

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION'

Civil Action No. HBC 284 of 2020

BETWEEN

BLUEWATER CRAFT PTE LIMITED a limited liability company registered
under the laws of Fiji having its registered office at
Lot 3 Naitata Road, Navua

PLAINTIFF

AND

CORALVIEW ISLAND RESORT AND TRAVEL TOURS LIMITED,
a limited liability company registered under the laws of Fiji having
its registered address at Tavewa Island, Nacula, Lautoka.

FIRST DEFENDANT

AND

YALODU ENTERPRISE COMPANY PTE LIMITED a limited liability
company registered under the laws of Fiji having its
registered office at MV Solar (Fiji) Building,
13 Bowalu Street, Lautoka.

SECOND DEFENDANT

AND

MARITIME SAFETY AUTHORITY, a statutory body registered under the laws of Fiji, a statutory authority having perpetual succession established pursuant to section 7 of the Maritime Safety Authority of Fiji Act 2009 and a limited liability company registered under the laws of Fiji having its registered office at Kadavu House, 414 Victoria Parade, Suva.

THIRD DEFENDANT

AND

MERCHANT FINANCE PTE LIMITED, a limited liability company having its registered office at Level 1, Ra Marama House, 91 Gordon Street, Suva

FOURTH DEFENDANT

Counsel : Ms. Ali A. for the Plaintiff
Mr. Jamnadas K. for the 1st & 2nd Defendants
Ms. Latianara W. for the 3rd Defendant
Mr. Tuitoga T. for the 4th Defendant

Date of Hearing : 10th December 2020

Date of Ruling : 18th January 2021

RULING

(On the application for injunction)

[1] The plaintiff filed a writ of summons which was subsequently amended seeking the following orders:

- (a) An order that the vessels are the legal property of the plaintiff and they be returned to the plaintiff.
- (b) An order that the 2nd defendant's name be omitted from the Register of Fiji Ships maintained by the Maritime Safety Authority in terms of section 75(1)(b) of the Ships Registration Act 2013 in respect of the Vessels and replaced with the plaintiff's name.
- (c) An order for payment by the 1st and 2nd defendants to the plaintiff \$90,000.00.
- (d) An order for payment by the 1st and 2nd defendants to the plaintiff for the sum of \$5000.00 per month from 15th September 2020 until Vessels are back in the possession of the plaintiff and operational.
- (e) Damages for loss of revenue due to the 1st and 2nd defendant's breach of the joint venture between them and the plaintiff.
- (f) General damages for breach of contract to return the Vessels to the plaintiff upon failure to pay the purchase price for the same.
- (g) General damages for breach of contract and for fraudulent encumbering the Vessels.
- (h) An order that the 1st, 2nd, and 3rd defendants indemnify the plaintiff from any and all actions which may arise involving the Vessel "SEABUS 1".
- (i) An order that the 1st and 2nd defendants account of all profits from their use of the Vessels from the date of delivery until 15th March 2019.
- (j) Exemplary damages.
- (k) Costs on an indemnity basis.
- (l) Interest at a rate of 8% from the date of judgment.
- (m) Any other orders that this Honourable Court deems just and equitable.

[2] The plaintiff on 30th November 2020 filed an ex-parte notice of motion pursuant to Order 29 of the High Court Rules 1988, which was converted by the court to an inter-parte notice of motion, seeking the following orders:

1. A declaration that the plaintiff is the legal and beneficial owner of the following motor vessels:
 - (a) MV Tavewa Seabus; and
 - (b) MV Tavewa Seabus 2,together the “Motor vessels”.
2. An order that the 3rd defendant henceforth restrain the 2nd defendant from utilizing or operating the Motor Vessels immediately.
3. An order that the plaintiff may immediately recover and repossess the Motor Vessels and that the 2nd defendant immediately releases said Motor Vessels to the custody of the plaintiff.
4. An order that 2nd defendant and/or its servants and/or agents howsoever be restrained from concealing, altering, dismantling, removing, transferring, encumbering, using, disposing of, selling or in any way threatening to diminish the value of the Motor Vessels until further orders of the Honourable Court.
5. An injunction restraining the 2nd defendant and/or its servants from hindering or interfering in any way with:
 - (a) the plaintiff’s recovery and repossession of the Motor Vessels;
 - (b) the dismantling and removal of the 2nd defendant’s outboard motors, rigid life raft, life jackets, EPRIB (Emergency Position Radio Indicating Beacon) and Global Positioning System (the “2nd defendant’s items”) from the Motor Vessels by independent third parties contracted by the plaintiffs at the 2nd defendant’s cost;
 - (c) the delivery of the 2nd defendant’s items to its registered address;
 - (d) the plaintiff’s ongoing possession and legal and beneficial ownership of the Motor Vessels;
6. An order that the 2nd defendant’s name be omitted from the Register of Fiji Ships maintained by the Maritime Safety Authority in terms of section 75(1)(b) of the Ships Registration Act 2013.

7. An order that the plaintiff be at liberty to engage and enlist the services of Police and/or Bailiffs in the execution of these orders.
8. Costs of this action on an indemnity basis.
9. Such other relief as the court deems just.

[3] The plaintiff is in the business of boat building. The plaintiff and the defendant discussed about having a partnership or a joint venture however, there is not written agreement. According to the plaintiff the 1st defendant agreed to contribute FJD60,000.00 for a 10% shareholding, the plaintiff's Director, Apostolos Christos Tsantikos would personally hold a 10% shareholding and the plaintiff would own 80% as all costs of construction was to be borne by the plaintiff.

[4] At the time of the delivery of SEABUS 1 to the 1st defendant, the latter had paid FJD45,000.00 out of agreed FJD60,000.00 and later the 1st and 2nd defendants had paid FJD20,000.00.

[5] The plaintiff built SEABUS 2 and the 1st defendant had contributed FJD2000.00 for the construction. SEABUS 2 was launched in June 2017 and the 2nd defendant started its operation.

[6] The joint venture failed and the plaintiff and the defendant agreed to sell the Vessels, however, there is no written sale and purchase agreement. The only document tendered in evidence is "Heads of Agreement" which is not an agreement enforceable in law.

[7] I will now proceed to consider the application for injunctions of the plaintiff.

[8] In **American Cyanamid Co. v Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396, Lord Diplock set down certain guidelines for the courts to consider in granting or refusing an application for interim injunction. They are as follows:

- (i) Whether there is a **serious question to be tried** at the hearing of the substantive matter;
- (ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be **adequately compensated by an award of damages** as a result of the defendant continuing to do what was sought to be enjoined; and

- (iii) In whose favour the **balance of convenience** lie if the injunction is granted or refused.

[9] It is also important to bear in mind that injunction is an equitable remedy granted at the discretion of the court. The power which the court possesses to grant injunctions should be cautiously exercised only on clear and satisfactory grounds. An application for injunction is an appeal to an extraordinary power of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise.

[10] Order 1 sought in the notice of motion is not an injunctive relief but a declaration of the ownership which cannot be granted in an interlocutory application of this kind. The title of these vessels are not registered in the name of the plaintiff nor is in the name of the defendants. Therefore, it is an issue that the court has to decide in the substantive matter and that is the first order the plaintiff has sought in its amended statement of claim. It is also important to note that the defendants also have contributed to the cost of the construction of these two Vessels.

[11] Order 3 sought in the Motion is for the plaintiff to recover Vessels immediately. Since the question of ownership is yet to be decided that order cannot be granted as an interim relief.

[12] In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 84 Lord Denning said:

In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

[13] The main purpose of granting an interlocutory injunction is to maintain the status quo that is to prevent a party from doing anything that would render the final judgment nugatory.

- [14] In this instance the defendants have been operating these two Vessels for four years since the dispute between them and the plaintiff arose but the plaintiff did not take any action against the defendants to recover the Vessels instead he continued to receive money from them.
- [15] Order 4 sought in the Motion is to restrain the defendants from concealing, altering, dismantling, removing, transferring, encumbering, using, disposing of, selling or in any way threatening to diminish the value of the Motor Vessels until further orders of the court.
- [16] There is no material before this court to show that the defendant was at least making arrangements to do to any of those acts. One cannot seek an injunctive order based on assumptions. In the affidavit in support it is averred that the 2nd defendant operates SEABUS 1 in breach of mandated maximum number of passengers but no injunction has been sought to restrain the 2nd defendant from acting contrary to the regulations.
- [17] The only injunctive relief is the order 5 sought in the Motion. There is no purpose of granting that order since the court has decided above to refuse the orders 1 and 3 sought in the Motion.
- [18] The orders 2 and 6 in the Motion are sought against the 3rd defendant. The 3rd defendant is an independent statutory authority apart from registering the Vessels it has no interest in the dispute between the plaintiff and the 1st and 2nd defendants.
- [19] Section 75(1)(d) provides that an entry incorrectly exists in the register a person aggrieved or the Registrar may apply to the High Court for rectification of the Register.
- [20] In this matter the plaintiff waited for about four years to raise this issue and also the plaintiff does not say the registration done without its consent or it objected to the registration. From the material available it is clear that the registration was done with the consent of the plaintiff.
- [21] In the case of **In re Ownership of MV Endeavour** [1997] FJHC 166; HBG0004d.1997s (4 November 1997) it was held:

What's more even if I accept that an '**order for rectification**' may be granted by the Court, such a remedy is undoubtedly in the nature of equitable relief and may be withheld at the discretion of the Court according to general equitable principles including the doctrine of '**laches and acquiescence**'; prejudice to innocent third parties; and absence of clean hands to name but a few.

[22] In this matter the plaintiff is guilty of both laches and acquiescence.

[23] For the reasons aforementioned the court makes the following orders.

ORDERS

- 1 The Notice of Motion filed on 30th September 2020 is struck out and the orders sought are refused.
- 2 The court will not make order as to costs of this application.

Lyone Seneviratne

JUDGE

18th January 2021