹ *Sultan Mohammed Khan v Official Receiver* [2022] FJHC 565; HBC238.2006 (2 September 2022).

Official Receiver and that the Official Receiver's seizure and sale of the vessel were also lawful.²

Sultan Khan's evidence as to his purchase of the vessel

- [5] Sultan Khan was a director of KSC during the 1990s until the death of his mother in 1999, when he ceased to be a director, and left the company. Mr Khan's brother Hasim Khan was the managing director of KSC.
- [6] In March 2005, Sultan Khan saw an advertisement for the sale of a vessel "MV Neha" ("the vessel") by mortgagee sale tender. At the time, he was about to travel to work in Kiribati. He was interested buying the vessel and spoke with the solicitors for the mortgagee, CNB Bank ("the bank"). Mr Khan indicated that he was prepared to pay \$20,000 for the vessel. As he was not going to be in Fiji, he gave his brother Hasim written authority to liaise and act on his behalf. On 4 July 2005 Hasim Khan made a formal offer to the bank, stated to be on behalf of Sultan Khan, to buy the vessel for \$20,000 VIP on an "as is where is" basis. The bank accepted the offer by a letter dated 7 July 2005, addressed to KSC. On 4 July 2005, Hasim Khan advised Sultan Khan that the bank had agreed to sell the vessel to him, and asked him to arrange for funds to be paid to the bank.
- [7] Sultan Khan arranged through WKK Shipping (the company he was involved with in Kiribati) for a Bank cheque for \$20,000 to be deposited into KSC's bank account. The payment of \$20,000 was receipted by the bank's solicitors on 27 July 2005.
- [8] On 27 July the Bank's solicitors prepared two Bills of Sale, on pre-printed forms headed "FIJI MARINE ACT 1986 BILL OF SALE (Body Corporate). The first Bill of Sale recorded the transfer of the vessel from the bank to KSC, for \$20,000. The second Bill of Sale recorded the transfer of the vessel (to be renamed "Temaui") from KSC to Sultan Khan, again for \$20,000. Both Bills of Sale were executed on 27 July 2005. Sultan Khan said in evidence in the High Court that the reason for there being two Bills of Sale was that when

² High Court judgment, at paragraphs 24 – 26.

his brother Hasim told him there was a Bill of Sale recording a transfer from the bank to KSC he realised a mistake had been made in the name of the registered owner. He said Hasim had gone back to the bank's solicitors and they corrected the error immediately by preparing the second Bill of Sale so that he (Sultan Khan) would be registered as the owner of the vessel, not KSC.

- [9] According to a KSC delivery docket, the two Bills of Sale, together with a "transfer" and "declaration of ownership" were delivered to the Registrar of Ships at FIMSA on 27 July 2005. There was also a letter on KSC letterhead addressed to the Registrar of Ships advising:

Re M V Neha

This is to certify that as of today 27 July 2005 the above named vessel has been sold to Mr Sultan Khan.

Khans Shipping Co Ltd has of today relinquished all responsibilities and liabilities in regards to the motor vessel M V NEHA.

Please kindly update all records in this matter.

If you require any clarification, please do contact the undersigned

Yours faithfully,

*Mohammed Hasim Khan
Managing Director*

- [10] FIMSA issued a receipt to KSC for fees totalling \$423.11 for "Change of Vessels Ownership, Discharge of Mortgage, Change of Name", dated 1 August 2005.
- [11] On his return to Fiji in August 2005, Sultan Khan undertook and paid for repairs and maintenance on the vessel over a period of five months, including installing a replacement engine. He obtained a professional survey report and a valuation report of the vessel on 5 April 2006, which valued the Vessel at \$285,000.
- [12] When registering the particulars of the vessel's engine (to reflect the replacement engine), Sultan Khan discovered that KSC was recorded as the owner of the vessel on a "Certificate of Fiji Registry", dated 18 October 2005. He raised the matter with FIMSA and (after payment of a further fee of \$83.43) an endorsement was placed on the back of the Certificate

of Fiji Registry recording Sultan Mohammed Khan as “the sole registered owner of the vessel prescribed within, with effect from 13 December 2005”.

- [13] Sultan Khan obtained a “Coasting Trade Licence” on 23 December 2005. On 7 March 2006 he was advised by Fiji Shipping Corporation Ltd that it was prepared to offer him a licence for a franchise route to Lower Southern Lau once a month at \$12,000 VIP per trip and to Lomaiviti once a month at \$7,200 per trip, conditional on Mr Khan obtaining specified insurance cover.
- [14] On 17 March 2006 Sultan Khan was advised by FIMSA that its records showed that the vessel was owned by KSC, which had been “wound up on 12 October 2005”, and that “ownership of the vessel was transferred to you on 27 October 2005, and it was registered under your name on 13/12/05”. FIMSA stated that “the dates implied that the vessel was transferred to you after the winding up of [KSC]”. Mr Khan responded on 27 March 2006, enclosing copies of documents that he said proved that he was the legal owner of the vessel, and no one else.

The winding up proceeding

- [15] I must refer to the proceeding to wind up KSC in some detail. On 25 March 2004 a petition to wind up KSC was filed in the High Court at Suva. In this Court, none of the parties was able to produce a copy of the winding up petition. The petition came before Justice Jiten Singh on 7 February 2005. Again, none of the parties was able to produce, in this Court, a copy of any judgment or ruling made on 7 February 2005. This Court has located a judgment delivered by the Judge on 7 February 2005. The judgment recorded that the proceeding was a disputed winding up petition, where KSC contended it had a substantial counterclaim against the petitioner, which exceeded the debt on which the proceeding was based. Justice Jiten Singh concluded that KSC’s allegations had not progressed beyond mere assertions. The final paragraph of the judgment read:³

³ *In re Khan's Shipping Company Ltd* [2005] FJHC 20; HBE0039.2004 (7 February 2005).

So I am of the view that the petition has been proven. I could make a winding up order now. However I shall postpone making the order for two weeks to enable the company to pay up the debts or make satisfactory arrangements.

- [16] Justice Jiten Singh made a ruling in the winding up proceeding on 23 September 2005 which referred to the matter having been before him on 7 February 2005.⁴ The relevant paragraphs of the 23 September 2005 ruling are:

On 7th February 2005 I had ruled in favour of the petitioner creditor (respondent) but had postponed the making of a winding up order for two weeks. However before the expiry of two weeks, an application for stay was filed. There was also a change of solicitors for the debtor company. In fairness to present solicitors I must say they were not acting for the appellant during the earlier proceedings.

...

The consideration of a stay application in winding up proceedings transcends the interests of the parties themselves as it also involves the public interest and the official receiver. I remain unmoved that this is a case where I ought to grant stay. Now that the stay application has been disposed off I also make an order winding up the appellant company. Application for stay is dismissed with costs which I fix in the sum of \$300.

- [17] It is apparent from the 7 February 2005 judgment that KSC was not wound up on that date, as was held by Justice Brito-Mutunayagam in the judgment under appeal. Rather, no order (whether for winding up or stay) was made on 7 February 2005: the making of a winding up order was “postponed for two weeks”, and it was noted in the 23 September 2005 ruling that an application for stay had been filed. However, no further orders were made until 23 September 2005. I add that counsel were asked at the appeal hearing whether a search had been made for any reference to orders made on 7 February 2005. The Court was told that such searches had been undertaken, to no avail. Counsel did not refer the Court to the 7 February 2005 judgment or the 23 September 2005 ruling. However, the Court located both on the PaCLiii website after the hearing.

⁴ *In re Khan's Shipping Company Ltd* [2005] FJHC 455; HBE0039.2004 (23 September 2005).

[18] At the hearing on 23 September 2005, as noted in the Ruling set out above, Justice Jiten Singh dismissed the application for stay and made an order to wind up KSC. A winding up order was sealed on 12 October 2005 (“the sealed winding up order”), as follows:

***UPON READING** the Notice of Motion for Stay pending Appeal by the Appellant dated the 15th of February 2005 and the Affidavit in Support of the same by Sultan Khan dated the 15th of February 2005 and upon reading the Affidavit in reply by the Respondent dated the 1st of April 2005 and **UPON HEARING MR ISIRELI FA** of Counsel for the respondent and upon hearing **MRS ROSELYN SHARMA** of Counsel for the Petitioner **IT IS HEREBY ORDERED** as follows:*

- (a) *That the Order for Stay of Winding Up of Khans Shipping Company Limited of the 7th day of February 2005 is hereby set aside;*
- (b) *That it is hereby ordered that Khans Shipping Company Limited be wound up.*
- (c) *That it is hereby ordered that Khans Shipping Company Limited pay costs to the Respondent fixed at \$300.*

***DATED** at Suva the [12th] day of [October] 2005*

BY THE COURT

[Signed]

BY THE DEPUTY REGISTRAR

[19] When the sealed winding up order is compared with Justice Jiten Singh’s Ruling, it is apparent that the sealed order contains significant errors, in stating that “the Order for Stay of Winding Up of Khans Shipping Company Limited of the 7th day of February 2005 is hereby set aside”. Justice Jiten Singh’s 7 February 2005 judgment does not contain an order to wind up KSC. Rather, the Judge said that he “postponed” making an order for two weeks, and that an “application for stay was filed”. Further, there was no stay order “set aside” on 23 September 2005, the application for a stay was “dismissed”.

[20] On 12 April 2006, Justice Jiten Singh made an order, on the application of the Official Receiver, vesting ownership of the vessel in the Official Receiver. A copy of the vesting order was provided to FIMSA on 28 April 2006. The Official Receiver sought expressions of interest for the purchase of the vessel in an advertisement on 24 May 2006. The vessel was sold by the Official Receiver on 21 June 2006 for \$20,000.

[21] I observe that it appears that errors were also made in a further ruling in the winding up proceeding. On 16 June 2006 Justice Jiten Singh issued a Ruling on an application for a stay of the winding up. The ruling was as follows:

I dismiss this application for following reasons:

The winding up petition was filed on 25th March 2004. Judgment was delivered on 7th February 2005. Once the judgment was delivered, the company could not have continued dealing with its property. In this case the alleged transfer of vessel occurred on 27th July 2005. The transferee is a director of the company. It is a clear case of fraudulent preference.

The application is dismissed. This is second attempt by the company to obtain an order from the court that the vessel belongs to its director. I award costs summarily fixed in the sum of \$200.00

The court orders that the company files its statement of affairs in the next four (4) days.

[signed]

[Jiten Singh]

JUDGE

[22] While it is correct that once a winding up order has been made a company cannot continue dealing with its property, such an order was not made on 7 February 2005. Further, the “transferee” referred to in the Ruling can only be Sultan Khan. Mr Khan’s evidence in the proceeding before Justice Brito-Mutunayagam that he had ceased to be a director of KSC in 1999 was not challenged. There is no evidence before this Court to indicate that that evidence was untrue.

Appeal grounds

[23] Sultan Khan’s Notice of Appeal set out nine grounds of appeal. These may be summarised as being that Justice Brito-Mutunayagam erred in:

- (a) Not considering that Sultan Khan was at all material times the rightful owner of the vessel, and not KSC;
- (b) Failing to uphold Sultan Khan’s claim that the seizure and sale of the vessel by the Official Receiver was unlawful;

- (c) Failing to uphold Sultan Khan's claim that the Official Receiver sold the vessel at a complete undervalue; and
- (d) Failing to consider Sultan Khan's claim for damages.

When was KSC wound up?

- [24] It is necessary to consider this point, because Justice Brito-Mutuayagam's judgment is premised on KSC having been wound up on 7 February 2005, with the consequence that it was prohibited thereafter from transferring any of its assets. While (in light of the terms of the sealed winding up order) it may be understandable that the Judge proceeded on that basis, it is evident from Justice Jiten Singh's 7 February 2005, judgment that KSC was not wound up on that date. A winding up order was not made until 23 September 2005.
- [25] Mr Sharma submitted that there was no evidence that KSC was wound up on 7 February 2005, and he further submitted that whatever order was made on 7 February 2005 had been stayed. In his cross-examination of the Official Receiver in the High Court trial, Mr Sharma elicited an acknowledgment that the effect of a stay would be that KSC was free to trade. However, in light of the fact that the winding up order was made on 23 September 2005, it is not necessary to consider the effect of a stay.

Who was the owner of the vessel as at 23 September 2005?

- [26] It was not contested that two Bills of Sale were executed on 27 July 2005: first, transferring ownership of the vessel from the bank to KSC and secondly, transferring ownership of the vessel from KSC to Sultan Khan. While noting Mr Sharma's submission that this was the result of an error, and that KSC never contributed to the purchase, or asserted any ownership or control over the vessel, the fact remains that two separate Bills of Sale were executed.
- [27] Both Bills of Sale were lodged with FIMSA on 27 July 2005 for registration by the Registrar of Ships. However, ownership of the vessel by KSC was not registered until 18 October 2005, and ownership by Sultan Khan was not registered until 13 December 2005. The

Official Receiver took the view that KSC became the owner of the vessel upon registration on 18 October 2005, after the date it was wound up.

[28] Regardless of whether the winding up was on 7 February or 23 September 2005, the Official Receiver's view would have been correct, if ownership were determined by registration by the Registrar of Ships. I turn to consider whether that is so.

[29] Pursuant to s 3(c) of the Bills of Sale Act Cap 225, a "bill of sale" does not include:

Transfers or assignments of any ship or vessel or any share thereof

[30] The transfer of a ship is governed by ss 33 to 35 of the Marine Act 1986 ("the Marine Act") which provide:⁵

Transfer of ownership by bill of sale

33 (1) Where a registered vessel is disposed of to a qualified person, or to persons each of whom is a qualified person, the vessel must be transferred by a bill of sale.

(2) A bill of sale is not effective unless it is in the prescribed form and has been executed by the transferor and the transferee in the prescribed manner.

Declaration of transfer

34. Where a registered vessel is transferred, the transferee is not entitled to be registered as owner of the vessel until he, or in the case of a corporation, a person authorised by the corporation to make declarations on its behalf, has made and signed a declaration of transfer in the prescribed form.

Registration of transfer

35. (1) A bill of sale for the transfer of a registered office, when duly executed, must be produced to the Registrar together with the declarations of transfer referred to in section 34.

(2) On production of a bill of sale under subsection (1) the Registrar shall enter in the Register the name of the transferee as owner of the vessel, and shall endorse on the bill of sale the fact of that entry having been made, with the day and hour of the entry.

⁵ The Marine Act 1986 was amended by the Marine Safety Authority of Fiji Act 2009, which commenced on 1 January 2011.

(3) The Registrar shall enter bills of sale produced to him under subsection (1) in the order of their production to him.

The Marine Act 1986: Marine (Registration) Regulations 1990 (“the Marine Regulations”) make further provisions as to the registration of vessels.

[31] I refer at this point to a statement printed at the foot of each Bill of Sale:

NOTE: A purchaser of a registered FLJI vessel does not obtain a complete title until the Bill of Sale has been recorded at the Port of SUVA and neglect of this precaution may entail serious consequences.

Neither the Marine Act nor the Marine Regulations contains any provision to the effect that title to a vessel is not “complete” until the Bill of Sale is registered.

[32] It is also necessary to refer to a statement printed at the foot of the Certificate of Fiji Registry for the vessel:

NOTICE: A Certificate of Registry is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgages affecting the ship. In case of any change of ownership it is important for the protection of the interests of all parties that the change should be registered according to law. ...

[33] In the present case there was no contention that the two Bills of Sale were not in the prescribed form or not executed by the transferor and transferee in the prescribed manner, or that they were not lodged with FIMSA for registration the same day, along with the requisite Declarations of Transfer and the fees required by FIMSA. Counsel for FIMSA was not able to explain to this Court the lengthy delay in registering the ownership (in the case of KSC, until 18 October 2005, and in the case of Sultan Khan, until 13 December 2005), but any delay in registering the ownership of the vessel cannot be held against Sultan Khan when determining when ownership was transferred to him.

[34] I have concluded that ownership of the vessel was transferred by the Bills of Sale, not registration. Sultan Khan was its owner as from the date the Bill of Sale transferring ownership of the vessel to him was executed. Accordingly, Sultan Khan was the owner of

the vessel as from 27 July 2005, it having been transferred to him on that date by KSC. It follows that the transfer from KSC to Sultan Khan was not made after KSC was wound up.

The Vesting Order obtained by the Official Receiver

[35] The High Court Record does not include a copy of the Official Receiver's application for a Vesting Order (although a copy of the backing sheet for the application is included, indicating that it was filed on 7 March 2006). It appears to this Court that the application for a Vesting Order was premised on KSC having been wound up on 7 February 2005, and on ownership of the vessel having been transferred to KSC on 18 October 2005 and to Sultan Khan on 13 December 2005.

[36] I have concluded that neither of these was sound: ownership of the vessel was transferred first to KSC, then to Sultan Khan, on 27 July 2005 and the winding up order was not made until 23 September 2005.

[37] However, this Court is not in a position to make any determination as to:

- (a) whether in the circumstances the Official Receiver was at fault in applying for a Vesting Order; and
- (b) if it is found that the Official Receiver was at fault, whether the Official Receiver is liable to pay Sultan Khan damages (and if so, in what amount).

[38] This Court is also not in a position to determine:

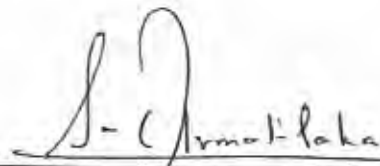
- (a) whether FIMSA was at fault in respect of the delay in registering the change of ownership to KSC then to Sultan Khan; and
- (b) if it is found that FIMSA was at fault, whether FIMSA is liable to pay Sultan Khan damages (and, if so, in what amount).

[39] Further, for this court to make such determinations would be to usurp the role of the High Court as a court of first instance.

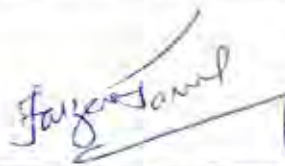
[40] Accordingly, the proceeding must be referred back to the High Court for the above matters to be determined, in the light of this Court's findings as to the winding up of KSC and the transfers of ownership of the vessel.

ORDERS

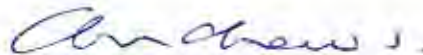
- (1) The proceeding is to be referred back to the High Court for further consideration and determination of Sultan Khan's remaining claims in the light of this Court's findings.
- (2) The 1st respondent is to pay costs to Sultan Khan, which are summarily assessed at \$2,500.00, within 21 days hereof.
- (3) The 2nd respondent is to pay costs to Sultan Khan, which are summarily assessed at \$2,500.00, within 21 days hereof.



Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice Farzana Jameel
JUSTICE OF APPEAL



Hon. Justice Pamela Andrews
JUSTICE OF APPEAL