

FAREAST ENTERPRISES (SI) CO LTD ~V~ MARTIN TSUKI

High Court of Solomon Islands
(Palmer ACJ)

Civil Case Number 42 of 2001

Hearing: 23rd July 2002

Judgment: 31st July 2002

Crystal Lawyers for the Applicant/Plaintiff
A & A Legal Service for the Respondent/Defendant.

Palmer ACJ: On 3rd May 2002, the Registrar of High Court made orders as follows:

1. *The Plaintiff is entitled to damages of \$94,585.84 less the amount of \$50,349.00 paid pursuant to order of the Court of Appeal; and*
2. *The Plaintiff is entitled to interest at 5% per annum on the judgment sum of \$94,585.84 from 31 May 2001; and*
3. *The Plaintiff is entitled to his costs, to be taxed, if not agreed."*

Note for purposes of this application the orders were based on the Counter-Claim of the Defendant and hence when it refers to the Plaintiff in the above order it refers to the Defendant, Martin Tsuki as the Plaintiff in his Counter-Claim filed 30th May 2001.

It is those orders, which the Applicant ("Plaintiff") now comes to court by way of Notice of Motion filed 22nd May 2002 to have set aside.

Brief facts

The Plaintiff filed Writ and Statement of Claim on 21st March 2001. By summons filed on same date, it sought and obtained orders *ex parte* for *inter alia*, the Defendant to be restrained from disposing of two Containers of timber identified as no. MLCU 2656141 and CRXU 2733160. The Plaintiff claims the containers of timber belonged to it by virtue of an agency agreement with the Defendant. Defendant entered Memorandum of Appearance on 4th May 2001 together with Defence and Counter-Claim. A & A Legal Service took over the file on or about 23rd May and re-filed Memorandum of Appearance on same date with Defence and Counter-Claim on 30th May 2001.

On 20th June 2001, Defendant filed Summons *inter alia*, for orders that the Plaintiff's Writ and Statement of Claim be struck out if it failed to file Reply to Defence and Defence to the Counter-Claim of the Defendant. On 26th July 2001, the parties signed consent orders which included an **unless order** to the effect that "*unless the Plaintiff within 14 days file its Reply to Defence and Defence to Counter-Claim, that its Writ and Statement of Claim will be struck out*".

Defendant obtained Judgment in Default of Compliance on 1st August 2001. This resulted in the striking out of the Writ and Statement of Claim of the Plaintiff and Judgment to be entered in favour of the Defendant on his Counter-Claim.

By Notice of Motion filed 7th August 2001 Plaintiff applied to have inter alia the Judgment in Default of Compliance dated 1st August 2001 set aside. This was heard by Kabui J. on 24th August 2001 but dismissed (see Judgment dated 28th August 2001).

The Defendant's Counter-Claim

The Claim of the Defendant contained at paragraph 21 of his Defence and Counter-Claim filed 30th May 2001 is as follows:

"The Defendant therefore claims from the Plaintiff the following: -

- (a) An account of the export prices of the 10 containers of timbers already sold by the plaintiff to overseas buyers; and*
- (b) 40% of the profit under clause 5 of the Remuneration Contract dated 2nd October 2000; and*
- (c) Damages for breach of Contract to be assessed; and*
- (d) Costs and interests; and*
- (e) Any further Order the Court deems fit to make"*

Submission of the Plaintiff

The gist of the Plaintiff's submission regarding the application to have the learned Registrar's Order of 3rd May 2002 set aside is based on the submission that the above orders filed on 30th May 2001 were not complied with in the Orders of the Registrar dated 3rd May 2002. For instance, paragraph 21(a) of the Counter-Claim provides that an account of the export prices of the 10 Containers of timbers already sold by the Plaintiff should be provided. The Plaintiff says that this has been done in the affidavit of Peter Zeng filed 7th August 2001 but that it had not been taken into account in the assessment of the profits to be calculated under paragraph 21(b) of the Counter-Claim.

This has been confirmed by learned Counsel Mr. Ashley in his submissions, that calculations of the profit had been based on the calculations set out in exhibit "MT3" annexed to the affidavit of Martin Tsuki filed 13th March 2002.

Sale price of the logs had been calculated based on the purchase price of AUD800-00 per cubic metre and not on the actual sale price of the timber as sold in the 10 Containers. According to the affidavit of Peter Zeng filed 7th August 2001, the value of the two Containers TOLU3033571 and CRXU2482790 is AUD19,031-95, which at exchange rate of .378 comes to SBD50,349-00. The value of the other 8 Containers is AUD83,237-30, which at exchange rate of .3822 comes to SBD217,784-70. The total value of the ten Containers therefore comes to only SBD268,133-70 and not SBD527,769-60. I appreciate these figures may be disputed by the Defendant. This is where the opportunity for assessment of damages important for purposes of calculating the profit due.

I am satisfied accordingly a fundamental error exists in the figures used for purposes of calculating the profit and what is due to the parties in this case, the result of which is that it appears on the face of the record that the orders issued are defective and should not be allowed to stay. I am also satisfied there has been no delay in the application filed to have the orders of 3rd May set aside. Those Orders accordingly should be set aside. Unless an agreement by consent is reached as between the parties, I order directions as follows:

- (1) That the Defendant to file any affidavit in support of his claims regarding the value of the ten Containers and any other affidavit he wishes to rely on in support of the judgment and claim for damages obtained in his favour as set out in his Counter-Claim within 7 days.
- (2) Any replies to be done 7 days thereafter.
- (3) The matter to be re-listed for hearing anytime thereafter.

ORDERS OF THE COURT:

1. Order that the Order of the Registrar dated 3rd May 2002 be set aside.
2. Unless an agreement by consent is reached, the Defendant may file any affidavit in support of his claims regarding value of the ten Containers and any other affidavit in support of his claim for damages within 7 days.
3. The Plaintiff may file any replies 7 days thereafter.
4. The matter to be re-listed for hearing anytime thereafter.
5. Order that the Writ of Fieri Facias filed on 9th May 2002 be stayed until further orders.
6. No order for costs in respect of this application.

THE COURT