

A bill of lading dated 18 September 2014 between the creditor as Consignor and the debtor as Consignee is sufficient evidence to prove the existence of a valid contract of the carriage of thirteen (13) cars and one (1) boat and trailer plus assorted items aboard the vessel "Captain Fearn" on a voyage from Brisbane, Australia on 29 September, 2014 to Nauru arriving on 12 October 2014. The total freight costs of the consignment was sixty six thousand eight hundred and ninety four dollars and twenty five cents (\$66,894.25). The term of the contract was "cash on delivery".

The Consignee initially had difficulties in the payment of the freight and on 10 November 2014, the parties agreed to amend the terms of payment from cash on delivery, to an extension time for payment of 30 days from the date of arrival of the goods. The Agreement was signed by the parties on 20 November 2014. On the same day, the Consignee paid ten thousand dollars (\$10,000.00) to the Consignor towards the debt redemption which the latter acknowledged with a receipt dated the same day. There has been no other payment received from the Consignee since.

The creditor has since, on numerous occasions reminded the Debtor by telephones and letters of his obligation to pay under the agreement. Demand letters dated 10 February and 27 April 2015 are produced as proof in the affidavit of the creditor's Finance Manager, Florence Waibuta-Toganivalu of 12 May. On the same day, the creditor filed a Writ demanding that the debtor pay the \$56,894.25 balance of the debt plus interests and costs.

On 25 May 2015 the creditor, by an *ex parte* application obtained an injunction preventing the debtor from accessing and taking delivery of all the cars and other items of goods that were part of the consignment on board the "Captain Fearn". In addition, the court ordered any future goods or cargoes consigned to the debtor may be held as bailment by the creditor until the debt is fully paid.

The debtor's statement of defence on 23 June 2015 did not really deny his indebtedness but rather explained that his inability to pay his debt was directly due to the Government's inability to pay out the second tranche of the Ronwan

capital. The debtor also stated that the creditor had rejected his offer for re-scheduling the debt to re-pay at the rate of \$5000.00 per month.

On 11 August 2015 the parties entered into another agreement referred to as "Debt Settlement Agreement" in which the debt of \$56,894.25 plus interest of \$4,551.54 were agreed to as the sum total of the debt owing by the debtor to the creditor. The parties also agreed to a payment schedule of \$9,000.00 due at the end of every month from July 2015 to November 2015 with the balance of \$16,445.79 due and payable on 31 December, 2015. The Agreement was tabled into court on 14 August and Khan J made the following **Orders**:

"1. I make orders in terms of the debt settlement agreement dated 11 August, 2015a copy attached thereto;

2. I order that the injunction orders made on 25 May, 2015 be discharged."

The effect of the orders were, inter alia, the release from the creditor's custody all of the debtor's goods that were part of "Captain Fearn" consignment, including the 13 cars and the boat and trailer.

To this day the debtor has not complied with the terms of the Agreement; failing to pay the debt or any part thereof.

Counsel for the debtor argued that while the debtor's business continues to operate, the payments for his contract projects especially those with the Government of Nauru, have been very slow. There are other projects that are delayed due to the problems of supply of materials. All of these, the debtor contends, have contributed to his inability to pay his debt. In addition he submitted as exhibit a copy of a contract agreement between his company Amwamo Bwio Construction and the Department of Commerce industry and Environment showing a schedule of payment upon completion of project 'Milestones'. The total amount of contract is worth \$839,256.00 and according to the evidence before the court the debtor had already received payments of \$679,256.00 upon reaching Milestone 1 and \$80,000.00 after Milestone 2. Anyone of these two payments, the creditor argued, was capable of clearing the debt. However, the creditor claims that the debtor did not make any serious or

conscientious effort towards meeting his debt commitment, although at one time or another he had the means to so do. Be that as it may, Counsel for the debtor submits, that while the debtor is presently carrying on other businesses, the incomes derived from these, are only sufficient to support his family. He is hoping to be able to pay the debt when Milestone 3 is reached and payment under it made by the Government.

The creditor's application for the enforcement of Clause 3 of the Debt Settlement Agreement is made by way of interlocutory motion pursuant to Order 7 of the Rules. Under it the creditor reserved the right to exercise recovery action on the debtor's assets, including those under the custody of the creditor through the injunction of 25 May 2015.

The doctrine of sanctity of contract (*pacta sunt servanda*) is a universally accepted principle. It recognizes that each party to an agreement had voluntarily entered into it in the full knowledge of their legal obligations and commitments under it. It represents a solemn undertaking by each of the party to perform and fulfil their obligations. Good faith and honest dealing demanded the observance of promises and agreements. Failure to do so by one party will result in enforcement of the promise so as to fulfil the well-founded expectations of the other.

In this case the debtor cannot continue to evade his contractual undertakings indefinitely. He cannot also continue to put the blame for his inability to pay on others who he claims have failed to pay him for his work or services. The responsibility to pay the debt is his alone. Any hardship which would have been considered by the court as mitigating factor had been taken as the reason why the deadlines for payments were extended time and again by the creditor. The principle of the sanctity of the contract must be scrupulously observed in the circumstances of this case.

In the end it is obvious that unless the creditor enforces its rights under the agreement, which rights have been severely compromised by the dissolution of the injunction which released the consignment from its reach, the creditor may not have another opportunity to seize or attach any other assets of the debtor in

order to recover monies for the repayment of the debt. To these ends the court makes the following:

1. **Order** is made for the creditor to enforce Clause 3 of the Debt Settlement Agreement of 11 August, 2015.
2. Matter to take its normal course.
3. Cost is summarily assessed at \$400.00 in favour of the creditor against the debtor.



F Jitoko
Registrar