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

CIVIL APPEAL NO. ABU0047 OF 1998S
(High Court Civil Action No.0002 of 1996)

BETWEEN:

KARIM BUKSH F/N MADAR BUKSH

Appellant/Applicant

AND:

DONALD PICKERING AND SONS ENTERPRISES LIMITED

1st Respondent

UNITED MARINE (SOUTH PACIFIC) LIMITED

2nd Respondent

KARIM'S LIMITED (IN LIQUIDATION)

3rd Respondent

THE SHIP "BAINIVUALIKU"

4th Respondent

THE SHIP "SENIBIYAU"

5th Respondent

In Chambers: **The Hon. Justice Ian R. Thompson, Justice of Appeal**

Date of Decision: **Friday, 27 November 1998**

DECISION IN CHAMBERS

In January 1996 the first and second respondents commenced an action in rem in the High Court against two vessels, the fourth and fifth respondents, for $15,695.89 and interest. The third respondent was also made a defendant. Warrants of arrest were issued in respect of the vessels and they were both arrested. They were released from arrest in May 1998 but the second respondent is apparently still in possession of them, exercising its maritime lien. The applicant was not an original party in the action but he appeared on behalf of the third respondent as its principal officer at the hearing of various applications in the High Court proceedings. In August 1996 he filed an affidavit in support of an application for "the arrest of [one of the vessels] to be dissolved" and in it stated that he was one of the owners of that ship.

Now, nearly three years after the action was commenced, it has still not been heard and determined, although there have been numerous interlocutory applications which have clearly taken up a lot of the time of a judge of the High Court and involved the parties in considerable expense - and that all for $15,695.89 plus interest!

The matter has come into this Court because the applicant has filed a notice of appeal to set aside what is referred to as the judgment of Fatiaki J. delivered on 21 July 1998. On that date His Lordship in fact made two orders. By one order he "dismissed as incompetent" a motion dated 21 May 1998 moved by the applicant for various orders, including striking out of the action for want of prosecution, damages, completion of work not done by the second respondent and injunctions to restrain interference with the vessels. By the other order he "dismissed as misconceived" a writ of summons issued out of the High Court to the applicant on 14 July 1998. The writ bears the same file number as that of the action commenced in January 1996.

The parties have made written submissions and have agreed that I should deal with the present application without receiving oral submissions.

The grounds of appeal are:

"*(a) that the learned judge erred on the facts that the ownership of the said vessels being (sic) vested in the 3rd Respondent (1st Defendant);*

(b) that the learned judge erred in law that the Appellant has no "LOCUS STANDI" to intervene and in refusing and dismissing the Motion of 21/5/98;

(c) that the learned judge failed to apply correctly the relevant Rules of Admiralty Proceedings applicable to this action.

(d) the Appellant craves leave to file further grounds of appeal upon receipts (sic) of the Court records."

It is apparent, I consider, that the appeal is intended to relate to the order made in respect of the motion of 21 May 1998 and not to the order made in respect of the writ of summons, which was issued on 14 June 1998.

As far as I can ascertain from examination of the file of the High Court action, the learned judge did not explain why he considered the motion to be "incompetent." However, counsel for the second respondent had submitted that the applicant, as an intervener in the action, could obtain only orders to protect his interest in the vessels. On a number of occasions the applicant was permitted to appear and make submissions to the court, so that, although I can see no formal application on the record for acceptance of him as an intervener, he appears to have been accepted as such. I have to say that I can see nothing in the motion which goes beyond protection of the interests of the owners, except for an application for an order that $750 be paid to the applicant personally as damages. In my view, therefore, the applicant has standing to appeal against His Lordship's orders, at least insofar as they relate to the vessel which is the fourth respondent. The application dismissed included application for injunctions; by virtue of section 12(1)(f)(ii) of the Court of Appeal. Act (Cap.12) leave to appeal is not required.

Turning to the application now before me, I note that the amount owed to the second respondent is in dispute. As noted above, the claim is for $15,695.98 plus interest. In those circumstances giving security in the sum of $4,000 is clearly not sufficient to justify an

order that the second respondent is to give possession of the vessels to their owners. Further, as Mr Young points out, in the absence of consent I cannot properly require the second respondent to do any further work on the vessels. However, it is clear that what the applicant is seeking is a determination of what he needs to give by way of security for the amount of the eventual judgment of the High Court in order to have the second respondent give possession of the vessels to their owners. I am satisfied that, in dealing with the application now before me, I can direct that, if adequate security is given by the applicant, the second respondent is to give the owners possession of the vessels and, most importantly, I can direct it that, if they are not seaworthy, it is to allow persons acting on the applicant's behalf such access as is required for them to make the vessels seaworthy so that the owners can take possession of them.

In view of the length of time that the action in the High Court has dragged on without coming to a hearing on the substantive issues while the second respondent has continued to exercise its lien over them, and as the loss which the delay is causing the owners of the vessels is by now out of any reasonable proportion to the amount in dispute in the action, it is clear that the application must be dealt with in a realistic way which will promote the interests of justice. I am satisfied that those interests will be served best by my making orders that will result in the vessels being returned into the possession of their owners in a seaworthy condition without further delay, upon the applicant giving security which is likely to be adequate to cover any judgment that the High Court can properly order on the second respondent's claim. The Gordian knot must be cut.

It appears from the pleadings and from affidavit evidence in the High Court that the third respondent may not have itself owned the vessels but merely represented their owners them. The applicant has sworn that he is one of the owners of one of the vessels. He must now file an affidavit showing all the owners of each vessel and, if they are willing to have the vessels given over into his possession, written authority from each of them for him to do so. If he does that and he gives the security which I am setting by my order, the second respondent must give possession of the vessel to him forthwith or as soon as they seaworthy. My order provides for its obligations in that regard. I, therefore, make the following order in respect of the application now before me.

Order: I order that -

(a) upon the applicant filing in this Court an affidavit sworn by him and showing the names and addresses of all the owners of each of the fourth and fifth respondents, the vessels "Bainivualiku" and "Senibiyau";

(b) upon the applicant also filing in this Court written authority from each of the owners of each of the vessels, signed by that owner and witnessed by a Commissioner for Oaths, for the applicant to take possession of that vessel from the second respondent on that owner's behalf; and

(c) upon his lodging in this Court a bank bond in the sum of $25,000,

the second respondent shall forthwith -

(1) give full possession of both the vessels to the applicant forthwith or as soon thereafter as they are in a seaworthy condition;

(2) allow the applicant and persons properly qualified to assess the seaworthiness of the vessels and to undertake such work as may be required to be undertaken to make them seaworthy to have full access to the ships at all times between 7 am and 6 pm on weekdays so that they may carry out that assessment and undertake that work on the applicant's behalf and at his expense; and

(3) not to hinder or delay them in their work or do anything to the vessels that may cause more work to be needed to be done to make them seaworthy than is needed at present.

I.R. Thompson

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Mr Justice I.R. Thompson
Justice of Appeal

27 November 1998

I have considered carefully what order I should make in respect of costs. The applicant has not obtained an order in the terms he was seeking. On the other hand, the technical legal arguments advanced by second respondent have done nothing to assist this Court to find a way of breaking the impasse which the proceedings have reached. That impasse clearly needed to be broken without further delay if the interests of justice were to be properly served by the proceedings in this Court and in the High Court. It reflected an intransigence on the part of both the applicant and the second respondent throughout the proceedings in the High Court over nearly three years, and now in the Court. In all the circumstances I have come to the conclusion that each party should bear his or its own costs of this application.

Order: Each party is to bear his or its own costs of this application.

FIJI COURT OF APPEAL

I.R. Thompson

Mr Justice I.R. Thompson
Justice of Appeal

27 November, 1998

Solicitors:

Appellant/Applicant in Person
Messrs. Howards, Suva for the Respondents

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