

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

Misc No. 27/2005

BETWEEN COOK ISLANDS FISH
EXPORTERS LIMITED

Plaintiff

AND ADELITA FISHING LLC

First Defendant

THE CHIKAMI FAMILY
PARTNERSHIP

Second Defendant

Mr A Relf for 2nd Defendant

Mr A Robinson for Plaintiff

Hearing: 2 May 2005 (C I time) by telephone

Date of Judgment: 5TH MAY 2005 (C I)

Reasons for Judgment of Greig CJ

1. On 15 April 2005 on an ex parte oral application I made an order against Adelita Fisheries LLC and the fishing vessel Adelita that the vessel remain at Rarotonga till further order of the Court. There has been some confusion about the name of the company but it is agreed that it is properly named as in the heading. I made an order changing the name of the 1st Defendant accordingly.
2. The 2nd Defendant makes this application to rescind or vary the order made. The application is supported by an affidavit of Stuart Chikami a member of the partnership and of the company the 1st Defendant. The partnership is the mortgagee of the FV Adelita under a mortgage dated 2 September 2003. After

argument I made an order joining the partnership into the proceedings as 2nd Defendant.

3. This case is another proceeding arising out of the prosecutions brought under the Marine Resources Act 1989 against Mr Chikami and another alleging a number of offences in the course of fishing by the FV Adelita. The vessel was seized on 24 November 2004 after a sighting by aircraft and was escorted to Rarotonga. By my judgment in March 2005 the vessel was released on bond conditions but before it had sailed this Mareva injunction was granted.
4. As part of the seizure of the vessel the catch of fish on board was seized pursuant to section 31 (2) of the Act. The Plaintiff purchased the catch and on sold it to StarKist Samoa Inc a cannery operation in American Samoa. That company has refused to pay the Plaintiff the purchase price because the 1st Defendant has made claim as owner to the catch. It challenges the validity of the seizure and sale of the catch by the Cook Island authorities. The Plaintiff claims in the proceedings it has issued after the grant of the injunction that the 1st Defendant in so claiming its right of ownership has committed the tort of interference with its contractual rights. The 1st Defendant has issued proceedings in Samoa against StarKist, the Plaintiff in this case and a number of John Does in support of its claim of ownership of the catch. Those proceedings have not been served on the Plaintiff or any of the authorized persons acting under the Act in Cook Islands.
5. StarKist has acknowledged to the Plaintiff that it is holding the proceeds of the purchase and will pay it out on agreement of the parties or on order of the Court.
6. At this stage there are a number of facts in dispute and the Court is unable to come to any conclusion on them. These include the currency of the sale in Samoa, the actual amount which is payable under that sale, the terms of the

contract between the sellers of the catch and StarKist, (there are forms of contract signed respectively by the Plaintiff and the 1st defendant). There are legal disputes to be resolved as to the appropriate forum for the hearing of the issues in the case. The key issue is the validity or otherwise of the seizure and sale of the catch of fish. That seems to depend on the proper construction of the Act which on one view can be dealt with as a precedent question to any substantive hearing of the disputes between the parties and on the other view as a subsequent question following and depending on the result of the prosecutions of Mr Chikami and the other person.

7. What is clear to me at this stage is that there is evidence that the 2nd Defendant has satisfied the onus of showing that it has a right to be joined in these proceedings and to challenge the injunction and its continuance. It is plain too that the 1st Defendant has maintained its claim, in competition with the Plaintiff, to ownership of the catch. As a result Starkist has refused to perform the contract with the Plaintiff. I expect that in due course Starkist will interplead. There is likely to be further proceeding in Cook Islands and a dispute as to the proper forum.
8. A number of technical matters of procedure were raised in support of the application to rescind the injunction. I do not intend to deal with them seriatim or at all. I did not give them any weight and would not have found in favour of the Plaintiff on any of them.
9. The Plaintiff's submission was that the legal test for a Mareva injunction is threefold:
 - a. Does the Plaintiff have a good arguable case on its substantial claim;
 - b. Are there assets of the Defendant within the jurisdiction to which the orders can apply;

- c. Is there a real risk that the Defendant will dissipate or dispose of assets so as to render himself “judgment proof”.
10. There is no question that the FV Adelita is an asset of the Plaintiff and is in the jurisdiction. Equally plain is the intention of the Defendants to remove the asset from the jurisdiction and not to return it. It has sought and obtained release of the vessel under bond for the purpose of its removal and its operation elsewhere. The real question is whether there is a good arguable case that the tort of interference with contract has been committed.
11. Motive and intention on the part of the defendant are not in issue but the defendant may be justified in acting as it did even though the result may be interference with a contract with a third party. That is a well recognized principle though there seems to be a paucity of authority on it. The head note to *Edwin Hill & Partners v First National Finance Corp* [1988] 3 All ER 801 CA reads in part “If the defendant had an equal or superior right that would justify him in interfering with the plaintiff’s contractual rights”. Reference may also be made to *Glamorgan Coal Co Ltd v South Wales Miners’ Federation* [1903] 2 KB 545 and particularly to Romer LJ at 574 adopting the remarks of Bowen LJ in *Mogul Steamship v McGregor* (1889) 23 QBD 598 at 618. In *Griffiths v Commonwealth Bank* [1994] 123 ALR 111 at 119 Lee J said the “...justification... will depend upon whether the interferor has sought, bona fide, to protect an equal or superior right to that of the interferee..”. His Honour went on to suggest the a test was whether the right was capable of supporting injunctive relief to restrain the exercise of the contractual rights.
12. Here the 1st Defendant had at least an equal right as original owner to the Plaintiff. There is no evidence to suggest that it was acting otherwise than bona fide in claiming its rights to the catch. The 2nd defendant is I believe entitled to

base its claim under the mortgage on the 1st defendant's rights and actions. In any event it can do so on its own as mortgagee of the vessel.

13. In any event I was satisfied that in the circumstances I would properly exercise my discretion to refuse or rescind the injunction. What is at stake is the contract price as between the Plaintiff and Starkist. That is held by the latter and it has declared that it will not pay out without agreement or Court order. It would be entirely unreasonable that the Adelita should be restrained for what is a very much smaller sum than the value of the vessel. This could not be a case for exemplary damages. Of course the money at stake is held in another jurisdiction but it does not seem to me that should weigh against the defendants.
14. For these reasons I made an order rescinding the injunction. I made an order that costs should follow the event and so there is an order for costs to the 2nd defendant in any event. The quantum if not agreed by Counsel will be fixed by the Court on submissions. Leave is reserved to the parties to apply further if necessary.

Laurie Greig CJ

A handwritten signature in black ink, appearing to read "Laurie Greig CJ". The signature is written in a cursive, flowing style.