

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 207 of 2023

BETWEEN : **NAKELO PTE LIMITED** a limited liability Company having its registered office at Reddy Dimond Building, Lot 4 Nuqa Place Off Marine Drive, Lautoka, Viti Levu, Fiji.

FIRST PLAINTIFF

AND : **MAMANUCA MARINE SERVICES PTE LIMITED** a limited liability Company having its registered office at HLB House, Cruickshank Road, Nadi in Fiji.

SECOND PLAINTIFF

AND : **AQUA FOODS FIJI PTE LIMITED T/A VUDA MARINA FIJI** a limited liability Company trading as Vuda Marina Fiji having its registered office at Vuda Point, Lautoka, Vitilevu, Fiji.

DEFENDANT

Appearances : Ms. Raga for the Plaintiffs
Ms. Khan with Ms. Fane K. for the Defendant

Date of Hearing : 29 May 2024

Date of Ruling : 21 June 2024

RULING

BACKGROUND

1. The plaintiffs are Nakelo Pte Limited (“**NPL**”) and Mamanuca Marine Services Pte Limited (“**MMSPL**”). In fact, NPL is also the sole shareholder of MMSPL.
2. By their Notice of Motion filed on 20 September 2023, NPL and MMSPL seek to recover three vessels which are in the possession of the defendant, Aqua Foods Fiji Pte Limited (“**defendant**”). The three vessels in question are named (i) *Tui Elevuka* (ii) *Dau Iro* and (iii) *Bulavou*. The *Tui Elevuka* and *Dau Iro* are owned by NPL. The *Bulavou* is owned by MMSPL.
3. NPL owns an island resort called Treasure Island (“**Resort**”). At some point, NPL was leasing out the Resort to a company called Treasure Island Pte Ltd (“**TIPL**”). In fact, NPL also now owns 100% of the shares in TIPL.

4. The three vessels in question were used by TIPL for its tourist business operations. This includes transporting tourists to and from the Resort as well as to some other nearby destinations.
5. It appears that NPL created MMSPL and TIPL to be special purpose vehicles for their respective operations in order to isolate NPL's financial risks.
6. The interconnection between the three companies is disclosed in the affidavit of Epele Natavukenimate filed by the plaintiffs in support of their Motion.

STORAGE & DEMURRAGE CHARGES

7. At some point in January 2021, TIPL took the three vessels to the defendant for storage. It is not clear from the affidavits filed what their arrangement was in terms of the particular rate of fee payable for storage.
8. The Affidavit of Adam Wade filed for and on behalf of the defendant deposes that the defendant had invoiced the plaintiffs for storage costs and that so long as the vessels remain at the defendant's marina, the charges would continue to accrue. In other words, if TIPL delayed in taking the vessel back, the defendant would be entitled to demurrage costs.
9. So, the plaintiffs (NPL and MMSPL) now want to retrieve their vessels from the defendant.
10. The defendant however will not release the vessels until the outstanding storage and demurrage charges are settled in full.

IS THE DEFENDANT ENTITLED TO RETAIN THE VESSELS ON ACCOUNT OF UNPAID DEBT?

11. The question is whether or not the defendant is entitled to storage and demurrage costs. None of the affidavits filed exhibits a contract.
12. I note that the plaintiffs allege that the defendant had lodged a proof of debt with the Official Receiver and that the substantive debt (or a large part of it) has been settled and that the defendant is retaining the vessels only on account of alleged outstanding demurrage (though I stand corrected).
13. Generally, a possessory lien entitles a creditor to retain possession of a property under lien until the debt owing to him is satisfied.

14. The debt is attached to the property.
15. Ms. Khan argues that a possessory lien allows an entity operating marina services such as the defendant to detain a vessel on account of unpaid services such as repairs, storage or demurrage costs.
16. I would rather postpone the resolution of this question to the substantive hearing of this matter.
17. If the principal storage costs have been paid but the demurrage costs not settled, is the defendant entitled to retain the vessels on account of the unsettled demurrage costs only? Should not the defendant mitigate its losses?
18. I observe that in **Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd** [2008] FJCA 101; ABU0090.2004S (16 April 2008), the Fiji Court of Appeal noted in passing as follows:

[87] The appellant refers the Court to President of India v Lips Maritime Corporation [1988] 1 AC 395 at 424, Apostolos Konstantine Ventouris v Trevor Rex Mountain (The "Italia Express" No. 2 [1992] 2 Lloyd's Rep 281, Sprung v Royal Insurance (UK) Ltd [1999] Lloyd's Rep IR 111 and Normanhurst Ltd & Ors v Dornoch & Ors [2004] 1 Lloyd's Rep IR 27.

[88] The first of those cases is authority for the proposition that a claim for demurrage sounds in damages, not debt, and that there is no such thing as a cause of action in damages for late payment of damages. "The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute." President of India v Lips Maritime (supra) at 425. In this case a dispute as to the period for which demurrage was payable by the insurer was referred to arbitration.

SHOULD I GRANT THE ORDERS SOUGHT?

19. The application now before me is primarily for the grant of an interlocutory mandatory injunction.
20. In **Software Factory Pte Ltd v Dayal** [2023] FJHC 79; HBC26.2022 (17 February 2023), Mr. Justice V. D Sharma cited **Redland Bricks, Ltd v. Morris** [1969] 2 ALL ER 576 and discussed some key points about what the Court should be wary of when considering whether or not to grant a mandatory injunction.

21. I accept that the Court has jurisdiction to grant an interlocutory mandatory injunction. However, this jurisdiction is exercised rather sparingly and with caution.
22. The reason why a Court would exercise great caution before granting an interlocutory mandatory injunction is because, generally, there is a greater risk of injustice involved, compared to the risk of injustice in the usual interlocutory prohibitive injunction.
23. The interlocutory prohibitive injunction restrains action. In doing so, it preserves the *status quo* until the parties' respective rights are finally determined.
24. In contrast, the interlocutory mandatory injunction will authorise action to be taken at the present time while postponing the determination of the issues and/or the parties' respective rights and entitlement to the substantive hearing.
25. Generally, because the interlocutory mandatory injunction does not preserve the status quo, there is a greater risk of injustice if it turns out to have been wrongly made. This is because, by the time it is realised that the mandatory injunction was wrongly made, the subject matter of the dispute would already have been spent (or half spent as the case may be).
26. The question for the Court in dealing with an application for an interlocutory mandatory injunction is:
 - (i) which of the two options carries the least risk of injustice?
 - (ii) to grant a mandatory interlocutory injunction to A who may yet fail to establish his right at trial OR, to refuse A a mandatory injunction who may very well succeed at trial?
27. Hence, to succeed, an applicant must show a very strong probability on the facts that grave damage will accrue to him in the future if the interlocutory mandatory injunction is not granted. The applicant must also show that damages will not be a sufficient or adequate remedy.
28. The court must also take into account the cost to the defendants to carry out the "mandated" act.
29. Generally, the greater the degree of assurance that the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

CONCLUSION

30. Having considered all that, I am not inclined to grant the Orders sought for the following reasons:
- (i) the defendant is a creditor.
 - (ii) the plaintiffs do not seriously dispute that some debt is owed. Rather, they appear to argue only that TIPL is the entity which owes the debt, but which is not the owner of the vessels.
 - (iii) TIPL apparently is in liquidation, though there is an application on foot before Mr. Justice Mackie to stay that process.
 - (iv) the defendant is exercising a possessory lien over the vessels on account of the debt owed.
 - (v) the principles of possessory lien would allow a debtor to retain possession of a property under a lien until the debt is satisfied.
 - (vi) there has been no convincing argument before me that the three vessels should not be subject to the possessory lien which the defendant asserts – although in saying that, I am not making a finding of fact in relation to any issue in this case.
 - (vii) while TIPL is a different legal entity from NML and MMSPL, their interlink cannot be ignored as the plaintiffs have, themselves, disclosed this in the supporting affidavit filed in support of their application.
 - (viii) while I note the submission that there are other entities which hold some securities over the vessels in question, none of those entities have been joined by the plaintiff as interested parties in this action. In any event, it appears that the loans for which those security instruments were granted – are being serviced well by the plaintiffs – given the lack of any mortgagee action over the vessels.
31. Having said all the above, I also caution that, if in fact it is true that the principal sum has been settled and that the defendant is only retaining the vessels for the alleged demurrage costs for which no clear contract is annexed, the defendant assumes for itself a risk of paying damages to the plaintiffs eventually, if, assuming, the *obita* observation in **Fai Insurance (Fiji) Ltd v Prasad's Nationwide** turns out to be true in law.
32. Given all the above, I refuse to grant the Orders sought. However, I am prepared to direct that the plaintiffs take immediate steps to apply for a joinder of all those other entities who hold some security over any of the three vessels in question.

ORDERS

33. Application dismissed.
34. Costs to the defendant which I summarily assess at \$1,000 – 00 (one thousand dollars only).



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Anare Tuilevuka
JUDGE

21 June 2024