

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0001 OF 2005S
 (High Court Admiralty Action No. 11 of 2001)

BETWEEN:

1. CLARKE MCLEOD
2. MARY QUASS
3. WEST PACIFIC SEAFOOD LIMITED

Appellants

AND:

1. FIJI FISH MARKETING GROUP LIMITED
2. INTERNATIONAL FREIGHT AND CLEARANCE SERVICES LIMITED
3. AGAPE FISHING ENTERPRISES LIMITED
4. JOE'S FARM PRODUCE LIMITED
5. UNITED MARINE S.P. LIMITED
6. SHELL FIJI LIMITED
7. SUNG JIN CO. FIJI LIMITED
8. TRIPACIFIC MARINE LIMITED
9. SOUTH SEAS ENGINEERING LIMITED
10. MARINE UNION OF FIJI
11. SEAMECH LIMITED
12. OFFICIAL RECEIVER
13. DURGA PRASAD
14. CAPTAIN REA CHUN BAK

Respondents

Coram: Gallen, JA
 Ellis, JA
 Scott, JA

Hearing: Wednesday, 19 July 2006, Suva

Counsel: J Apted and F Haniff for the Appellants
 I Roche for the 1st Respondent
 V Tuberi for the 2nd and 3rd Respondents
 D Sharma for the 4th, 5th and 6th Respondents
 V Kapadia for the 7th Respondent
 D Sharma for the 8th and 9th Respondents
 T Fa for the 10th Respondent
 D Sharma for the 11th Respondent
 No Appearance for the 12th and 13th Respondents
 V Kapadia for the 14th Respondent

Date of Judgment: Friday, 28 July 2006, Suva

JUDGMENT OF THE COURT

Introduction

- [1] This is an appeal from a decision of Pathik J exercising the jurisdiction of the High Court in Admiralty.
- [2] On the 4 December 2001 the first respondent in these proceedings, Fiji Fish Marketing Group Limited, (hereinafter referred to as Fiji Fish Marketing) filed, *ex parte*, a notice of motion for the arrest of three fishing vessels, The Mary Q, The Mary M, and the Holy G. This was supported by an affidavit claiming that at the request of Great Pacific Sea Food Limited, services and supplies had been provided to the three ships above named, and that Great Pacific Sea Food Limited, the first defendant in the proceedings was indebted to Fiji Fish Marketing in the sum of \$95,771.51. The affidavit indicated that it was imperative that the vessels be arrested because it was alleged Fiji Fish Marketing had no other means of enforcing a claimed maritime lien over them. On 4 December 2001 an order was issued by Fatiaki J (as he then was) in chambers after hearing counsel for Fiji Fish Marketing, that a warrant of arrest be issued to arrest the vessels. On the 6 December 2001 *ex parte* notices of motion for leave to intervene were filed by the second respondent in these proceedings, International Freight and Clearance Services Limited, and Agape Fishing Enterprises Limited the third respondent in these proceedings, and on the 7 December 2001 similar applications were filed by United Marine S.P. Limited, and Joe's Farm Produce Limited. All of them are respondents to these proceedings. On 10 December 2001 Shell Fiji Limited sought leave to intervene. At that time the solicitors for the defendants were Munro Leys, on whom the statement of claim was served, and the acknowledgment of service was filed.

- [3] On 11 December 2001 the firm of Munro Leys on behalf of the appellants in these proceedings Clarke McLeod the first appellant, Mary Quass the second appellant, and West Pacific seafood Limited the third appellant, filed *ex parte* notices for leave to intervene. The applications in respect of Mr McLeod and Ms Quass both indicated that the leave to intervene was sought by them as mortgagees so that at that stage at least it was a matter of record that the claims were made on that basis. It is pertinent to point out that the firm of Munro Leys was acting both for the defendants, having accepted service on their behalf, and for the claimant interveners. This assumed some importance in later arguments. On 7 January 2002 Tripacific Marine Limited sought leave to intervene.
- [4] At this point it is appropriate to note that the appellants sought to rely in this Court on material contained in an affidavit made by Mr McLeod setting out in detail correspondence and negotiations between Mr McLeod, Ms Quass their United States solicitor and Messrs Munro Leys and Co. This material was not before the Court in the case under appeal, but leave was sought to introduce it before us and to rely on the material which it contains.
- [5] In his decision the Judge noted that on 1 February 2002 Mr Clarke appeared before Fatiaki J for the plaintiff and Mr Haniff for the defendants and mortgages when orders by consent were made as follows:-

"Court: By consent there will be an order for the boats to be sold and the proceeds of sale be paid into court for distribution.

Mr Haniff: defendants are quite happy to conduct the sale which will be by transparent public tender.

W Clarke: Consent, better that boats be sold than left to depreciate and incur additional costs.

Court: So ordered by consent.

That vessels be sold by the defendants and proceeds of sale be paid into court."

- [6] On 17 April a further order was made by consent by the Deputy Registrar in the following terms:-

"It is declared that the High Court of Fiji has jurisdiction over the motor vessels "Holly G", "Mary M" and "Mary Q."

It is further ordered that:

- 1. "The vessels "Holly G" – Official Number 972469, "Mary Q" – Official Number 650399, "Mary M" – Official Number 621074 be sold by the High Court of Fiji free and clear of any and all encumbrances and the proceeds of the sale be paid into the High Court of Fiji.***
- 2. That an application be made for the deletion of the United States of America Coast Guard Registration of the said vessels "Holly G", Mary Q" "Mary M" from the National Vessel Documentation Centre in the United States of America.***
- 3. Costs of this Application be costs in he cause."***

- [7] On 15 May Fatiaki J granted leave for the papers relating to applications to intervene to be served on the defendant's solicitor who was of course Munro Leys. It is asserted that it was only then that the other interveners learned of the mortgages. Mr Haniff is recorded as appearing for Mr McLeod and Ms Quass as mortgagees.

- [8] The sale of the vessels proceeded, and it became apparent that the proceeds of the sale would be insufficient to allow payment in full to all the claimants so that a decision was necessary as to their various entitlements under the admiralty jurisdiction of the Court.

- [9] The proceedings to determine the rights of the parties came before Pathik J who delivered a reserved decision on 4 January 2005.
- [10] The Judge stated that the issue before him could be expressed in the following terms:
- “The issues before me are firstly to determine the entitlement reached in the interveners claim and secondly to determine how the proceeds of sale deposited in Court are to be divided amongst the several claimants whether any particular claimant is to be afforded priority over any other claimant. The determination of these issues involves a consideration of the law of priority.”***
- [11] The Judge referred to the proceedings which had already taken place and obviously faced the disadvantage that he had had no involvement in the early stages having not received the file until October of 2002. At the hearing before the Judge counsel for some at least of the claimants took strong exception to Mr Haniff and the firm of Munro Leys having acted both for the defendants and for Mr McLeod and Ms Quass. It was claimed that there was a sufficient conflict of interest to make this inappropriate and it was argued that this ought to have a bearing on the outcome of the claims. We were informed that the objection to Mr Haniff acting was later withdrawn, but it is clear that this question not surprisingly coloured the approach which the Judge adopted in determining the questions before him, particularly as he considered the equity of the situation might determine the order of priority.
- [12] Having considered submissions made he set out to determine the competing claims and expressed the view that an over-riding consideration was a necessity for the Court to endeavour to do justice between the parties. He considered that the allegations of impropriety against the advisers to Mr McLeod and Ms Quass in acting for the defendants as well had a bearing on the equities of partition.
- [13] The Judge took the view that in consenting to the sale of the vessels free of all encumbrances, Mr Haniff acting for the mortgagees, the appellants had waived their rights as mortgagees, although he did not spell out to what that waiver actually

extended. Subsequently in his decision he made it plain that he considered it was a waiver of the right to rely not only on the securities but also to claim against the proceeds of sale.

[14] The Judge went on to then determine the entitlements of other claimants claiming to intervene.

[15] From that decision the appellants appeal, not only against the decision which affects their rights under the mortgage and to claim against the fund, but also asserting that the findings of the Judge with regard to the right to maritime liens and the assessment of amounts payable were wrong in law and in fact.

[16] It was clear from the submissions filed that a great many issues were raised by the appeal and it was also clear that the material before us was insufficient to enable us to determine what amounted in a number of issues to questions of mixed law and fact. In an endeavour to achieve some finality in a complex matter we suggested to counsel that there were in fact four main issues which needed to be determined before finality could be achieved and we set them out in the following form:-

- (1) What is the nationality of the boats?
- (2) Are the mortgages valid in terms of the law which applied to the nationality of the boats?
- (3) Did the consent of counsel or solicitors to the sale of the boats free of encumbrances amount to a waiver of any right of the mortgagees to participate in the proceeds of sale or to their priority in terms of the admiralty procedures for priorities?
- (4) Whether and to what extent the claims of the respondents are entitled to priority as being entitled to maritime liens?

- [17] After some discussion counsel agreed that the nationality of the boats was American they being registered, on the material before us, in Hawaii.
- [18] The question of the validity of the mortgages in maritime law and their enforceability could not be determined. During the course of the proceedings an affidavit had been filed on behalf of the appellants from a person appearing to be qualified as an expert on United States shipping law and indicating the effect under that law of the existence of the mortgages on which the appellants rely. This affidavit had not been released to other parties nor had they had any opportunity to consider it or produce any counter material. The judge stated that it he had not read it and did not intend to refer to it and there was no further argument on it.
- [19] The content and effect of foreign law is a question of fact to be proved in the ordinary way either by affidavit or oral evidence. The material provided by the affidavit was in our view both relevant and admissible but in the absence of any opportunity for any other party to express opposition or to put forward material which might question the conclusions expressed it must follow that it would be impossible to rely upon it at this stage to conclude any of the issues which remain extant.
- [20] It is therefore impossible for us to arrive at any concluded view on the validity or effect of the mortgages in this case.
- [21] Counsel agreed however that it was possible and desirable to determine the questions raised by issue 3 and we heard submissions from all counsel who wished to make them with regard to this issue.
- [22] The first question is whether any of the material before the Court could give rise to a waiver sufficient to prevent the appellants from now relying upon the mortgage securities which they hold, to support a claim against the funds obtained from the sale of the vessels.

- [23] A waiver can be express or implied but in either case it is essential that it be a deliberate act intended to make it plain that the party waiving is abandoning a right or rights on which that party might otherwise rely. The Judge thought that the action of Mr Haniff in consenting to the sale of the vessels free of all encumbrances amounted to such a waiver. We regret we cannot agree.

The sale of a ship by the Admiralty Marshall gives the purchaser title free of all maritime liens and other charges and encumbrances and after the sale all claims and demands against the ship can only be enforced against the proceeds of sale. See Meeson Admiralty Jurisdiction and Practice p142 and the cases there cited. If it were not for such a principle sales could never be effected. We do not think the consent went beyond allowing the Admiralty procedures to continue and did not amount to a waiver of the mortgagees to rely upon the mortgages in support of a claim against the proceeds of sale, nor to a waiver of a right to claim against those proceeds.

- [24] In argument Mr Roche did not abandon the contention that there had been a waiver but did concede his argument was stronger based on the assertion that the appellants were, in the circumstances of this case, estopped from relying on the mortgages either as securities or as a basis for claim against the sale proceeds. In support of this argument he relied on two propositions.

The first of these was that although the appellants intended to rely on the mortgages they did not disclose their existence until May of 2002 so that at the time they gave notice of intervention the respondents were not aware of the existence of the mortgages, and suffered detriment, since if they had known of the mortgages they might not have incurred the expense of proceedings. We do not think this argument can stand. The appellants had given notice of intervention long before May and the delay occurred only because these applications were not released by the court until then. It is impossible to say that the appellants in the circumstances could be said by act or omission to have intended or induced the respondents to

alter their positions and there is no evidence other than assertion that any of them did so.

The second ground on which he relied was that there had been no reservation of rights of the mortgagees when consent was given to the sale. This argument cannot succeed for the same reasons that we consider there was no waiver in the legal sense. There is neither evidence of inducement nor reliance to support an estoppel.

[25] Accordingly we find that there was in this case neither waiver nor estoppel which affects the rights of the appellants to claim the monies which secured in respect of the vessel sold.

[26] For those reasons the appeal must be allowed, but unfortunately that is not the end of the matter.

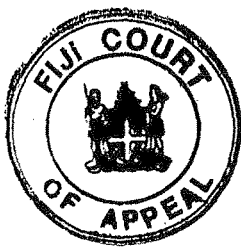
[27] Because the affidavit of the expert was not in the circumstances made available to the parties to contest either by cross examination or by producing contrary material we are in no position to conclude whether or not the mortgages were enforceable under the law of the United States or what effect they would have had in determining priorities in dividing the amount recovered on the sale of the vessels.


[28] Nor are we in a position to determine the disputed questions of fact which relate to the extent of priority or protection conferred by maritime liens in respect of other claims. In any event these must now be considered in relation to the claims made by the appellants and priorities assessed.


[29] Accordingly the proceedings must be remitted to the High Court for a determination of the appropriate apportionment of the proceeds held in Court taking into account our decision on the claims of the appellants. Whether or not the subsequent affidavit of Mr McLeod referred to above is taken into account in whole or in part is a matter for the High Court.

[30] In the circumstances of this case we understand the problem faced by the Judge but in view of the opinions he expressed with regard to the appropriateness of the actions of the counsel appearing for more than one party we think it would be undesirable for the case to be sent back to the Judge who originally heard it.

[31] The appeal is allowed and the matter is remitted to the High Court for determination of the apportionment of the funds held in Court after sale of the vessels concerned in terms of the established priorities on such apportionment in admiralty actions of this kind. The appellants are entitled to costs which we fix it at the sum of \$750 in respect of each appellant together with disbursements to be fixed by the Registrar. Such costs are to be born by the respondents pro-rata with the amounts claimed by them.




Gallen, JA


Ellis, JA


Scott, JA

Solicitors:

Munro Leys, Suva for the Appellants

Howards Lawyers, Suva for the 1st Respondent

Tuberi Chambers, Suva for the 2nd and 3rd Respondents

Messrs R Patel and Company, Suva for the 4th, 5th, 6th, 8th, 9th, and 11th Respondents

Messrs Sherani and Company, Suva for the 7th and 14th Respondents

Messrs Tevita Fa and Company, Suva for the 10th Respondent

No Appearance for the 12th and 13th Respondents