

McGREGOR CONSULTANT AND MANAGEMENT SERVICES LTD v KAMA

Supreme Court
Harwood J
Civil Case 263/84

7 November 1984

10 *Admiralty action - owner may arrest own ship*

Conflict of laws - court entitled to assume, in absence of proof to the contrary that law of Tonga same as law of foreign country

Conflict of laws - matters of evidence and procedure to be determined by lex fori

Practice - arrears of rent should be specifically pleaded as special damages and did not constitute general damages

20 McGregor Consultant and Management Services Ltd, which was based in Fiji, by a written agreement made on 14 October 1983 leased a fishing vessel to William Jackson for 12 months. In November 1983 Jackson withdrew, and in December 1983, the company entered into a written agreement in Fiji with Kama for a lease of the vessel from 14 November 1983 until 14 October 1984. In March 1984, after he had failed to pay the rent due under the lease, Kama signed in Fiji an undertaking to pay the arrears.

30 Kama failed to make payments for the hire of the vessel in accordance with the agreement of December 1983, and in July 1984 the company terminated the agreement, and arrested the vessel which was in Tongan waters.

The company sued for possession of the vessel and general and special damages, and Kama counterclaimed for damages for losses caused to him, he alleged, by the unseaworthiness of the vessel.

HELD:

Upholding the plaintiff's claim for possession, but not the claims for general damages, and dismissing the counterclaim:

- (1) Insofar as the law to be applied was the law of Fiji, the court was entitled to presume that it was the same as Tongan law, unless the contrary was proved;
- (2) Matters of evidence and procedure were to be determined by Tongan law as the *lex fori*, and accordingly the written agreement of December 1983 was admissible as evidence even although it might not have been admissible in Fiji for lack of a stamp;
- (3) The agreement of December 1983 was not proved by the defendant to have been procured by misrepresentation or duress by the plaintiff, and was binding on the defendant ;
- 50 (4) The plaintiff had properly instituted admiralty proceedings in Tonga and arrested the vessel for non-payment of rent under the lease;
- (5) The plaintiff had lawfully rescinded the agreement in July 1984 and an order for possession was made, but no award of general damages, and since arrears of rent were not pleaded as special damages no award was made of them;
- (6) The defendant had not proved that the vessel was unseaworthy nor that he had suffered losses as a result.

Counsel for Plaintiff: Mr Niu

60 Counsel for defendant: Mr Parmanandam

Harwood J

Judgment

In this case both parties agreed that the proceedings be conducted in English without the necessity of a shorthand note and that the Judge's notes would suffice.

70 Insofar as the *lex causae* maybe the law of Fiji, that law has neither been pleaded, nor proved by evidence, the onus being upon the party relying on it. I am, I believe, entitled to presume that it is the same as Tongan law in relation to this case, in the absence of proof to the contrary, and I am not entitled to take judicial notice of it nor do I feel impelled to undertake research into it of my own motion. By his causing the arrest of the "res" in Tonga, the Plaintiff made his election as to the *forum conveniens*. The Defendant disputes the agreement and in any event, so far as clause 21 thereof is concerned, neither of the parties has placed any reliance upon that clause in the pleadings as they would ordinarily be obliged to do under R.S.C. Order 18, rule 8(1) if they wished to rely upon it in support of, or as a defence to, the action. Accordingly it is, in my judgment, quite proper for this Court to have proceeded with the hearing of this case, in its endeavour to secure that justice is done between the parties without further delay, in accordance with and applying the *lex fori* and with due regard to sections 3 and 4 of the Civil Law Act (Cap. 80 14).

At an early stage, Mr Parmanandam for the Defendant objected to the production of the agreement (Exhibit 1) basing his objection on the provisions of sections 39 and 41 of the Stamp Duties Act of Fiji (Cap. 205) which he referred to. Having regard to the fact that questions of evidence are matters of procedure for the *lex fori* and that the question of proof of the facts in the action is to be determined by the *lex fori* and that no objection to its validity had been earlier made or pleaded, I overruled his objection: under the law of Tonga, Exhibit 1 was and is properly admissible, questions relating to the admissibility of evidence are governed by that law in this Court even if the inadmissibility of Exhibit 90 1 in Fiji would be for want of a stamp.

The Plaintiff is and was at all material times the registered owner of the motor vessel "Rainbow Runner". Despite the criticisms levelled at the Plaintiff in the closing address by the defendant's counsel for having caused the arrest of its own vessel on 17th July, 1984, I was and am quite satisfied that the arrest was lawful and proper. By doing so the Plaintiff properly instituted an action in rem in respect of the vessel under the Admiralty jurisdiction of this Court on the ground that the Defendant, to whom the vessel was alleged to have been leased, had defaulted in respect of certain monthly rental payments and other debts relating to the running of the vessel. 100

The lease agreement relied upon by the Plaintiff has been produced as Exhibit 1 by Malcolm McGregor, the managing director of the company, whose claim briefly stated is that after leasing the vessel the Defendant made use of it yet, thereafter, failed to pay any of the amounts due under the agreement from and including the month of December, 1983. The Plaintiff duly terminated the agreement on 17th July, 1984, when the vessel was arrested, since when the vessel has remained under arrest up to the present time.

The Defendant, on the other hand, alleges that, although he did lease the vessel on certain terms and conditions, the agreement relied upon (Exhibit 1) is not the contractual document; he says that the Plaintiff caused the preparation of two purported lease agreements and furthermore that by reason of certain fraudulent or innocent misrepresentation, Exhibit 1 is void and unenforceable and that in addition the vessel, when leased, was unseaworthy. The Defendant counterclaims \$47,000 damages arising 110

from loss of use of the vessel for the purpose of fishing and the cost of repairs; and he asks the Court to declare that Exhibit 1 is void and unenforceable for the reasons particularized in the defence and counterclaim.

In support of the Plaintiff's case I heard the evidence of Malcolm McGregor, and of William Travis who described himself as a marine and fisheries consultant, and reliance is placed by the Plaintiff upon documentary Exhibits numbered 1 to 7 inclusive. In support of the Defendant's case I heard the evidence of the Defendant himself who placed reliance upon Exhibit 8. I was impressed by the demeanour of Mr McGregor as a witness and I am quite satisfied that his evidence was given carefully, and that he was as accurate in his evidence as he possibly could be. By contrast, I have no doubt at all that the Defendant's evidence is not reliable. He appeared to me to attach little importance to the need for accuracy; he was at times deliberately evasive and at other times - especially when probed in cross-examination - clearly bolstering his evidence by invention. In determining the facts of this case I have no hesitation in accepting Mr McGregor's version of events and, where his version conflicts with that of the Defendant, I feel confident in rejecting the evidence of Meli Kama. Against that background I find the following facts satisfactorily proved.

The Rainbow Runner is a fishing vessel registered with the Fisheries Division in Fiji. It was leased in pursuance of a written agreement to one William Jackson on 14th October, 1983 by the Plaintiff for 12 months. The vessel left Suva that day with Jackson aboard and was met in Tonga by the Defendant. In late October, or early November, Jackson flew back to Fiji & spoke to Mr McGregor as a result of which the latter spoke to the Defendant in Tonga by radio or by telephone and it was agreed verbally that the Defendant would take over the vessel as lessee on similar terms and he did so. In December the Defendant went to Suva, announced his arrival to Mr McGregor, and the two met on 20th December for the purpose of entering into a formal written lease agreement prepared by Mr McGregor. The formal agreement so prepared was Exhibit 1, and this was signed on that date by the Defendant's son. This location was chosen by the Defendant. The Defendant having browsed through the agreement, his son read it, and the Defendant signed it at the end of the Schedule on page 5, also initialling each of the first 4 pages. The next day the Defendant came back to Tonga to resume fishing and he made arrangements for the payment by him of \$2166 to the Plaintiff which was the instalment due from him for the month beginning 14th November, 1983, under clause 3 of Exhibit 1. This sum was duly received by the Plaintiff and acknowledgement of receipt is recorded by Mr McGregor on Exhibit 2. This was the only sum ever paid by the Defendant. I find that the Defendant was not rushed into signing, and that he was aware of, and in agreement with, what it principally contained. It is the clearest evidence of a binding contract. I do not accept his evidence that "the date of commencement is nicely hidden in Clause 1 and that he was ignorant of this date" until June or July (1984) when I read the contract carefully for the first time". The insertion of that date is consistent with Mr McGregor's evidence, which I accept, that the Defendant had earlier agreed to take over the lease originally granted to Jackson; and the payment of \$2,166 by the Defendant is consistent with Mr McGregor's evidence, which I accept, that the payment was made in accordance with clause 3 of Exhibit 1 in respect of the period of one month from 14th November as shown on Exhibit 2. Needless to say I reject the Defendant's assertion that he only agreed to a lease commencing on the date of signature.

Exhibit 2 was sent to the Defendant by post on 31st December, 1983, and whilst awaiting a response the Plaintiff supplied, at the Defendant's request, a propeller for the vessel (costing \$48.68 plus air freight of \$18.70). The Defendant acknowledged safe receipt of this item by telephone, and these sums were separately included in the invoice (Exhibit 3) sent by post on 11th January, 1984, and in the invoice (Exhibit 4) sent likewise on 5th March, both of which were accumulating. The Defendant denied receiving any of these invoices; I am satisfied, however, that he did and that he never at any time disputed them - I believe that, as Mr McGregor said, the Defendant always promised to make payment when the next lot of fish had been sold.

In March 1984 the Defendant visited Fiji and was seen by Mr McGregor in the office of the Plaintiff's lawyers. Payment of the outstanding debts was demanded from the Defendant - he did not deny them; on the contrary, on 27th March he signed an undertaking in the presence of Mr Jamnadass - Exhibit 9. In addition, his son entered into a bond for the payment of all the debts then outstanding - a sum of \$10,839.38 (made up as itemized in Exhibit 4).

Certainly there were Court proceedings, in respect of these debts, either instituted or intended against the Defendant at the time of the execution of the undertaking and of the bond, and it may well be that the Defendant was, or was under threat of being, arrested on an absconding Debtor's warrant issued by the Supreme Court of Fiji. The Defendant said that his passport was seized the evening before the day of his planned return to Tonga and that he was put "under house arrest" by a Court bailiff: no doubt this was on Monday 26th March. As a result, the Defendant although he admits paragraph 7 of the statement of claim says that he acted "under duress" and that he "would have signed anything" because he wanted above all else to return to Tonga and continue fishing. I have no doubt whatever that such "duress" as there was consisted only of the threat of well-founded civil proceedings. In any event, I am satisfied that it did not have the effect (as implied I think by the Defendant) that he or his son executed a document which contained an untruth or that the evidential value of the matters so alleged in paragraph 7, and admitted in paragraph 7 of the defence, is thereby lost. Civil proceedings were in fact instituted between the parties, and were concluded by a judgment in default of appearance (as shown by Exhibit 5 which is dated 17th April, 1984). After the Defendant's return to Tonga, proved as alleged in paragraph 7 of the statement of claim, he resumed his use of the vessel for the purpose of fishing.

According to his evidence the Defendant had had engine trouble in January near Minerva Reef necessitating the vessel's return to Tonga for repairs, and trouble in February also, after a 10-day fishing trip, with the battery charger, necessitating repairs during the whole of March. He went to Minerva Reef again in April but said that after two days the auxiliary engine (which generates power to operate the refrigeration compressor) broke down necessitating his return to Tonga and three weeks of repair work. In May he says he got about half way to Minerva Reef but had trouble with the exterior of the auxiliary engine and again had to return. In June he says that he reached Minerva Reef and fished for two days when trouble occurred with the main engine water pump, the general service pump and the auxiliary engine, and that he returned to Tonga and was in the process of carrying out repairs when the vessel was arrested. The Defendant's counterclaim mentions, by way of particulars of unseaworthiness, mechanical troubles experienced in January, February, April and May. In his evidence in chief the Defendant

asserted that "in the 7 months I had the boat I was only able to do 2 weeks fishing"; he was referring no doubt to the period from the end of December 1983 to mid-July 1984. He agreed in cross-examination, that before coming to Tonga (in about 1981) he had not been a fisherman and had no seagoing experience; that the skipper's and engineer's log books would contain details of all the vessel's trips, repairs and breakdowns, but said he was not producing them and would not necessarily wish them to be produced even though "they are my case"; and that for a period of about 2 weeks the vessel was sailed without an engineer aboard. As regards the counterclaim for losses amounting to \$47,000, the Defendant agreed in cross-examination: that he has no written summary or other documentary evidence of his losses nor was any ever submitted to Mr McGregor; that he did not have a receipt book recording sums received on the sale of fish, but that an invoice book recording sums thus charged might be in his house; that he does not have a cash book though his accountant might have it; that during his 4 years in Tonga he has never made a return of income to the Inland Revenue Department; and that with regard to the cost of repairs to the vessel he does have certain papers but is not producing them because he can as well estimate the amount.

Even if I were satisfied, which I am not, that the Defendant had proved his claim for losses as alleged, I would have to be also satisfied that the Plaintiff leased to him an unseaworthy vessel. On his own evidence I am not even satisfied of that; and I also pay regard to the evidence of William Travis concerning the condition of the vessel when he inspected it in September/October 1983 and again in July 1984.

There are no properly pleaded particulars, and there has been no evidence, of fraudulent misrepresentation by the Plaintiff as alleged; and such evidence as there was of innocent misrepresentation I do not accept.

Now the Plaintiff prays for an order of possession. I find that the lease agreement, Exhibit 1, was the contractual basis between the parties and it has been lawfully rescinded by the Plaintiff. In any event it ran for 12 months from 14th October, 1983, and has now expired by effluxion of time. The Defendant has no longer any right to possession at all, whereas the Plaintiff is and has at all material times remained the owner of the vessel. The Plaintiff also claims general damages "in the sum of \$5,000"; I find this claim somewhat perplexing because it is not put forward on the basis of any proven cause and if it were to refer to any arrears of unpaid monthly instalments or other losses it should and no doubt would have been pleaded as special damages, and rightly so. I can find no basis in this case for an award of general damages on the evidence and I feel I must reject that claim. Special damages are claimed, amounting to \$1,770.05 being the amount said to be due from the Plaintiff to William Travis; the amount is itemized in Exhibit 7 and Mr Travis gave certain evidence about it. He said that on about 28th June, before these proceedings were commenced, he was retained as a consultant for a fee of F\$1,000 to, as it were, look after the interests of the Plaintiff in Tonga with, no doubt, civil proceedings here in contemplation and other tasks in connection with the vessel. Although he has not yet been paid his fee by the Plaintiff, I am satisfied that it is properly claimed and that it is reasonable and recoverable as special damages to that extent. His "account" (Exhibit 7) included, however, further items (the reasonableness of which is disputed) such as an air fare of \$225 and per diem expenses and the costs of telex messages up to 31st August plus further similar expenses and costs to date. I upheld an objection to a further amendment of the statement of claim to increase the amount claimed and in any event it seems to me

that all the charges made by Mr Travis after and beyond his initial fee fall more appropriately for consideration as costs in the action. As special damage, therefore, I consider that only T\$1050 would be justified.

Accordingly, the counterclaim is dismissed and I give judgment for the Plaintiff and award special damages of \$1,050, with costs. In accordance with R.S.C. Order 15, rule 16, under which the Court has undoubted discretion to make declarations, and having regard to the fact that even to this day the vessel is still under arrest, no application for its release having successfully been made, I declare that the Plaintiff is lawfully entitled to possession of the vessel and I order its release from arrest.