

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 362 of 2018

BETWEEN : FIJI REVENUE AND CUSTOMS SERVICE

PLAINTIFF

AND : JOHN NIKOLIC AND YVETTE NIKOLIC

DEFENDANT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr O. Verebalavu for the Plaintiff
Mr W.S Pillay for the Defendant

Date of Hearing : 1 March 2019

Date of Judgment : 15 March 2019

JUDGMENT

1. The Plaintiff (the Revenue) by its Originating Summons (OS) seeks the following orders:
 - (1) That the Defendant unlawfully smuggled prohibited goods into Fiji using his Yacht.
 - (2) That the Yacht which was used to conceal the prohibited goods is forfeited to the State.
 - (3) That the undeclared US \$15,000 which was concealed in the yacht is forfeited to the State.
 - (4) That the forfeited goods be disposed of in any manner as determined by the Comptroller of Customs and transfer documents be signed by the Comptroller.

2. The OS is supported by the affidavit of Tomasi Drisi (Drisi) sworn on 27 November 2018 wherein he deposes inter-alia, as follows:
 - (1) He is the Chief Customs Officer (Manager) of the Drug Enforcement Unit at Nadi International Airport.
 - (2) On 22 June 2018, he and his team accompanied by a detector dog searched the Sailing Yacht Shenanigans (vessel).
 - (3) Upon completion of the search his team seized a number of prohibited items which were concealed in the vessel vide: 6 Detention Notices to Yvette Nikolic c/- Yacht Shenanigans relating, inter-alia, to 3 bars of illicit substance, undeclared currency of \$15,000 USD, 65 Ecstasy tablets and 2 guns and ammunition.
 - (4) On 6 July 2018 a Notice of Seizure was issued to the Defendants to which they responded through their lawyer Gordon & Co on 27 September 2018. On 13 November 2018 the Plaintiff responded to the Defendant's said letter.

3. Although the Defendant's Counsel, Mr R. R Gordon was on 31 January 2019 given by the Court until 14 February 2019 to file and serve the affidavit in reply to the OS, no reply was in fact filed. I will have to refer to this later.

4. The hearing commenced on 1 March 2019 when the Defendant's Counsel, Mr Pillay informed the Court that John Nikolic (John) had been convicted on 3 charges on 28 February and would be sentenced on 8 March 2019. He provided a written submission. He said he had a preliminary objection, under Order 7 rule 2(1) of the High Court Rules (HCR) in that the OS is not in Form No.3. Further, under 0.7 r. 3(1) the OS must identify the cause of action for him to know. This defect is fatal to the Revenue and not curable. The Revenue has not complied with section

156(1) of the Customs Act (Act). The Counsel said Yvette Nikolic (Yvette) is the owner of the vessel while John is in control. There was no case to answer referring to paras 20, 21 and 22 of his submission. Mr Pillay concluded by referring to s.158(1) of the Act.

5. Mr Verebalavu then submitted. He said this is the third time the matter is being mentioned and the Defendant is raising this preliminary issue for the first time. He said O.2 r.2 HCR requires an application regarding an irregularity to be filed by motion or summons and here, neither has taken place. He asked for the preliminary objection to be dismissed, and provided a written submission.
6. After the recess Mr Verebalavu submitted on the substantive matter. He referred to s.156(1) of the Act and said service had been done on the master, John and it complied with the section. The master is in control of the vessel as conceded by Mr Pillay. The Notice of Seizure had been signed by John on 6 July 2018. Within the requisite 3 months, the legal representative of the owner and the master gave notice of the claim, received by the Revenue on 27 September 2018. The Counsel said the Act does not recognize legal representatives; it requires the owner or master to give notice personally, not through an agent. It was not necessary for the Revenue to institute these proceedings in court, but the Revenue did institute proceedings within 2 months.
7. Mr Verebalavu said the facts had been established in the criminal case and through the Advance Notification signed by John, the master, on 22 June 2018. Line 7 (sic, item) states USD \$5,000.00. This is a false declaration, as the amount in excess is smuggled and prohibited goods under s.129(2)(a)&(b)&(c) of the Act. The undeclared amount is liable to forfeiture. The vessel was used to conceal into Fiji, prohibited items, contrary to s.130(1)(a) of the Act. This was also established in the criminal court. Mr Verebalavu asked for an order that the Revenue dispose of the vessel and the money as the Comptroller deems.
8. Mr Pillay then submitted. He said the Defendants did not take any step after 31 January 2019, and "are objecting today" (1/3/19). He said the Revenue failed to notify the Defendant of the cause of action. He submitted that M/S Gordon & Co made the claim as the agent of John and Yvette. John, the master, was in control. Yvette, the owner was not complicit and had no knowledge of the existence of the package.
9. Mr Verebalavu in his reply said under s.130 of the Act, who is the owner is not relevant here. The fact that (the vessel) was used to conceal the goods liable to

forfeiture under the Act is sufficient to forfeit the ship. The currency was concealed and taped to drugs in a hidden place. Obviously it was not meant to be found. It was irrelevant to talk about other crew members.

10. At the conclusion of arguments I informed I would take time for consideration. Having done so I shall now deliver first my decision on the preliminary objection and then my judgment on the substantive issue.
11. The Defendant's Counsel has chosen to raise his objection by an oral submission from the bar table. But is this is the proper way to raise an objection? So, I shall turn to O. 2 r. 2 (2) HCR. This says;
"An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion".
12. The intention of the framers of the HCR was clearly that the mode to be used was either summons or motion. The operative word here is "may". According to the Concise Oxford English Dictionary, 12th edn, "may" is defined as "expressing permission". In other words the Defendant is permitted to raise her objection either in a summons or by a motion - one or the other-. The sub-section (2) does not provide for the objection to be made by Counsel orally from the bar table, as "the grounds of objection must be stated in the summon or notice of motion."
13. At this juncture I shall refer to para 3 of this Judgment. O.2 r.2(1) states an application shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step. No doubt this is why Yvette has obviously chosen not to file any affidavit in reply as that would be taking a fresh step. But this is of no avail as she has not made the application by summons or motion.

Thus, the Court has no alternative but to reject the preliminary objection. If I may say so with respect, both Counsel and Defendant know the cause of action relates to the seizure of the vessel.
14. That clears the decks for me to consider the substantive matter - the vessel and then the currency.
15. I shall start by considering s.158(1) of the Act which reads as follows:
158-(1) If a notice of claim has been given to the Comptroller in accordance with the provisions of section 157, then the Comptroller

may within a period of 2 months from the receipt of such claim, either-

- (a) by notice in writing to the claimant, requiring the claimant to institute proceedings for the recovery of the goods within 2 months of the date of such notice; or*
- (b) himself or herself institute proceedings for the condemnation of the goods.*

16. I note the Defendant's solicitors gave their client's notice of claim by a letter received by the Revenue on 27 September 2018. The Revenue then instituted these proceedings by filing its OS on 27 November 2018.

17. Under s.158(1) and (2) the Comptroller is required to institute proceedings within 2 months of a notice of claim. The Interpretation Act 1967 in s.2(1) states words shall have the meanings assigned to them unless there is something inconsistent in the context or it is therein otherwise expressly provided. "Month means a calendar month". So in the instant case a period of 2 months of 27 September would be the period of time to the same date in the successive second month which would be 27 November 2018. Thus contrary to Counsel's written submission the Revenue had filed their claim within the statutory period prescribed.

18. I turn to s.129 (2) of the Act which reads as follows:

The following goods are liable to forfeiture and may be seized or detained as aforesaid-

- (a) all goods which are smuggled;*
- (b) all prohibited goods and any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;*
- (c) all goods found in any aircraft or ship after arrival in any port and not being specified in the inward manifest or parcel list and not being baggage belonging to the master, crew or passengers and not being satisfactorily accounted for;*

19. I shall turn now to the judgment of Goundar J delivered on 28 February 2019 in *State v John Geoffrey Nikolic: Criminal Case No. HAC 115 of 2018 [LTK]*. His Lordship's findings of fact are as follows:

"[3] The accused was in control of the yacht (the vessel) on which the two packages containing 13 bars of powdery substances and the two packages containing substance in

tablet form, arms and ammunition and US\$15,000.00 cash were found by the Customs officers on 22 June 2018. These items were concealed and hidden in different compartments of the vessel. The vessel had arrived from abroad when the discovery was made.

[10] All these facts lead me to a sure conclusion that the accused brought into Fiji illicit drugs, and arms and ammunition on the vessel he was in control of. I find the accused guilty of importation of an illicit drug as charged on counts one and three and possessing arms and ammunitions without an arms licence as charged on count five. The accused is convicted as charged on these three counts."

20. From the evidence before this Court, the currency were goods which were smuggled while the drugs and the guns and the ammunition were prohibited or restricted goods and all were liable to forfeiture, and seizure or detention.
21. The currency was referred to in the Notice of Seizure to John and Yvette where para 2(iii) thereof states *"You attempt to smuggle the \$15,000 USD by concealing the currency in a container which was sealed in a duct tape and was hidden in the Yacht Bulk Head, the goods is a Prohibited Import under Item 5 Schedule 1 of the Customs (Prohibited Imports and Exports) Regulation"*. If as the solicitors say in their letter dated 25 September 2018 to the Revenue that there were 5 passengers on the vessel, each allowed *"to bring into Fiji least FJD \$10,000,00"* it is surprising, to say the least, that none came forward to claim any part of the currency as being theirs. Even more perplexing is the fact the currency was concealed in a sealed container and hidden in the yacht bulk head. One would have expected anyone to have banknotes in a wallet on his person or in the open in his cabin which would be the case if the currency belonged to him legitimately.
22. But the currency was concealed clearly because it was not intended to be discovered by the Revenue nor to be declared to the Revenue when the vessel reached Fijian Waters.
23. I shall finally turn to consider s.156 (i) which reads:
"If goods have been seized as being liable to forfeiture under this Act, then, unless such goods were seized in the presence of the owner thereof or, in the case of an aircraft or ship, of the master thereof, the Comptroller shall give notice in writing of

such seizure and the reason therefor to the owner thereof or, in the case of an aircraft or ship, to the master thereof."

24. I am unable to accept the Defendant's Counsel's submission that the notice of seizure is not in compliance with s.156(1) because the notice was not given to the Defendant. In my view the subsection imposes no such requirement as it provides that when the good were not seized in the presence of their owner or the presence of the master of the aircraft or ship, the Comptroller shall give notice to the owner thereof or the master of the aircraft or ship.
25. This is precisely what the Revenue has done and the solicitors acknowledge this when they state "Your notice was served on John Nikolic at Lautoka Hospital". To my mind there was no requirement to serve the notice on Yvette as well. The notice was served personally on John and this complies with s.160(a) of the Act.
26. Consequently this would have caused s.130 of the Act to come into play. This reads as follows:
- "130.-(1) Without limiting any other provision of this Act, if any goods or things have become liable to forfeiture under the customs laws-*
- (a) any ship, aircraft, vehicle, living creature, container (including any article of passenger's baggage) or anything whatsoever which has been used for the carriage, handling, deposit or concealment of the goods or things so liable to forfeiture either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and*
 - (b) any other thing mixed, placed or found with the goods or things so liable, is also liable to forfeiture.*
- (2) Where a ship, aircraft, vehicle or living creature has become liable to forfeiture under the customs laws, whether by virtue of the last preceding subsection or otherwise, all tackle, apparel or furniture thereof is also liable to forfeiture".*
27. The vessel that was carrying the said smuggled and prohibited goods was named "Shenanigans" which according to the Oxford Dictionary means "secret or dishonest activity". There can be no better description of what the vessel was engaged in at the material time than this.

28. As the vessel was used for the carriage and concealment of the goods liable to forfeiture it is itself also liable to forfeiture. In my opinion this is the plain and clear intention of the legislature when I read section 130 from its heading "Forfeiture of ships etc, used in connection with goods liable to forfeiture" to sub-section (2).
29. In the light of the decision I have reached it was inexpedient to cite the cases relied on by Counsel as, in my considered opinion, they did not advance the Defendant's cause.
30. In the result, I make the following orders:
- [1] That as the vessel the Shenanigans was used to conceal and carry goods liable to forfeiture it is hereby forfeited to the State.
 - [2] The USD 15,000 is also forfeited to the State.
 - [3] The vessel and the currency are to be disposed of as determined by the Comptroller of Customs who is authorized to sign the transfer documents.
 - [4] Each party shall bear their own costs of these proceedings.

Delivered at Suva this 15th day of March 2019.



David Alfred
JUDGE
High Court of Fiji