

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Application No. 48/03

BETWEEN **Worldwide Bait Limited**
Of Auckland Incorporated
Company

AND **Raro Fish Co. Limited (In**
Receivership) of Rarotonga
Incorporated Company

Mr C Little for Plaintiff
Mr J McFadzien for Defendant
Date of hearing: 19 and 22 May 2004
Date of decision: 31 August 2004

DECISION OF GREIG CJ

[1] The essence of this dispute is the ownership of the proceeds of the sale of containers of bait fish. The proceeds are held by agreement in Court pending the decision of this case. By agreement the money is to be treated as if it was the bait fish. The Plaintiff supplied the bait fish to the Defendant. It is claimed by the Plaintiff that it remained entitled to ownership under a Romalpa clause in the contract between them. The Defendant did not pay for the fish bait. It came into the possession of Latitude 22 Fisheries Limited which operated cool storage facilities... The Defendant claims that that was by sale and purchase. The Plaintiff claims that it was for storage only. There is an additional claim for \$12600.00 as the cost of storage and power costs incurred by the Plaintiff.

[1] In May 2003 the Plaintiff and Defendant entered into an agreement for supply of fish bait. The fish bait was to be supplied on a regular basis sourced from the Plaintiff's supplier in South Africa. The first container was supplied and duly paid for. Two further

containers were delivered to Rarotonga in or about July and September 2003. Payment was not made for them. The agreement for supply included the following:

“6. Transfer of property and goods to buyer
On payment of full price

“7. Rights of unpaid seller

Irrespective of whether property in the goods has passed to the buyer or not, until the seller shall have received the full price of the goods, the seller may hold or obtain possession of the goods and sell or resell the goods at the prevailing market price at the time of sale, and may direct any carrier or shipping company as agent of the buyer”

[2] It was the evidence of the Defendant that after the first shipment no further order was made and that there was no continuing arrangement for supply. That evidence was not put in terms to the witness for the Plaintiff and is contrary to the contemporary record contained in emails to the defendant and to the Plaintiff's supplier. For example in email, dated 30 June 2003 the Plaintiff records that the Defendant had confirmed a 3 weekly schedule during a visit to the defendant earlier that month. Later emails to the Defendant on 11 and 20 and 25 August 2003 all refer to the continuing supply. There is no response from the defendant until early September when the Plaintiff took steps to stop any further supply from South Africa. I do not accept that there was any early change to what was a continuing arrangement which came to an end in September when the Defendant indicated to the Plaintiff that the bait was not selling and was still on the wharf.

[3] The principal defence to the claim is that the bait fish was sold by the Defendant to Latitude 22 in or about September 2003. Invoices dated 12 and 25 September were produced in support of that. In addition there was an email from the Defendant to the Plaintiff dated 10 September the text of which is:

“I have not been able to make any sales until yesterday. Latitude 22 Fisheries Ltd has been taken over by the owner of the big CITC group. They wish to purchase both containers. I will complete negotiations today or tomorrow.”

There is no evidence documentary or otherwise that the Defendant ever advised the Plaintiff that the negotiations had been completed though the Plaintiff had emailed on 15 September enquiring progress of the negotiations.

[4] The Plaintiff's evidence on this was that in September there was discussion about obtaining storage for the bait off the wharf and that the defendant as agent of the Plaintiff should endeavour to sell. It was said that on or about 19 September the Plaintiff was advised that the deal with CITC had fallen through. Mr Matai Price who at the time was involved with Latitude 22 gave evidence on behalf of the Plaintiff. He stated that the Defendant had approached him for storage and that the bait was taken into the cold store. Later he was asked if he wanted to buy the bait and that he should deal through the Plaintiff. Mr Price said that in discussion with an officer of the Westpac Bank he understood there was a dispute as to ownership. He denied any sale or purchase of the

bait had taken place and suggested that the later invoice was spurious and had been backdated. He said that only the earlier one was handled by the Defendant who had sought payment from him at his home.

[5] At a later stage there was email correspondence between Mr Matai and the Plaintiff about a sale but that came to nothing after the Defendant went into receivership on or about 8 October 2003.

[6] In the end I prefer the evidence of the Plaintiff's witnesses. There was a consistency between them and a relation of events which seemed to me to be more logical and businesslike as might be expected in transactions in the circumstances of the case. The Defendant's witness was, in my view, prepared to extend his evidence to fit the position that he wished to reach. As an example he at a later stage, as receivership loomed, proposed a reconstruction of the documents to alter the title to the goods. This was rejected by the Plaintiff but indicates the steps the Defendant was prepared to take. I conclude that there was no sale of the bait in question to Latitude 22 but that it remained in its possession for storage only.

[7] Subsequently the bait was sold by agreement between the Plaintiff and the receiver of the Defendant. The money is held or to be held in Court pending the decision of this case. For the purposes of the case the money is therefore to be treated as if it was the bait itself. This would not be the situation, in the Defendant's submission; if the bait had been sold by the Defendant as that it is said would have altered the title position. Since I find there was no such sale the bait remained in storage unaffected by any subsequent transaction by the Defendant.

[8] The contract between the parties is declared to be governed by New Zealand law but in this case there is as I understand it no difference between New Zealand and Cook Islands Law. The Court of Appeal in *Pongakawa Sawmill Ltd v NZ Forest Products Ltd* [1992] 3NZLR 304 stated the law:

"The legal answer rests in the end on the interpretation and application in the particular circumstances of ss.19 and 21 of the Sale of Goods Act. In arriving at the intention of the parties one must consider the agreement as a whole and in rare cases the proper conclusion may be that viewed overall the parties intended the property to pass even though a contrary statement appears somewhere in the document".

That was a case like this where the document could hardly be clearer in expressing the intention that title was to remain with the seller until full payment and that in any event the seller might obtain possession of the goods and resell them. There is no issue as in that case about the processing of the goods or their onward sale or disposal in the course of trade.

I think that it is plain that the intention of the parties as expressed in their contract was that the bait fish remained in the ownership of the Plaintiff until paid for, there being no payment the Plaintiff remained the owner until the sale agreed between it and the

receiver. The Plaintiff is entitled to the proceeds of that sale as represented by the money held or to be held in Court. Further as owner it became responsible for the storage which arose because of the Defendant's failure to pay for the bait. It is entitled to recover that liability from the Defendant.

[9] There will be judgment for the Plaintiff that it is entitled to the proceeds of the sale of the fish bait as held or to be held in Court. There will be an order for payment out to the Plaintiff accordingly. There will be judgment for the Plaintiff against the Defendant in the sum of \$12600.00. The Plaintiff is entitled to costs. If necessary I will receive submissions from Counsel in that regard.

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