

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 153 of 2016

BETWEEN : **FREEDIVE (FIJI) CHARTERS LIMITED** a limited liability company
having its registered office at 31 Evuevu Place, Pacific Harbour, Fiji

PLAINTIFF

AND : **BLUEWATER CRAFT LIMITED** a limited liability company having
its registered office at Lot 3, Naitata Road, Navua, Fiji.

DEFENDANT

Counsel : **Mr. K. Chambers for Plaintiff**
Ms. Ali for the Defendant
Date of Hearing : **21st June, 2017**
Date of Judgment : **18th July, 2017**

JUDGMENT

INTRODUCTION

1. Defendant filed an *ex-parte* motion inter alia for return of vessel FAD 1 which was registered by Plaintiff. The hull of vessel FAD 1 was initially, built by the Defendant and possession of it given to the Plaintiff upon an 'Operating Agreement' in return for 10% share of all revenue from usage of the vessel. This 'Operating Agreement' worked well for the parties till there was an accident where hull of the vessel FAD 1 was damaged and it was later returned to the Defendant for repair. A dispute arose as to the amount of work done on repair and amount of receipt of the insurance claim by the Plaintiff and not fully reimbursement the same to Defendant. This resulted this action by the Plaintiff seeking interim order for possession of vessel from Defendant. The agreement was for a time period for sharing of 10 % all revenue generated from FAD1 and for the return of the ownership of hull to Defendant at the 'termination' of the said contract. The initial time period for the said agreement ended, and there was no consensus by two parties for extension for further time, though there was an option for such further extension of it. By not consenting

to extension the time period of 'Operating Agreement' is now ended and according to 'Operating Agreement' hull of FAD 1 is to be returned to Defendant. What was agreed between the parties should be given priority in terms of 'freedom of contract' of the parties. It is admitted fact that no revenue were shared in terms of the said agreement since the return of FAD 1 to Plaintiff by way of mandatory injunction by this court. The Plaintiff did not produce evidence of outright purchase of hull of FAD 1 from its builder. Plaintiff admits that the Defendant had 'a contingent unsecured right to payment of deferred purchase price for the hull...' (see para 6 of Reply to Defence and Counterclaim) The Plaintiff obtained possession of FAD 1 as time period of the 'Operating Agreement' was not expired at that time. Since the time period of the said 'Operating Agreement' had ended the Defendant is now seeking repossession of hull of Vessel FAD 1.

FACTS AND ANALYSIS

2. The hull of FAD 1 was built by Defendant. Instead of purchasing the vessel outright parties entered in to 'Operating Agreement' for a specific period of time with an option to extend the said time period for 'additional term'.
3. In terms of the said 'Operating Agreement', 'Bluewater-covers all costs of hull (which includes steering /paint/wiring/toilet, plumbing) and keeps ownership of hull after operating agreement is terminated.'
4. At the end of 'Operating Agreement' the hull of FAD 1 was to be returned to Defendant, in terms of the said agreement.
5. FAD 1 was registered by Plaintiff as its owner despite these terms of 'Operating Agreement' and return of the hull at the termination of the said contract. In order to use the vessel for commercial use it has to be registered and also insured and these were done by the Plaintiff. The Defendant provided a letter to Plaintiff confirming ownership of FAD 1.
6. During the term of 3 years of the 'Operating Agreement' there was an accident and hull of FAD 1 got damaged and it was returned to Defendant for repair by the Plaintiff.

7. The insurance claim for FAD 1 was paid to Plaintiff as the registered owner and part of that was paid for the Defendant for the repair of FAD 1.
8. There was some dispute between the parties and Plaintiff sought an order of the court for the return of FAD1 to their custody in this action.
9. Following orders were made by the court
 - a. That the Defendant by itself or through its servants or agents or otherwise howsoever do forthwith release to and deliver to the Plaintiff and or its servants or agents possession of the Registered vessel FAD 1.
 - b. That Defendant by itself or through its servants or agents or otherwise do deliver the vessel FAD 1 by properly lifting the vessel using s suitable crane to the Defendant on to a boat trailer supplied by the Plaintiff.
 - c. That the Defendant by itself or through its servants or agents or howsoever be restrained from hindering or interfering with the Plaintiff taking possession of the vessel FAD 1.
 - d. The Defendant by itself or through its servants or agents or otherwise be restrained from concealing, altering, dismantling removing, transferring, encumbering, using, disposing of selling or any way threatening to diminish the value of the Registered Vessel FAD 1 until further order of this court.
 - e. The Plaintiff be at liberty to engage and enlist the service of police and or bailiffs in the execution of this orders.
 - f. The cost of this application is summarily assessed at \$2,000.
 - g. The matter to take normal cause. The matter should be listed before the Master for directions.'
10. After obtaining possession of FAD1 in pursuant to above orders no payments were made to the Defendant in terms of the said 'Operating Agreement', though the vessel was admittedly utilized for commercial purposes. It is not disputed by the Plaintiff that substantial revenue were generated, from the said commercial use.
11. The return of FAD 1 to the custody of Plaintiff was based on among other things the 'Operating Agreement' and its time period being not expired at that time.

12. The time period for said 'Operating Agreement' was 3 years from 1st June, 2014 and there was an option for extension of the same.
13. There was no provision in said 'Operating Agreement' as to manner in which such option is to be exercised and duration of such extension. So the parties to the said contract, took the business risks regarding non extension of 'Operating Agreement'.
14. There is no evidence of extension of said 'Operational Agreement' after lapse of initial time period of 3 Years form 2014 June.
15. The *inter partes* motion before this court, inter alia, seeks the following orders:
 - (a) An Order that the 'operational agreement' dated 9th April 2014 between the Plaintiff and the Defendant has lapsed and the legal ownership of the hull of the Registered Vessel "FAD 1" has reverted to the Defendant;
 - (b) An Order that the court's Order dated 30th August 2016 restraining the "Defendant by itself or through its servants or agents or otherwise be restrained from concealing, altering, dismantling, removing, transferring, encumbering, using, disposing of, selling or in any way threatening to diminish the value of the Registered Vessel "FAD 1" until further order of the Court", be permanently lifted;
 - (c) An injunction restraining the Plaintiff and/or its agents and/or its servants from hindering or interfering in any way with (a) the Defendant's immediate recovery and repossession of the vessel FAD 1; (b) the dismantling and removal of the Plaintiff's engines and electronics from FAD 1 independent third parties contracted by the Defendants ; (c) the delivery of the Plaintiff's engines and electronics to its registered address; and (d) the Defendant's ongoing possession and legal and beneficial ownership of the vessel FAD 1.
 - (d) An Order that the Plaintiff promptly and at latest by 9th June 2017 cooperate in good faith with the Defendant to undertake all necessary actions and documentation to transfer legal ownership of the vessel FAD 1 from the Plaintiff to the Defendant;
 - (e) An Order that the Defendant be at liberty to engage and enlist the services of the Police and/or Bailiffs in the execution of these Orders.
 - (f) Costs of this Action to be paid by the Plaintiff.
 - (g) An Order that the matter before the Court continue to take its normal course.
 - (h) Such other relief as the Court deems just.

16. The law relating to ownership and registration of a vessel is contained in a case note published by the Maritime Law Association of Australia and New Zealand by Peter Dawson entitled "*Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton"*" (ex "Freya) [2005] FCAFC 68" (2005) 19 MLAANZ Journal, pp 161 – 165 contained in the written submission of the Defendant.

17. The said article states at page 163 notes that the Court in *Tisand* found that:

"Ownership is found to be a slippery concept but what is clear is that it does denote the right or power to dispose of dominion, possession and enjoyment of the ship. This is essentially a matter of private law and arises from the dealings between parties with the ship and not in statute. This supports the view that the fact of registration of a vessel is at best prima facie evidence of ownership.

...

The Register was found not to be determinative of title and the underlying law of the transaction (and which law applies to the transaction) should be examined. Reference was made to the New Zealand practitioners) which seemed to suggest that the relevant law to determine the nature and extent of any rights (of ownership) in issue, is the law of the domicile of the registered owner."

18. In *Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton"* (ex "Freya) [2005] FCAFC 68 in paragraph 129 stated

"The ship is a chattel. Subject to statute, the course of dealing between the parties and custom (and any consideration of private international law respect thereof), the sale or transfer of title to ships can be seen as a question of the sale of goods; Behnke v Bede Shipping Company Ltd [1927] 1 KB 649, 659; Lloyd del Pacifico v Board of Trade(1929) 35 Ll.L.Rep,217; McDougall v Aeromarine of Emsworth Ltd[1958] 1 WLR 1126, 1129; Bank of New South Wales v Palmer (1970) 91 WN(NSW)580,583; and Devine Shipping Pty Ltd v The Owners of the Ship 'BP Melborne '(1994) 3 Tas LR 456,466 and further cases there cited. See also ss29(2) and 47 of the SR Act. Nevertheless, as Turner LJ said in McLellanGumm(1867) LR 2 Ch App 290, a ship is not like an ordinary personal chattel. At common law there was some doubt whether title would pass merely by delivery. Certainly, the use of a bill of sale (enshrined in legislation such as the SR Act and the Merchant Shipping Acts has been long recognized as usual and customary, if not required

19. In the said case Federal Court of Australia held that registration of a ship is not conclusive proof of ownership. The court in an interim order regarding an arrest of a ship was required to consider ownership of the ship. The registered ownership remained with one entity though there was evidence of sale to another party. The Federal Court of Australia, applied Law of Contract as the sale was governed by English Law as stated in the said contract and did not rely on the registration as a non-rebuttable. The ratio of the said case is that registration of ship is not conclusive proof of ownership, and contractual arrangements contrary to registration can be recognized for determination of ownership of a ship in an interim order.
20. Though *Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton"* (ex "Freya) [2005] FCAFC was a case regarding arrest of a ship, the above mentioned ratio equally applicable to dispute as to ownership of vessel in any civil dispute, and registration is not conclusive.
21. The law of registration and ownership of vessels in Fiji is contained in Ship Registration Act 2013. (Which came in to operation on 1st June, 2015).
22. Section 2 of the Ship Registration Act 2013 specifically recognize 'beneficial interest' and it defined as follows;
- 'Beneficial interest includes interest arising under contract and other equitable interest.'*
23. Pursuant to Sections 42(1) of the Ship Registration Act 2013, a ship or any share in a ship may be transferred by bill of sale made in the prescribed form under said Act and section 42 states as follows
- 42. Transfer of ships and shares in ships**
- (1) *Subject to section 43, a ship or any share in a ship, shall be transferred by a bill of sale made in the prescribed form.*
- (2) *Where a ship or share in a ship is transferred in accordance with subsection (1), the Registrar shall, as soon as practicable after the lodgment of the bill of sale and a declaration of transfer made by the transferee in accordance with section 44 –*

- (a) *register the bill of sale by entering in the Register the name of the transferee as owner of the ship or share; and*
 - (b) *endorse on the bill of sale that the entry has been made, including the date and time of the making of the entry.*
- (3) *The transferee of any bill of sale made under this section shall lodge the bill of sale with the Registrar within 3 months after the date on which the transfer takes effect, and bills of sale lodged under this section shall be registered in the order of their lodgment.*
- (4) *Any transferee who fails to lodge a bill of sale in accordance with subsection (3) commits an offence and shall be liable to a fine not exceeding \$2,000.*
24. There was no evidence of bill of sale in relation to FAD 1 being issued. From the evidence available at this moment the builder of the vessel had entered in to an 'operating' agreement or for contract for a specific period (3years) in exchange for 10% of all revenue from use of such vessel, with an option for extension of said period. The ownership of hull is to be returned at the termination of the said contract. The builder also provided a letter that it belonged to Plaintiff, and this provided for registration and insurance of the same in the name of Plaintiff, according to the Defendant.
25. The possession of hull of FAD 1 was given on a contract for 3 years, in return for share of turnover from its commercial activities and payments were made in pursuant to that till the vessel met with an accident.
26. It seemed each party took certain risks in the said contract and one such risk is any accident and damage to the hull in such commercial operation. At the same time there was no certainty as extension of the term of the said term of 3 years, through the exercise of the option. There was no indication as to how such option is to be exercised and duration of such extension.
27. There was also no compulsion on parties to extend said operating agreement and there was no penalty for not extending.

28. From the available facts the 3 year period of the Agreement that had granted possession of the hull to the Plaintiff had ended. Even during the time period of the said 'Operating Agreement' Defendant's claim for equitable interest is not diminished in terms of Section 57 of Ship Registration Act 2013 which states as follows
- 57. Equities included**
Subject to sections 53, 5 and 56 nothing in this Decree shall affect any power to enforce any beneficial interest in a ship or in a share in a ship, in the same manner as in respect of any other personal property.
29. The Certificate of Fiji Registry for FAD 1 states
- 'NOTICE: A Certificate of Registry is not a document of title. It does not necessarily contain notice of all changes of ownership and no case does it contain and [sic] official record of any mortgages affecting the ship. ...'*
30. So, in my judgment what is relevant in consideration of ownership of hull as an interim measure of vessel FAD 1 after expiration 3 year term are contained in 'Operating Agreement'. This is their own choice, and freedom of contract is paramount in such commercial dealings. The Plaintiff cannot rely on the registration to prevent express terms of the said contract which they voluntarily entered, while taking risks and also benefits associated with that agreement.
31. The leading authority for interim interlocutory injunctions is *American Cyanamid Co Ethicon Ltd* (1975) 1 All ER 504 and the factors for consideration stated in that case are as follows:
- (a) Seriousness of the issues to be tried;
 - (b) Adequacy of damages; and
 - (c) The balance of convenience.
32. There is a serious question to be tried in this action and there is no dispute as to that requirement. The parties had entered in to an Operating Agreement for commercial purpose and Defendant who had built the hull of FAD1 had allowed it to be used for commercial purpose by the Plaintiff and return of ownership of hull at the termination of contract. FAD 1 was registered by Plaintiff and it was also insured by the Plaintiff. There is serious dispute

as to the work done on the repair after the accident and also delay in the said repair. The Plaintiff is also claiming ownership of FAD 1 and in the Reply to Defence and Counterclaim at paragraph 6 stated that '*defendant only had contingent unsecured right to payment of deferred purchase price for the hull calculated as book value less depreciation ...*'. So admittedly there was no payment for the hull of vessel FAD1 and hence the possession and registration was contingent on 'Operating Agreement' and there are serious issues relating to claims and counter claims by the parties, and by no means they can be considered as frivolous or vexatious. The issue remains what should be done in the interim and who should obtain the ownership or possession of hull of FAD 1, till final determination of this action.

33. These are serious issues to be tried at the hearing and cannot be dealt with affidavit evidence, but as an equitable remedy possession and ownership of hull of vessel FAD 1 needs to be determined as an interim measure and registration of that in the name of Plaintiff should not deter such an order, in terms of Ship Registration Act 2013.
34. In the affidavit in opposition filed by the Plaintiff filed on 14th June, 2017 had annexed as FO 1 a letter written by the Plaintiff to the Defendant seeking extension of time period for 'Operating Agreement'. The said extension was sought in terms of their alleged exercise of 'option' in terms of said contract.
35. In order for the Plaintiff to exercise the option for renewal of Operating Agreement it should be valid at that moment and that letter was written on 8th June, 2017. So, there is admitted evidence that Plaintiff relied on said agreement even as late as June, 2017.
36. Any extension of time period for said Operating Agreement, cannot be exercised ex-parte and there was no reply from Defendant agreeing for such an extension. In the absence of extension, the said 'Operating Agreement' had come to an end and this was the end of possession and also ownership of hull by the Plaintiff as they agreed.
37. It is also an admitted fact that Plaintiff had not paid 10% of the revenue it received since obtaining possession of FAD 1 by order of this court.

38. In accordance with 'Operating Agreement' at the 3 year term of the contract had come to an end and it can be extended by consensus of both parties and it had not happened. There is no specific term for such extension and also no specific mode of extension. So, if there is an extension first parties should determine term of such extension before the exercise of such option, and this cannot be done ex-parte, by writing a letter as done by the Plaintiff. It should also be noted that both parties are at liberty to refuse extension and in such a situation the court is in no position to compel the parties for uncertain period. What was agreed between the parties was to return the ownership of hull of FAD 1 at the end of 3 year period. In the circumstances ownership of hull of FAD 1 should be returned to Defendant, since there is no extension of Operating Agreement. The obstacle for such return is obviously the registration of ownership of the vessel and it should be rectified with omission of Plaintiff's name as the owner as an interim measure. While the ownership of FAD1 in the name of Plaintiff, the ownership of hull of FAD1 cannot be returned to Defendant.
39. Depreciation of hull had happened while it was being used for commercial purposes by the Plaintiff and as parties agreed beforehand it should be returned to Defendant in terms of Operating Agreement. So, it is paramount that hull of the vessel be returned in its present condition without further depreciation, by commercial usage. Such usage may in addition to usual depreciation can also incur depreciation due to damage to the hull from accidents, natural disasters etc.
40. These are all risks each party has to bear in terms of their agreement for a specific time period, and according to 'Operating Agreement' it was for 3 years and at the end of such period, such risk should not be forced to an unwilling party.
41. The Plaintiff state that it had made some improvements to vessel FAD1 and they cannot be removed from vessel. This was a business risk that Plaintiff took and on that basis they cannot refuse to return of the vessel FAD1, in terms of the said contract between the parties. Compensation for such a claim is an adequate remedy and independent assessment of such improvement should be allowed by Defendant and for that two week time period should be allowed before any changes to the vessel unless parties themselves agree to removal of

such improvements that can be easily removed without damage to hull of the vessel, before it take possession or at the time it take possession. This assessment of improvement can be obtained by Plaintiff within two weeks at their cost and Defendant should provide FAD 1 for such inspection, at the request of Plaintiff within this time period.

42. If the hull is not returned to Defendant forthwith, it would be breach of 'Operating Agreement' as 3 year term had ended. Any further usage of hull which is admittedly unpaid by the Plaintiff and its economic loss to the Defendant is difficult to assess. As stated earlier if the hull is not returned there is an element of risk that is forced to the Defendant, which cannot be measured in monetary terms.
43. The Plaintiff was aware of the time period of 'Operating Agreement' and its end so any booking done beyond that period cannot be a reason for consideration of balance of convenience in their favour. The Plaintiff was not paying 10% of the revenue for several months when 3year 'Operating Agreement' came to an end. It is difficult to fathom that that such a party can reasonably expect to extend the term of 'Operating Agreement' in such a scenario, when they are already defaulting even 10% of all revenue under the same 'Operating Agreement'.
44. The Plaintiff knew that 3 year term was ending and there was no extension so the ownership of hull should be returned to Defendant. So any future bookings were done with necessary commercial risks and balance of convenience lies with return of ownership of hull of FAD 1 to the Defendant, as agreed by the operating agreement by the parties.
45. It should also be noted that since injunction is an equitable remedy the court is not confined to the manner in which orders are sought in the motion. It is clear that with the change of possession of hull registration of FAD1 cannot remain in the registry. So in terms of Section 75(1)(b) of Ship Registration Act, 2013 the Plaintiff's name should be omitted from that and an order in terms of that is should be made.

CONCLUSION

46. The claims of the respective parties are not vexatious or frivolous, but till they are resolved at the end interim orders were sought. The Defendant who had built the hull of vessel FAD1 entered in to an operating contract where Plaintiff was allowed usage of hull for commercial purpose for a term of 3 years for 10 % of all revenue from that use, and return of ownership of hull to the Defendant at the end of such term. Since commercial usage required registration and insurance these were obtained by the Plaintiff. The balance of convenience lies with the Defendant as term of such operating agreement had ended and in terms of that the ownership of the hull should be returned to Defendant. The registration of Plaintiff as the owner in the ship registry needs to be rectified with omission of the name of the Plaintiff and ownership of the hull of FAD 1 should be returned to Defendant. The cost of this application is summarily assessed at \$2,000.

FINAL ORDERS

- (a) The hull of the Registered Vessel "FAD 1" be returned to the Defendant forthwith in terms of Operating Agreement entered between the parties as there is no extension of term. Since there is an allegation of some permanent improvements to hull of "FAD1" it should be returned with all such permanent improvements that could not be removed without damage to hull. A two week time period is granted to obtain assessment through an independent body of such permanent improvements that cannot be removed without damage to hull of vessel, by the Plaintiff at its cost.
- (b) An Order that the court's Order dated 30th August 2016 restraining the "Defendant by itself or through its servants or agents or otherwise be restrained from concealing, altering, dismantling, removing, transferring, encumbering, using, disposing of, selling or in any way threatening to diminish the value of the Registered Vessel "FAD 1" until further order of the Court", is permanently lifted after two weeks from today.

- (c) An injunction restraining the Plaintiff and/or its agents and/or its servants from hindering or interfering in any way with (a) the Defendant's immediate recovery and repossession of the vessel "FAD 1"; (b) the dismantling and removal of the Plaintiff's engines and electronics from "FAD 1" by independent third parties contracted by the Defendants at its cost; (c) the delivery of the Plaintiff's engines and electronics to its registered address; and (d) the Defendant's ongoing possession and legal and beneficial ownership of the vessel "FAD 1".(subject to 2 week period granted for assessment by the Plaintiff for any permanent improvements to the hull).
- (d) An Order that the Plaintiff's name be omitted from registry in terms of Section 75(1)(b) of Ship Registration Act, 2013
- (e) An Order that the Defendant be at liberty to engage and enlist the services of the Police and/or Bailiffs in the execution of these Orders.
- (f) Cost of this action is summarily assessed at \$2,000.
- (g) The matter is referred to Master for directives. The action should be expedited, with necessary orders.

Dated at Suva this 18th day of July, 2017



Amu
.....
Justice Deepthi Amaratunga
High Court, Suva