

**WESTPAC BANKING CORPORATION LTD -V- THE SHIP MOTUNUI:
PACIFIC EMPORIUM PTY LTD and FIRI TOBACCO PTY LTD;
INTERVENORS.**

Andrew Radcliffe for the plaintiff.

Patrick Lavery for the 1st intervenor.

Andrew Nori for the 2nd intervenor.

At Honiara

Hearing: 23 July 2004

Judgment: 23 July 2004

Brown J. This application by the first intervenor seeks to set aside the order for possession of the Ship given Westpac Banking Cooperation Ltd on the 30 June.

Mr Lavery appeared for Pacific Emporium in this application to set aside and for ancillary orders. Mr Nori appeared for Firi Tobacco, a Company which apparently has taken a sublease of the Ship.

The Ship was originally arrested by Order of my brother Judge Kabui on the 28th May and on the 30th June being satisfied of the material matters necessary, I ordered that the plaintiff have possession of the Ship and be at liberty to return the Ship to Australian waters. Mr Lavery comes by way of application on Pacific Emporium's part seeking to set aside those orders and in the alternative allow the rights of these intervenors to be determined in this forum.

The plaintiff opposed the application and sought to have it dismissed. I should say that I accept the plaintiff's arguments. Various issues were raised by counsel and I proposed to deal with them.

A question arose in relation to the fact that the Warrant of Arrest of the Ship appears to have been given on the 20th May in the absence of notice to the Australian Consul as provided for in the Shipping Act. That Act evinces discretion in the Court and I propose to exercise that discretion. The Order of Arrest of course, is valid unless overturned by an appeal court.

The second issue is one of delay in the intervenor, Pacific Emporium. Mr Lavery pointed to the fact that following orders for possession on the 30th June an application was filed the very next day. The delay to which Mr Radclyffe addressed was that delay from the time of the Ship's arrest. The basis of my decision does not rest on the issue of delay however but if necessary I would not grant the relief sort for the delay precludes the intervenor in this jurisdiction from now arguing the right in the plaintiff to possession of

Mr Lavery also argues that no notice was given the interveners despite knowledge in the plaintiff of the intervener, Pacific Emporium's interests in the vessel since it was effectively in Pacific Emporium's possession when the vessel was arrested in Solomon Islands' waters.

I consider the fact of arrest is notice enough. The first intervener here claims as owner, dispossessed. The vessel was out of Australian waters when the application was made to this court. The paramount right is in the plaintiff by virtue of the earlier mortgage, to seek this court's help in proceedings *in rem* based on uncontested factual matters before the court in relation to the mortgage by the original owner (from whom the 1st intervenor says it derives its rights) as previously shown at the time of the order for possession.

I was referred to Kents case. That federal court decision deals with the ownership issue. There is much argument about legal, equitable and beneficial ownership. The need to consider the practical meaning of "beneficially owner" as arising under a demise charter does not arise in this case. The maritime claim arises not under the lease agreement between Tangaroa Fishing and Pacific Emporium but under the earlier mortgage agreement of the plaintiff and Tangaroa Fishing. That latter Company is the legal owner as Mr Radclyffe successfully argued. Tangaroa Fishing entered into the mortgage agreement with the Westpac Bank earlier in time to the lease agreement and in any event the express terms of the lease agreement preclude the first intervener from denying ownership in the lessee, Tangaroa Fishing. The practical meaning that Brandon J thought to put on the term "beneficial owner" as including a party in possession was subsequently criticized by Rolf J who considered a demise charter had "beneficial use" not "ownership".

In this case there is nothing advanced to support departure from the natural and ordinary meaning of the words of the lease agreement. There is no evidence of the exercise of an option to purchase which would transfer ownership from Tangaroa Fishing to Pacific Emporium.

Consequently for the purposes of the maritime claim in which the plaintiff is interested in this court, the owner is clearly Tangaroa Fishing.

Mr Lavery also relies on s.203 (7) as affording the intervener rights as claimant. I do not need to consider the subsection for I do not find need to "release" the ship. The interveners here (the second intervener with a sub-lease of the ship, stands or falls on the argument of the first intervener) has a dispute arising out of the lease of the vessel Tangaroa Fishing. That dispute arises out of the lease agreement coupled with the effect of my earlier order for possession in favour of the plaintiff and the fact of the appointment of Mr. N.C. Hall, the receiver and the manager of the Ship in Australia on the 30th June 2004.

These parties are Australian entities. The ship is in Solomon Islands waters although it is an Australian registered ship. The right of the plaintiffs to proceed by an action *in rem* against the ship is based solely on its presence in country. Any contest of these intervening parties should more properly be conducted, if it be, in Australia. The conflicting rights of these interveners should be dealt with in the *forum conveniens*. The *forum conveniens* is Australia.

Should it be necessary I grant leave, effective from the date of the earlier order for arrest, in supporting of my brother Judges order and dispense with notice to the Australian Consul.

For these reasons I refuse orders in terms of the application which is consequently dismissed. Cost of these proceedings shall be paid by the Intervener, Pacific Emporium