IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 153 of 2016

BETWEEN : **FREEDIVE (FIJI) CHARTERS LIMITED** a limited liability company having its registered office at 31 Evuevu Place, Pacific Harbour, Fiji.

PLAINTIFF

AND : **BLUEWATER CRAFT LIMITED** a limited liability company having its registered office at Coopers & Lybrand Charted Accountants, 7th Floor Pacific House, Butt Street, Suva.

DEFENDANT

Counsel	:	**Ms. Fung M for the Plaintiff**
		Ms. Narayan S for the Defendant
Dates of Hearing	:	**19th & 23rd August, 2016**
Date of Judgment	:	**29th August, 2016**

JUDGMENT

INTRODUCTION

1. The Plaintiff is the registered owner of a vessel named FAD 1. The Defendant built it and there is no evidence of its value and for what price it was sold. It is admitted that the Defendant built the hull and the Plaintiff fitted it with propellers and engines, electronic devices and it was used for leisure industry for actives including diving, fishing etc and 10% of the revenue generated from the vessel was paid to the Defendant. The arrangement between the parties continued for over two years and the vessel met with an accident and capsized. The hull was salvaged and brought to the Defendant for repair. The Defendant had provided a detailed quotation for the repair. Since the vessel was insured the insurers indemnified the damage but the Plaintiff only made a partial payment

of the sum quoted for the repair. The Defendant requested for the full quoted sum but the Plaintiff insisted that sufficient work was not carried out, for the sum paid, hence the vessel should be returned to him. The Defendant refuses to return it, stating that the salvageable part after the accident was only the hull and it belonged to him as no money was paid for the purchase of the same. According to him he only allowed usage of hull for three years for 10% of revenue generated from it. According to him it was a joint venture between the Plaintiff and Defendant for the sharing of profits for the usage of the hull by the Plaintiff.

FACTS

2. The vessel FAD 1, hull was built by the Defendant. The Plaintiff provided the engines and propellers and electronic devices on board. The Plaintiff by email dated 9th April, 2014 had offered certain terms to the defendant for an 'operating agreement' and the conditions inter alia are as follows

   i. '3 year **operating agreement** starting June 1st with option for additional term.

   ii. Freedive purchases Engines and Electronics (Batteries/GPS/Chart plotter/VHF/Stereo/Lights) and keeps ownership of hull after operating agreement is terminated.

   iii. Bluewater received 10% of all revenue monthly (see annual projections).' (emphasis is mine)

3. Though there is no specific email either confirming or rejecting the above the Defendant alleges that this as final terms of the parties for the joint venture. **It should be noted that the Plaintiff did not disclose this email or even details of its offer to the Defendant, in the ex-parte application for mandatory injunction**, but it was converted for *inter partes* for obvious reasons. When the Defendant disclosed this email the reply was that this was only an initial offer, but did not produce any counter offers or evidence of deviation from it till the vessel FAD 1 capsized.

10. The vessel FAD 1 could not be utilized for its intended use within the stipulated time and the Plaintiff in anticipating such activities, had allowed booking for the vessel FAD 1 from the anticipated delivery date.

ANALYSIS

11. The Plaintiff had voluntarily given a letter on 25th June, 2014 that the vessel FAD1 which was in the Defendant's boat building yard at that time belonged to the Plaintiff.

12. The Plaintiff had registered it under its name on 16th July, 2014. There is no evidence of this registration being cancelled or being made void in any other way. It should also be noted that though the parties had mutually decided to make alterations to the hull, the name of the vessel or its registration did not change or even anticipated such change.

13. The Plaintiff had also insured the vessel FAD 1 under its name and after the accident had recovered the sum paid for the damage. This was on the basis of ownership of the vessel FAD 1, before and after the accident.

14. The Plaintiff had brought the damaged FAD 1 after the accident for the repair at Defendant's boat building facility and he had provided quotation for its repair and it was apparently used for the claim for the insurance.

15. The Plaintiff had paid $22,000 for the restoration of FAD1, and both parties had decided to make changes to the hull to accommodate more space. This may be a good business opportunity for the parties to improve the facilities for the prospective tourists that ultimately increase revenue for both parties, but lack of understanding between them resulted present status. There is no evidence of predetermined plan for the additional alterations and also who would fund such alterations. There are disputed facts on this issue.

16. The Plaintiff allege that sufficient work was not carried out for the paid sum of $22,000 and details of the work carried out was requested by the Plaintiff but Defendant did not submit such details . In the affidavit in opposition some details of the work carried out for $22,000 but these are disputed facts which cannot be decided through affidavits. The fact remained that the Plaintiff is not satisfied with the Defendant's progress with the repair. The Defendant in the affidavit in opposition allege it had only done work for the paid sum and does not claim it has a right to retain the property for the unpaid work. The claim for the Defendant is based on ownership of the hull, but the FAD1 on registration remains a property of Plaintiff.

17. Admittedly the vessel FAD 1 was built by the Defendant and it was subject of an 'operational agreement' between the parties for a period and it had not lapsed. So, on that basis alone the hull should be in the possession of the Plaintiff at least till the end of such period. Neither party had indicated their desire to deviate from the said agreement or given notice of breach of their agreement. If the agreement was continued to the email dated 9th April, 2014 the time period is 3 years from June, 2014. So despite the accident, the hull should be subject to the said 'operational agreement' after salvage and repair to its normal use as FAD 1.

18. The Plaintiff is using FAD 1 for leisure business for money. It obtains 90% of the income from the usage of the vessel whereas Defendant obtains 10%. The registration of the vessel FAD 1 is in the Plaintiff's name despite the conflicting evidence of ownership relating to hull.

19. The vessel FAD 1 was bought to the repair by the Plaintiff and he should not be prevented from taking it to any place that he desire for repair if he is not satisfied with Defendant's work.

20. In ***Redland Bricks Ltd v Morris and Another*** [1969] 2 All ER 576 at p 579-80 the House of Lords of UK laid the general principles relating to grant of mandatory injunctions as follows;

> *'**Isenberg v East India House Estate Co Ltd and Durell v Pritchard** have laid down some basic principles and your Lordships have been referred to some other cases which have been helpful. The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course". Every case must depend essentially on its own particular circumstances. Any general principles for it application can only be laid down in the most general terms:*
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> *1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damages will accrue to him in the future. As Lord Dunedin said[1] it is not sufficient to say "timeo". It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly.*
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> *2. Damages will not be a sufficient or adequate remedy if such damages do happen. This is only the application of a general principle of equity; it has nothing to do with Lord Cairns' Act[c] or Meux's case.[2]*
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> *3. Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account: (a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour **he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff.** As illustrative of this see Woodhouse v Newry Navigation Co[3]; (b) but where the defendant has acted reasonably, although in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never*

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[1] In *A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd*; [1919] AC 999 at p 1005

[2] *Meux's Brewery Co v City of London Electric Lighting Co, Shelfer v Same* [1895] 1 Ch 287, [1891-94] All ER Rep 838, 64 LJCh 216, 72 LT 34, *subsequent proceedings*, [1895] 2 Ch 388, 28 *Digest* (Repl) 792, *418*.

[3] *Woodhouse v Newry Navigation Co* [1898] 1 IR 161, 28 *Digest* (Repl) 780, * *254*.

occur or possibly only on a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudicial for he has his action at law and all his consequential remedies in equity.

So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damages to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure on one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such works as on the evidence before it will remedy the wrong but may think it proper to impose on the defendant the obligation of doing certain works may on expert opinion merely lessen the likelihood of any further injury to the plaintiff's land. Sargant J pointed this out in effect in the celebrated "Moving Mountain" case, Kennard v Cory Brothers & Co Ltd ([1922] 1 Ch 265 at pp 274, 275) (his judgment was affirmed in the Court of Appeal).

4. *If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction , then the court must be careful to see that the* ***defendant knows exactly in fact what he has to do*** *and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions' (reference and emphasis added)*

21. The abovementioned case was followed in *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] 2 All ER 1056 and in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] 3 All ER 934. Both decisions were UK Court of Appeal decisions.

22. In ***Rainbow Estates Ltd v Tokenhold Ltd and another*** [1998] 2 All ER 860 at 866 while applying the judgment of Lord Upjohn in *Redland Bricks Ltd v Morris and Another* [1969] 2 All ER 576 held that the scope of mandatory injunctions is wider but it has to be exercised carefully. Some examples of such application are contained in the said judgment at p 866 as follows,

'The conditions were that the work was sufficiently defined by the contract; damages would not be an adequate remedy; and the defendant was in possession, and so the plaintiff could not have the work done without committing a trespass. These conditions were fulfilled, and after referring to the statement of Lord Upjohn in Redland Bricks Ltd v Morris [1969] 2 All ER 576 at 580, [1970] AC 652 at 666 that the court must be

careful to ensure that the defendant knows exactly what he has to do so that in carrying out an order he can give contractors the proper instructions, Pennycuick V-C said there was no difficulty about that, but a difficulty arose from the decision of Lord Eldon LC in Hill v Barclay. In holding that there was no reason in principle why an order should not be made against a landlord to do some specific work, he said (obiter) of Hill v Barclay:

'Now that decision is, I think an authority laying down the principle that a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair.'

In concluding that the landlord's covenant could be the subject of an order for specific performance, he said:

'Obviously, it is a jurisdiction which should be carefully exercised. But in a case ... where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made.' (See [1973] 3 All ER 97 at 99–100, [1974] Ch 97 at 101.)

More recently orders have been made against a landlord to enforce a covenant to employ a resident porter; what had to be done was capable of definition, and enforcing compliance would not involve superintendence by the court to an unacceptable degree: Posner v Scott-Lewis [1986] 3 All ER 513 at 519–522, [1987] Ch 25 at 33–37; and against a landlord requiring removal of dry rot, on the basis that, notwithstanding the difficulty of working out the appropriate order, damages would not be an adequate remedy: in particular, the condition of the premises was continually deteriorating: Gordon v Selico Ltd (1986) 18 HLR 219. See also Peninsular Maritime Ltd v Padseal Ltd [1981] 2 EGLR 43 (interlocutory mandatory injunction to use best endeavours to put a lift into working order) and Tustian v Johnston [1983] 2 All ER 673 at 681.'

23. There is evidence of loss of revenue (90%) to the Plaintiff as well as its reputation due to not being able to provide same or better facilities than in vessel FAD 1 to its clients. The loss of reputation and dissatisfaction will continue as long as the delay in completion of repair to FAD 1. It should be noted that the delay cannot be solely attributable to the Defendant as the Plaintiff had admittedly being unable to provide certain parts, but now it wants the repairs to be completed by another party. There is no clear indication as to who should provide such additional parts or material as parties had verbally altered the design of the vessel. This is a material alteration in terms of the Ship Registration Decree 2013 and Maritime Transport Decree 2013 read with Maritime (Novel Ship) Regulation 2014.

In any event delay is causing damage to the reputation and loss of revenue to the Defendant in future.

24. If there is inordinate delay by refusing to allow the repair by another entity, and the loss of reputation due to delay will be hard to regain in the industry and this would be hard to measure in monitory terms. By refusal of the Defendant to give possession of the FAD 1 in its current status would cause loss of revenue and reputation to the Plaintiff.

25. In the mandatory injunction sought by the Plaintiff the extra cost to the Defendant is not significant. They were only required to provide the services of a crane to lift the hull of FAD 1 safely and this should be done without damaging properties including FAD1. The best option is to utilize the crane belonging to the Defendant, but if that cannot be used for some reason, every effort should also be made to allow the services by outside party acceptable to the Defendant at the cost of Plaintiff. By doing this the cost would be minimal for the Defendant in the exercise of mandatory injunction.

26. The balance of convenience heavily favours the Plaintiff as his business and reputation is affected due to non supply of the vessel and it had accepted bookings from the anticipated date of restoration of the vessel FAD1. When the vessel is in the yard of the Defendant it would not generate any income. It may cause an economic waste, and the mandatory injunction is justified in the circumstances. So the discretion to grant mandatory injunction is exercised in favour of the Plaintiff to obtain the possession of the partially repaired hull of vessel FAD 1 which is in the Defendant's boat building facility.

27. The cost of this application is summarily assessed at $2,000.

FINAL ORDERS

a. That the Defendant by itself or through its servants or agents or otherwise howsoever do forthwith release to and deliver to the Plaintiff and or its servants or agents possession of the Registered vessel FAD 1.

b. That Defendant by itself or through its servants or agents or otherwise do deliver the vessel FAD 1 by properly lifting the vessel using s suitable crane to the Defendant on to a boat trailer supplied by the Plaintiff.

c. That the Defendant by itself or through its servants or agents or howsoever be restrained from hindering or interfering with the Plaintiff taking possession of the vessel FAD 1.

d. The Defendant by itself or through its servants or agents or otherwise be restrained from concealing, altering, dismantling removing, transferring, encumbering, using, disposing of selling or any way threatening to diminish the value of the Registered Vessel FAD 1 until further order of this court.

e. The Plaintiff be at liberty to engage and enlist the service of police and or bailiffs in the execution of this orders.

f. The cost of this application is summarily assessed at $2,000.

g. The matter to take normal cause. The matter should be listed before the Master for directions.

Dated at Suva this 29th day of August, 2016

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Justice Deepthi Amaratunga
High Court, Suva