IN THE COURT OF APPEAL
APPELLATE JURISDICTION

Civil Appeal No. ABU 0034 of 2010
(High Court Civil Action No. HBC 224 of 2008)

BETWEEN	:	**SOUTH SEA CRUISES LIMITED**
		Appellant
AND	:	**SAMSUL MODY** `
		Respondent

Coram	:	Calanchini AP Basnayake JA Chandra JA
Counsel	:	Mr. N. Barnes for the Appellant
	:	Mr. M. Thompson with Mr. E. Maopa for the Respondent
Date of hearing	:	13 May 2013
Date of judgment	:	30 May 2013

JUDGMENT

Calanchini AP

[1] I agree with the reasons and the conclusions of Basnayake JA

Basnayake JA

[2] This judgment is in connection with an application made for the respondent-defendant (defendant) seeking leave to adduce further evidence in pursuant to Rule 22 of the Court of Appeal Rules. In terms of these Rules "the Court of Appeal shall have full discretionary power to receive further evidence upon question of fact either by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner (Rule 22 (2)).

[3] The defendant is an Australian citizen. He was on holiday in Fiji with his family. On 19.2.2006 the defendant together with his family went on a day cruise on "SV Seaspray". During the cruise the defendant had accidentally consumed caustic liquid stored in a water bottle and suffered personal injury. The defendant made a claim for compensation to which the plaintiff-appellant (plaintiff) paid the defendant AUD $135000. On 11 August 2008 the defendant instituted legal proceedings in the Supreme Court of New South Wales claiming damages for personal injuries for breach of contract and negligence. This action is pending.

[4] On 20 October 2008 the plaintiff filed in the High Court of Fiji in Lautoka a writ of summons to have its limitation of liability determined pursuant to S. 178 of the Marine Act 1986.

> "178 (1): Where a claim is made against or apprehended by a person in respect of liability of that person which that person may limit in accordance with the applied provisions of the Convention he may apply to the Court to determine the limit of his liability in accordance with this provisions.
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> (2): Where an application is made under subsection (1) the Court
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> may-
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> (a) determine the limit of the applicant's liability; and
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> (b) make such order or orders as it thinks fit in respect to the constitution, administration and distribution in accordance with the applied provisions of the Convention, of a limitation fund for the payment of claims in respect of which the applicant so entitled to limit his liability. "

[5] On 22 December 2008 the plaintiff filed summons for a decree of limitation of liability in damages beyond Special Drawing Rights of 62001 converted into Fiji Dollars. The plaintiff claims that they have paid more than they were required to pay because of the limitation set by the Marine Act under the International Convention relating to the Limitation of Liability of owners of Sea-Going ships and the protocol amending the Limitation of the Liability of Owners of Sea-Going ships. The plaintiff claims that the limit was AUD $115000 (rounded off) and the defendant was already overpaid AUD $20000.

[6] The owner of a sea-going ship may limit his liability in accordance with Article 3 of the convention in respect of claims arising from personal injury, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner (Article 1A of the Convention) (Sanko Steamship Co Limited and Grandslam Enterprise Corporation v Sumitomo Australia Limited; Kim In Hyeon And Ors [1995] FCA 1700, James Patrick And Co Limited v The Union Steamship Co of New Zealand Ltd [1938] 60 CLR 650, Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd The Eurysthenes [1976] 3 All ER 243, Ian Mc Donald Alstergren v The owners of the ship "Territory Pearl" [1992] FCA 268).

Three affidavits filed for the plaintiff

[7] The plaintiff filed three affidavits in support to exculpate himself from liability on the ground of no actual fault or privity on the part of the plaintiff. Mr. Christopher James Nixon, Managing Director of the plaintiff company stated in the first affidavit of 19 December 2008 in paragraphs 9, 10 and 11 as follows:-

> "9. *Prior to the incident, the Chef on board the SV Seaspray, Setareki Ratatagia, cleaned the griller with the caustic liquid. He had decanted the caustic liquid into an empty water bottle. After cleaning the barbeque griller, Mr. Ratatagia placed the bottle containing the caustic liquid near the main mast. The barbeque griller on board the SV Seaspray is located near the main mast. During the cruise Mr. Mody was having his lunch on board the SV Seaspray near the main mast. He had been previously sitting near the main mast drinking water from a bottle that had a label indicating it was water. Mr. Mody picked up the bottle containing the caustic liquid, thinking that it was the bottle of water that he had been*

drinking from, consumed some of the contents of the bottle containing the caustic liquid thereby causing him personal injury.

10. Mr. Ratatagia was engaged by SSCL as a Chef because he had cooking experience. Any ordinary and reasonable person involved in the cooking profession, should, as a matter of common sense, know better than to decant caustic liquid into a water bottle and to leave the caustic liquid in a water bottle in a popular eating area of the SV Seaspray. It is self evident that Mr. Ratatagia, in the exercise of reasonable skill which SSCL was entitled to expect from a person engaged as a Chef,should have placed the bottle containing the caustic liquid in safe storage.

11. In the premises, SSCL therefore contends that the actions of the Chef in leaving the bottle containing the caustic liquid near the main mast where it could be mistaken by guests on board the SV Seaspray for water and the subsequent injury suffered by Mr. Mody was without the actual fault or privity of SSCL and therefore it is entitled to limit its liability under the provisions of the Marine Act, 1986".

[8] The operations Manager of the plaintiff company Mr. Daniel Heffernan in an affidavit dated 24.3.2009 stated as follows: (reproduced paragraphs 3 to 9)

"3. *It is part of my responsibility to ensure that company policy and procedures are in place and that the workers are familiar with them.*

4. SSCL has a procedure for the ordering, dispensing and storing of the chemical agent which is used for cleaning the barbeque stove on board the vessel:

(i) When the chef from the vessel orders this cleaning agent, it is dispatched to the vessel in a four litre flagon and the chef is, in turn, to decant some of the agent into a 500ml spray bottle, which is supplied to the vessel, and which is labelled accordingly. The spray bottle is supposed to be used on deck for the cleaning of the barbeque and then to be removed to safe storage thereafter.

5. Mr. Ratatagia, the chef on board the vessel on 19 February 2006, was familiar with the procedure for the cleaning agent and the necessary use of the spray bottle.

6. Although the procedure relating to food and beverage fell under the supervision of the then Hospitality Manager, Mr. Tamani, I as Operations Manager, carried out periodic checks, on roughly a quarterly basis, to ensure that company procedures, including the cleaning agent procedure referred to above, were being followed.

7. Mr. Ratatagia had been working on board the vessel for approximately one year when the incident occurred.

8. I do not know why the then chef, Mr. Ratatagia, did not use the spray bottle, and instead used a water bottle and left this on the deck on this occasion. This was in breach of procedures that were well established and which he well knew.

9. The use of a water bottle and leaving it on the deck was also in breach of common sense and the reasonable skill that SSCL was entitled to expect from Ratatagia.

[9] Mr. Nasoni Tamani who worked as Hospitality Manager of the SSCL in 2006 in an affidavit dated 24 March 2009 stated thus in paragraphs 3, 6, 7, 8, 10 and 12 as follows:-

"3. *At SSCL, I worked as the Hospitality Manager. One of my primary duties as the Hospitality Manager was to ensure that all outlets preparing food for the guests did so in a clean and hygienic manner. This entailed all equipment used for preparing and cooking to be clean.....*

6. The chef on duty on 19 February 2006 on board the SV Seaspray was Mr. Setareki Ratatagia. Mr. Ratatagia was also a steward. A steward's responsibility is to ensure that the entire kitchen and utensils are cleaned by using various chemicals.

7. Mr. Ratatagia was familiar with SSCL's procedure for the ordering, dispensing and storing of the cleaning agent. Also, Mr. Ratatagia was trained by the chemical company supplying the cleaning agent to SSCL in the proper use and handling of the cleaning agent.

8. The chemical agent which Mr. Mody is alleged to have consumed is a grease cutter, which is used for removing grease from stove ovens and other cooking appliances.....

10. During this time I had personally carried out checks to ensure the procedure for decanting, using and storing the cleaning agent as well as other company procedures on board the vessel were being followed.

12. I asked from Mr. Ratatagia soon after the incident why he had decanted the cleaning agent into a water bottle and left it on the deck. His response was that he was in a rush and he was not expecting anyone to be back on board at that time. This was in breach of procedures that were well- established and which he well knew. The use of a water bottle and leaving it on deck was also in breach of common sense and the reasonable skill that SSCL was entitled to expect from Mr. Ratatagia."

[10] The defendant and his solicitor too had filed affidavits in opposition.

Judgment of the Learned Judge

[11] The learned High Court Judge having considered the writ of summons and the affidavits held that the injuries of the defendant was not as a result of a collision between two ships and that the Act and the convention have no application to this case and dismissed the application of the plaintiff with costs.

[12] **Leave to Appeal Application**

The plaintiff in a leave to appeal application filed aver in paragraphs 1 and 2 as follows-:

1. *The learned Judge erred in law in dismissing the plaintiff/Appellant's application for a decree of limitation of liability by holding the Division 2 of Part IX of the Marine Act 1986 and the Limitation of Liability Convention contained in schedules 6 and 7 of the Marine Act, 1986 only apply in situations where personal injury occurred as a result of collision between two vessels.*

2. *The learned Judge erred in law and in fact by failing to find that the injury to the defendant, Samsul Mody, occurred without the actual fault or privity of the plaintiff, South Sea Cruises Limited and that pursuant to Section 178 (1) of the Marine Act, 1986, the Plaintiff/Appellant was not answerable in damages beyond special drawing rights of 62,001 converted into Fiji Dollar currency at the time of making such Declaration in respect of the injury suffered by the Defendant/Respondent on 19 February 2006 on board the ship SV Seaspray.*

[13] **Ruling on Leave**

The learned Judge of the Court of Appeal had granted leave. In that the learned Judge had stated that (paragraphs 21 and 33, Tab 5 of the High Court Record) "The issue of whether the limitation actions are restricted only to collisions between vessels is one of law. There is also the issue of what is meant by the words "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner" in Article 1 of the 1957 Brussels Convention.

[14] On 27 March 2011 this case was heard in appeal and the judgment reserved. However judgment was not delivered and the case had to be relisted for argument.

[15] **The motion dated 4 February 2013 seeking leave of court to lead fresh evidence**

The defendant on a motion dated 4 February 2013 moved court for leave to adduce fresh evidence on the appeal. The defendant relied on an affidavit filed by his solicitor Mr. Vrege Kolokossian on 20 December 2012. In that affidavit the solicitor Mr. Kolokossian stated that the plaintiff relied on the affidavits filed by Mr. Christopher James Nixon (19 December 2008), Mr. Daniel Heffernan (24 March 2009) and Mr. Nasoni Tamani (24 March 2009). Mr. Kolokossian stated that the above affidavits "annexed no documents as might have been capable of evidencing that the plaintiff had in some manner competently selected, trained, instructed or supervised the staff by which it crewed the SV Seaspray on 19 February 2006".

[16] He further stated that after granting leave to appeal, the appeal was heard by the Court of Appeal on 27 March 2011 and reserved order. He stated that the issue before the Court was whether there was any actual fault or privity on the part of the plaintiff for the defendant's injury. On 1 May 2012 he received 10 photographs and two reports from the plaintiff in response to a subpoena filed in the Supreme Court of New South Wales on 27 February 2012. Those documents have been marked VK 1, VK 2, VK 3 and VK 4-10. Mr. Kolokossian states the grounds that occasioned him to move for further evidence in the following paragraphs of his affidavit, namely:-

[17] 21. *My office has never been served by the Appellant (plaintiff) with any document capable of evidencing that the plaintiff had in some manner competently selected, trained, instructed or supervised the staff by which it crewed the SV Seaspray on 19 February 2006. I am not aware of the existence of any such document.*

22. The plaintiff bears the onus of negativing actual fault or privity on its part and must establish that the defendant's injury was not caused by its actual fault or privity. This my affidavit and the further documents annexed to it directly relates to that issue.

23. The further documents were not available to the defendant during the hearing of the Appeal on 7 March 2011 and have only become available to the defendant since the issuing of the above subpoena and its service on the plaintiff.

24. The defendant seeks leave of this Honourable Court to re-open the hearing before it in order to read this my affidavit and tender the further documents into evidence and put submissions before the court in relation to same.

[18] **<u>Submission of the learned counsel for the defendant</u>**

The learned counsel submitted that trial in this case took place on 27 March 2009. The affidavits of Daniel Heffernan and Nasoni Tamani were filed only on 24 March 2009. Their evidence was presented to prove that the plaintiff was not at fault and that it had taken all steps to discharge its responsibilities. No documents were annexed to the affidavits. The absence of such documents gave rise to the inference that no such documents existed as might have assisted the plaintiff's case. The learned counsel submitted that the evidence annexed to the affidavit of Mr. Kolokossian dated 20

December 2012 explains the absence of such documents and moves that he be allowed to adduce such.

[19] **Submissions of the learned counsel for the plaintiff**

The learned counsel for the plaintiff submitted that the defendant has failed to exercise due diligence in this case. The proceedings commenced on 20 October 2008. The trial was held on 27 March 2009. The judgment was delivered on 20 April 2009. Leave to appeal application was filed and Ruling was made on 26 August 2010. The appeal was heard in court on 7 March 2011. No evidence had been led so far in the Supreme Court of New South Wales. This application was made only on 4 February 2013 and therefore should not be allowed due to delay. The learned counsel also referred to the affidavits filed for the plaintiff which would establish procedures, supervision and training given to the chef to negative actual fault or privity of the plaintiff.

Weighing and not counting evidence

[20] The necessity to lead fresh evidence is to enlighten court that the plaintiff did not file any document to support the averments in the affidavits of the plaintiff. The affidavits speak of procedures. No document was filed to prove that there was such procedure. No document was filed to prove the check ups carried out by the supervisors. There is no dispute that the plaintiff did not file any documents to prove various averments in the affidavits of Mr. Christopher James Nixon, Mr. Daniel Heffernan and Mr. Nasoni Tamani. The defendant is seeking to lead fresh evidence to prove that the plaintiff did not file documents.

[21] It is not necessary to bring fresh evidence to prove this fact. This can be done by counsel in the submissions. This relates to the weighing of evidence. While weighing evidence the court is entitled to draw inferences. When someone refers to procedures, he must necessarily produce it in court. If someone speaks of check ups, he must produce records to prove that those check ups were carried out. How can the court verify the truth of what is stated in the affidavits? The onus is on the person who

asserts. It is for the court to weigh evidence. Counsel is entitled to assist court by bringing these matters to light. Evidence need not be led at this stage to prove that the plaintiff did not produce documents.

[22] Therefore I find no merit in this application and thus dismiss it with costs fixed at $2000.

Chandra JA

[23] I agree with the reasons and the conclusions of Basnayake JA.

[24] Orders of Court are:-

1. Application to lead fresh evidence is refused.

2. Costs $2000 to be paid to the plaintiff.

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HON. MR. JUSTICE WILLIAM CALANCHINI
ACTING PRESIDENT

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HON. MR JUSTICE ERIC BASNAYAKE
JUSTICE OF APPEAL

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HON. MR JUSTICE SURESH CHANDRA
JUSTICE OF APPEAL