IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 34 of 2009

BETWEEN : **STEVEN LAULEA** of 10 Toga Place, Nabua, Fisherman.

PLAINTIFF

AND : **TAI-FI FISHERIES LIMITED** a limited liability company having its office at the premises of Fiji Fish Marketing Group Limited, Queens Road, Lami.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. D. Singh** for the Plaintiff
Ms. D. Sharma for the Defendant

Date of Hearing : 2nd May, 2013
Date of Judgment : 12th August, 2013

JUDGMENT

A. INTRODUCTION

1. The Plaintiff got injured in his eye while he was engaged as a seaman/fisherman in a fishing vessel. The Plaintiff had sued Defendant as the entity which employed the Defendant, but the Defendant in its statement of defence alleged that they were only providers of operational and management services to vessels and was never an employee of the Defendant. The main issue was whether the Plaintiff had sued the correct party as the employer of the Plaintiff. In the submissions the Plaintiff's counsel jettisoned the position taken in statement of claim and contended that the Defendant is an agent of the

actual employer of the Plaintiff. No such evidence was led to establish agency. There was no evidence to establish the Defendant was an employer of the Plaintiff.

B. ANALYSIS

2. The Plaintiff, his wife and a Doctor gave evidence on behalf of the Plaintiff and on behalf of the Defence an officer from the Defendant Company gave evidence. The main issue is whether the Plaintiff was employed by the Defendant and if so whether there was any negligent act that caused injury to the Plaintiff. The evidence of the Doctor, and the wife of the Plaintiff would become relevant only if the answer to the earlier question is answered in affirmative.

3. The evidence of the Plaintiff was that he was working as a fisherman in a fishing vessel known as 'Sing Man Yi' and according to him, the employer was the Defendant. He in his evidence stated that the injury happened while the ship was at sea, between Fiji and Vanuatu. The injury happened due to the braking of the fishing main line (a rope made out of special material with buoys attached to it), that was winding on to the spool and hitting the broken part of the fishing line on the left eye of the Plaintiff. At that time the Plaintiff was standing two meters away from the winding spool. The main fishing line was attached by other lines which attached the fishing nets. After laying of the fishing main line and the nets attached to it, the main line was wound up and nets attached to the other lines were detached and collected, and this was done while the vessel was moving. From the description it seems a carefully co-ordinated act and the speed of the ship and the collection of the attached nets with the fish needs synchronized with the winding of the spool. According to the Plaintiff the weight of the fish caught in the nets and the speed of the ship caused the breaking of the main line that caused the injury to the Plaintiff. There were other factors like the condition of the sea, that determines the tension of the main line, that can result breaking of it. The Plaintiff had previous experiences in this kind of activity as he was engaged in fishing vessels prior to this incident, and had also continued to engage in vessels even after this incident.

Was the Plaintiff employed by the Defendant

4. The Plaintiff's counsel had taken a position that was not supported by his pleadings. The Plaintiff had instituted the action on the basis that the Defendant was the employee of the Plaintiff, but in the written submissions has taken the position that the Defendant was an agent of the employee of the Plaintiff. Fiji Court of Appeal held in the case of Khan v Buanasolo [2013] FJCA 10; ABU49.2011 (8 February 2013) as follows

> '[19]. However, pursuant to Order 18 Rule 7 (1) (a) a party must, in any pleading subsequent to the Statement of Claim, plead specifically any matter which he alleges makes any claim of the opposite party not maintainable. Consequently section 59 of the Act (which in effect reproduces the old section 4 of the Statute of Frauds) must be specifically pleaded if a defendant intends to rely on it. (**Supreme Court Practice 1991** Volume 1 at paragraph 18/8/21). Furthermore, the section must be pleaded in such a way as to indicate to the other party clearly the exact point raised and in what respect it will be contended that the statute applies: **Pullen –v- Snelus** (1879) 40 LT 363, **North –v- Loomes** [1919] 1 Ch. 378 and generally **Halsbury's Laws of England** Fourth Edition Volume 36 paragraph 48.
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> [20]. The Appellant's Statement of Defence filed on 13 December 2005 makes no reference to section 59 of the Act and as a result the Appellant cannot rely on the Defence. Even if the Appellant had properly pleaded the Defence the Respondents, rightly or wrongly, had pleaded in the Statement of Claim sufficient facts to raise the common law exception to the requirement in section 59 that the contract had been partly performed. Furthermore the inclusion of alleged facts by way of part performance in the Statement of

Claim in order to take the case out of the operation of section 59 of the Act did not relieve the Appellant from the requirement to plead the defence if he wanted to raise it and rely on it: **Clarke –v- Callow** (1877) 46 L.J.Q.B. 53.'

5. Order 18 rule 6 of the High Court Rules of 1988, states as follows

'6(1) Subject to the provisions of this rule, and rules 9,10,11, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

(2) Without prejudice to paragraph(1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be not be stated, except in so far as those words are themselves material.

(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an even has occurred being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in hid pleading.'

6. The plaintiff did not plead any liability based on principle of 'agency' from the Defendant. No evidence was led to that effect, but in the written submissions he had raised a new issue of agency and claims that the Defendant is an agent of

the Captain of the vessel in which the Plaintiff worked. When the Defendant denied employment of the Defendant, if the liability is claimed under the law of agency the statement of claim would have amended accordingly, but instead did not even tried to reply to the Defence. Without doing that the counsel for the Plaintiff in the written submission raised an issue of agency between the Defendant and the owner of the vessel, which was not even suggested to the Plaintiff, when his evidence was led. The Plaintiff's counsel, did not cross-examine the witness who gave evidence on behalf of the Defendant on this issue of agency. If he was relying on the principle of agency, the Defendant should have been given an opportunity to refute such an allegation, but this was not done. The evidence does not support such a finding on agency.

7. The Defendant had stated that it was never the employer of the Plaintiff, and the Plaintiff had sought to continue with the same pleadings and also without seeking specific discovery as to this vital fact. The Defendant had in the statement of defence, described its functions and stated that it only supplied 'operational and management services' to the foreign vessels including the vessel where the Plaintiff got injured. Neither interrogatories nor any specific discovery of vital issue of the employer employee relationship was elicited, by the Plaintiff.

8. The Plaintiff stated that he was employed by the Defendant, since he applied to the Defendant and also paid by the Defendant. The witness for the Defendant admitted that Plaintiff applied through them, but stated that applicants were only selected by the Captain and the Defendant only recommended certain applicants on the request of the Captain and the final decision remained with the Captain of the ship and payments were made from the account of the ship owner and they were only making payments on behalf of their clients. The burden is with the Plaintiff to prove on preponderance of evidence that the Plaintiff was an employed by the Defendant, when it had denied that fact and, had also stated the details of its relationship with the Plaintiff. The Defendant had also detailed the type of services it supplied to the owner of the ship who had hired the Plaintiff.

9. According to the Plaintiff he applied for a job in a vessel to the Defendant upon information that he received from a villager, who had returned from such a voyage and had personally came to the office of the Defendant and voluntarily expressed his desire to work in a ship. From the analysis of evidence it is clear that the Plaintiff was seeking employment in a foreign vessel, whereas the Defendant is a local company. The Plaintiff was aware of periodical berthing of fishing vessels in Fiji harbour and he had sought employment in such a vessel through the Defendant, which was a local company. The Plaintiff admitted that he was selected by the captain of the ship, after he applied for a job in a vessel. He said that there were altogether 15 people employed in the said ship and all except two locals were Taiwanese nationals. It was a normal practice to employ about two locals to a foreign vessel berthed in Fiji waters according to the evidence of the Plaintiff.

10. No written agreement or contract was produced by the Plaintiff and the burden of proof is with the Plaintiff to prove that he was employed by the defendant. Though oral contract is sufficient it is not enough to state that the Plaintiff applied to the Defendant, seeking some work in a fishing vessel, since the Defendant had admitted that fact, but stated that they only recommend certain persons to the Captain who made ultimate decision to hire a person or to terminate their engagement. The Captain of the vessel was a Taiwanese and he could not speak English, all the others except two locals were foreigners, and the Defendant had provided services as an intermediary under the circumstances, and the Plaintiff who sought employment in a foreign vessel through the Defendant would have known that he was not employed by the Defendant. The Plaintiff did not state that he sought employment with the Defendant and or a vessel belonging to the Defendant.

11. In the statement of defence the Defendant had denied that it employed the Plaintiff. It had also stated that the vessel 'Sing Man Yi' was owned by a company in Taiwan and had produced the certificate of vessel's Nationality to prove that fact. This fact is not disputed. The Plaintiff stated that he was selected for certain trips and also stated that his salary was not subject to PAYE Tax and only provisional Withholding Tax of 15% was deducted. It was also contended that 15% Provisional Withholding Tax was deducted for independent

contractors as opposed to PAYE Tax paid by permanent employees. The Plaintiff also admitted that he never received any FNPF contribution from the employer and no deductions were made in relation to FNPF from his wages, by the Defendant. Though these facts are not conclusive proof of non existence of employer employee relationship, these facts substantiate the Defendant's contention that they were only facilitating the fishing vessels, and that the Plaintiff was not employed by the Defendant.

12. The Plaintiff admitted that the Captain of the Vessel was the person who selected him, while the Defendant had recommended him for employment. He also stated that the Captain did not know his language, and the Captain was in command of the ship and Defendant was not in control of the ship, as well as the Plaintiff while he was on the ship. If so how could there be negligence on the part of the Defendant by not providing protective gear, needs an explanation. He also admitted that working conditions were determined by the Captain of the ship depending on the circumstances. The Plaintiff admitted that the Defendant did not own the vessel. The Plaintiff stated that he was unaware of the relationship between the Defendant and the Captain of the ship vis-à-vis the owner of the vessel.

13. The Plaintiff in the statement of claim had included a claim for breach of statutory duties under the Regulations of the Health and Safety at Work Act 1996. In the circumstances not only the common law interpretation, but also the interpretation of employer employee relationship, under the Health and Safety at Work Act 1996 needs consideration. The Plaintiff had submitted following decisions of High Court of Fiji cases

    a. Baravi Vs Fish Marketing Group Ltd Civil Action No 43 of 2006
    b. Timoci Raitamata Vs hagton Pacific Company HBC 270 of 2007
    c. Apimeleki Kava Vs Jiko Fisheries Limited HBC 283 of 1996.

And Following PNG cases

a. Continental Trading Ltd Vs Patsy

b. Toplis & Harding Pty Ltd Vs Toka.

14. None of the submitted decisions of the Fiji High Court dealt with the issue before me, as the employment was admitted in all the said cases. They also relate to injuries to fishermen while on board due to the snapping of the main fishing line, and would be relevant only after employment is established. Though the injury was similar the issue before me was never an issue in any of the cases submitted by the Plaintiff and their ratio cannot be applied to this case, until the employment of the Plaintiff is established. The two PNG cases were submitted to establish agency, between the Defendant and the company that engaged the Plaintiff in the vessel and since there is no pleading regarding agency, I do not consider them relevant, at this moment.

15. The written submission for the Defendant, did not refer to any case law or authority but has only summarized the evidence of each witness and contended that the Defendant did not employ the Plaintiff.

16. In the circumstances, first I consider the common law position whether the Plaintiff was employed by the Defendant and then consider the statutory provision under the Health and Safety at Work Act 1996.

C. COMMON LAW

17. Halsbury's Laws of England states as follows on the issue of whether a person is an employee or not

> (Halsbury's Laws of England/EMPLOYMENT (VOLUME 39 (2009) 5TH EDITION, PARAS 1-561; VOLUME 40 (2009) 5TH EDITION PARAS 562-1041; VOLUME 41 (2009) 5TH EDITION, PARAS 1042-1503)/1. NATURE OF A CONTRACT OF EMPLOYMENT/(1) EMPLOYMENT UNDER

CONTRACT/(i) In general/4. Test whether a person is an employee at common law.)

"4. Test whether a person is an employee at common law.

There is no single test for determining whether a person is an employee[1]. The test that used to be considered sufficient, that is to say the 'control' test[2], can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals[3], and is now only one of the particular factors which may assist a court or tribunal in deciding the point[4]. More recently, the 'integration' or 'organization' test had been suggested, proposing that the important question was whether the person was integrated into the enterprise or remained apart from, and independent of, it[5]. However, while both of these factors are still pertinent, the modern starting point for deciding whether a contract of service (now generally referred to as a 'contract of employment')[6] exists is to ascertain if:

(1) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master ('mutuality of obligation');
(2) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master ('control'); and
(3) the other provisions of the contract are consistent with its being a contract of service[7].

The final classification of an individual now depends upon a balance of all relevant factors[8], fine though that

balance sometimes might be[9], with 'mutuality of obligation' and 'control' being seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment[10]. **The factors taken into consideration may include: the method of payment; any obligation to work only for that employer[11]; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions[12]; how the contract may be terminated[13]; whether the individual may delegate work[14]; who provides tools and equipment[15]; and who, ultimately, bears the risk of loss and the chance of profit[16]. In some cases the nature of the work itself may be an important consideration[17].**

The way in which the parties themselves treat the contract and the way in which they describe and operate it are not decisive[18]; and a court or tribunal must consider the categorization of the person in question objectively[19]. Thus a person could have been described as self-employed during the currency of the engagement but, on its termination, claim to have been in fact an employee for the purpose of claiming unfair dismissal[20], although such a course of action could have unfortunate taxation implications[21].

In many employments, the contract will not be discernible just from one document, **but will require consideration of several documents, oral exchanges (for example, at interview) and subsequent conduct[22]. In a case of what is often referred to as 'a typical employment', such as temporary or casual work, sporadic work or homeworking, it may be appropriate, when deciding on the employment status of an individual subject to such a regime, to consider whether there is sufficient mutuality of obligations to justify a finding that there was a contract of employment[23].”** (Foot notes deleted, emphasis added)

18. If the employment is highly skilled, the application of the control test is not the best to be applied for resolving issue regarding the employment. By the same token it can be said if the alleged work is unskilled, as in this case, the control test can be used predominantly though it may not be the only test to determine the issue of employment.

19. In Hassan v Transport Workers Union [2006] FJSC 11; CBV0006U.2005S (19 October 2006) the Supreme Court of Fiji decided the issue of whether taxi drivers who were engaged by the owner of the vehicles for a fixed daily income, can be considered as employees of the owner of the vehicles. Though this was a judicial review, that ultimately decided that the taxi drivers cannot be categorized as 'employees' of the owner of the vehicle, the relevant law was analyzed and held,

> '[69] To the extent that this case involves the common law governing the characterization of contractual service relationships and bailment relationships, the Court is concerned with the common law of Fiji, which is ultimately that declared by this Court. Doctrines and principles accepted in Australia will be part of the common law of Australia. The same is true of New Zealand and Canada and other countries. They, like Fiji, inherited the common law from England. But at particular times, and in particular ways, the common law, as declared in the courts of those countries, may have diverged from the common law elsewhere. **The question must always be asked – what is the common law of Fiji?** That does not entitle this Court lightly to set that common law in directions which diverge from its historical origins or that of other countries with whom it shares its legal heritage.' (emphasis added)

20. Though the Plaintiff cited PNG cases in the written submission, I do not think that I should apply them for determination of this judgment. In any event those cases were submitted in support of the Plaintiff's contention that the Defendant

was an agent of the Plaintiff, which was neither pleaded nor elicited in evidence. When the Defendant's representative gave evidence no such evidence elicited. Under the circumstances the issue of Agency has to be rejected and the PNG cases cannot be considered on that ground, too.

21. Hassan v Transport Workers Union [2006] FJSC 11; CBV0006U.2005S (19 October 2006) after carefully analyzing the common law , held

> '[62] The difficult distinctions involved in the multi-factor approach are illustrated by the difference in outcomes between the decisions of the Court of Appeal of New South Wales in ***Vabu Pty Ltd v Commissioner of Taxation*** (1996) 86 IR 150 and of the High Court in ***Hollis v Vabu Pty Ltd***. The company provided courier services and the question in the New South Wales Court of Appeal case was whether it was an employer for the purposes of superannuation legislation. The company's couriers were paid for the number of successful deliveries undertaken. They owned the cars, motor bikes and bicycles which they used and had to meet the cost of maintaining, repairing and insuring them. They had to provide themselves with street directories and telephone books. They had to wear a company uniform and to comply with the company conduct standards. Their working hours were fixed. There was no discretion to refuse work allocated by the company. However, because of the payment arrangements and the responsibility of the couriers to supply their own equipment they were held to be independent contractors.
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> [63] The High Court case involving Vabu arose out of an accident in which a person was injured by the negligence of one of its bicycle couriers while making a delivery. The High Court held 6-1, that the company was vicariously liable for the act of its courier. In relation to the bicycle couriers it

differed from the New South Wales Court of Appeal in the earlier superannuation case.

[64] The majority judgment discussed the "control" test and observed that in ***Brodribb*** the Court had been ***"adjusting the notion of 'control' to circumstances of contemporary life"*** (at 40). The Court quoted with approval the observations of Mason J and in particular the passage in which he identified ***"the totality of the relationship between the parties"*** which must be considered for the purpose of its characterization. After reviewing the various elements of the working relationship between Vabu and its couriers, the majority said (at 45):

"**...Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, ... they were Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.**"

[65] The decision of the High Court of Australia differed from that of the New Zealand Court of Appeal on similar facts in ***TNT Worldwide Express (NZ) Ltd v Cunningham*** [1993] 3 NZLR 681. That too concerned owner-driver couriers employed under standard contracts which declared that the relationship between the drivers and the company was that of independent contractors. It contained terms which, as the Court of Appeal in New Zealand found, suggested that ***"each party was genuinely trading off benefits under one relationship for perceived***

advantages under the other" (at 695). Although the company controlled the livery of the vehicle, the courier controlled his own chosen area or territory. He was responsible for employing relief drivers and would profit from sound management and performance of his task.

[66] A declaration in a contract that a party is an "independent contractor" does not determine the character of the relationship. In ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2 QB 497, MacKenna J pointed out that the characterization of the relationship as independent contractor or otherwise is a matter of law. It is dependent upon the rights and duties imposed by the contract. If a contract established a relationship of employer and employee it would be irrelevant that the parties declared it to be something else. MacKenna J did not deny some utility for such declarations, because they might help resolve cases of doubt. His judgment was approved by the majority of the Court of Appeal in ***Ferguson v John Dawson and Partners (Contractors) Ltd*** [1976] 1 WLR 1213. Browne LJ (at 1270) was prepared to assume that a declaration as to the nature of a relationship by the parties is ***"a relevant but certainly not a conclusive factor"***. (See also ***Massey v Crown Life Insurance Company*** [1978] 1 WLR 676).

[67] **The present position under the common law of England, Australia and New Zealand requires the Court to consider the whole relationship. The primary consideration must be the degree of control, direction or constraint exercised or entitled to be exercised by the person receiving the services over the person providing them.**'

22. In the circumstances, the common law approach to his issue varies from one jurisdiction to another, but the control test is widely used for unskilled workers, similar to the Plaintiff's work. The test of control deviates from being a determinative factor depending on the skill and judgment of the employee in the exercise of his employment. From the common law in Fiji it is safe to deduce, that the unskilled worker like the Plaintiff has to establish a degree of control by the Defendant to succeed in this action to prove his employment with the Defendant. In his evidence he has failed to do so.

Statutory Provision in Fiji

23. The Plaintiff has relied on the Section 5 of the Health and Safety at Work Act 1996 and the said interpretation section of the Act defines a contract of service as follows

> "**contract of service**" means any contract, whether oral or in writing, whether expressed or implied, or under a law of Fiji or not and includes –
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> *(a)* a contract under which a person is employed by another;
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> *(b)* a contract of apprenticeship;
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> *(c)* a contract arrangement or understanding under which a person receives on-the-job training in a trade or vocation from another;

The employer is defined as follows

> "'employer" means a corporation or an individual by whom a worker is employed **under a contract of service**. It includes Government Departments and statutory authorities"(emphasis added)

24. The Plaintiff's claim is based on the statutory law. The claim is based on the Health and Safety at Work Regulations made under the Health and Health and

Safety at Work Act 1996. In order to claim negligence under the said Act the Plaintiff has to prove that he was an employee under the said Act. According to the definition of the Health and Safety at Work Act 1996, the 'employer' is a person who employs a person under a contract of service except for certain exceptions given in the interpretation, which is not relevant to the case before me. The word 'contract of service' is also defined under the said Act, and accordingly it can either be oral or written. I have not been submitted any case law on the interpretation of the said provision contained in Health and Safety at Work Act 1996, by both parties.

25. The Supreme Court of Fiji in Hassan v Transport Workers Union [2006] FJSC 11; CBV0006U.2005S (19 October 2006) held

> '[68] Before applying the employee-independent contractor distinction in a statutory context, the question must be asked - what is the proper interpretation of the statute? For the statute may define "employee" or "employer" in a way which elides the distinction. **The common law does not determine the meaning of the statute. However, where there is an established common law principle the statute is not generally taken to displace it unless it does so expressly** or by necessary implication. There is an overlapping interpretive principle that where terms are used in a statute which have acquired an established judicial interpretation, there will be an inference that the legislature intended that interpretation to apply to those terms. There is nothing in the Recognition Act to suggest that it extends beyond employments existing at common law."
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> Further held
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> '[70] In some cases, particularly those affected by its constitutional principles including those relating to human rights and fundamental freedoms, Fiji may diverge from other jurisdictions which have been, like it, the inheritors of

> the common law of England. **But a conservative principle should be applied to maintain, so far as possible, a degree of certainty and predictability about the judge-made law.** With its historical depth of trial and error evolution it provides an immense resource upon which to draw in dealing with disputes between people which are part of the common lot of humanity and know no jurisdictional boundaries. (emphasis added)

26. In the Health and Safety at Work Act 1996, the control test is not expressly eliminated for the determination of the employment, though certain express inclusions are being made to cover the contract of service in terms of the said Act and they are found in (a),(b)and (c) of the said definition, which I quoted in full paragraph 23 of this judgment. Non exclusion of the established control test for determination of the issue of employment of unskilled workers is an indication that it had not been excluded in the determination of the employment, in Fiji under the Health and Safety Act, 1996.

27. The Plaintiff's evidence is that he applied to Plaintiff to work in a vessel and he was interviewed by the Defendant. The Plaintiff admitted that he was selected by the captain of the ship as opposed to the Defendant. There is no evidence of control of the Plaintiff by the Defendant, specially when he worked in the vessel. The payment of wages after the voyage in local currency cannot be considered a control. According to the evidence all the major decisions including whether the 'catch' could result an additional payment was by the Captain of the ship, and disbursement of payments to Plaintiff in local currency cannot establish employment.

28. The Defendant's witness stated that they only recommend certain people to the Captain of the vessels and the ultimate decision is entirely with the Captain of the ship, who was not an employee of the Defendant. The Defendant paid the money in local currency to the Plaintiff after a voyage, and this not necessarily make it an employee. No FNPF contribution was deducted and no PAYE Tax deducted, instead a provisional Withholding Tax was deducted from the wages. All these supports that the Plaintiff was not an employee. The fact that wages

were collected from the Defendant does not necessarily make the Defendant an employer. For convenience and also to avoid any impediments dealing with the foreign vessels the payments made through the Defendant can be accepted as more pragmatic method of dealing with the only two locals out of a crew of 15 mostly comprising Taiwanese nationals. The Plaintiff was engaged in for one voyage upon his inquiry from the Defendant, and he was paid for the voyage, and he was never in control with the Defendant. The Defendant had only facilitated the Plaintiff to obtain some work in a vessel and had paid his wages to him. In the circumstances the Plaintiff cannot be considered as an employee of the Defendant.

29. The Plaintiff's counsel in its submission state that errant companies should not take refuge under the guise of companies similar to Defendant, where the actual employer is not revealed. First I do not think that Plaintiff was deceived in any way when he sought employment in foreign vessels, through the Defendant. In any event, I do not think that this should be a consideration in this action, where the Plaintiff had sued the Defendant for failure to provide statutory obligations. For this I need only to quote the decision of Fiji Supreme Court in Hassan v Transport Workers Union [2006] FJSC 11; CBV0006U.2005S (19 October 2006)

> '[91] The respondents have also referred to public policy considerations about the need to ensure that taxi drivers receive entitlements of the kind contained in the Order. It is not for this Court to determine such matters. The Court is not equipped to make judgments about the costs and benefits in the taxi industry of such entitlements and effectively to impose them by extending the concept of "employee" beyond its common law limits.'

D. CONCLUSION

30. The Plaintiff sued the Defendant as the employer for the alleged negligence and also for breach of statutory provision in terms of the Health and Safety Act 1996. The defendant in its statement of defence denied the employment of the

Plaintiff, and stated that it only provided operational and management services to the foreign vessels. There is no claim against the Defendant based on the principles of agency, and no evidence was led on that basis, but in the submission the Plaintiff is relying on the principles of agency. This contention has to be rejected since it was not supported by the pleadings or evidence. The Plaintiff has failed to establish that the Defendant was the employee of the Plaintiff. The sudden jettisoning of the initial contention, is an indication of failure to establish essential ingredients of employment. The Plaintiff failed to establish that the Defendant is an employer of the Plaintiff. The Plaintiff was never under any effective control of the Defendant. The application to the Defendant and the interview of the Plaintiff to consider the suitability for recommendation to the Captain of the vessel would not make the Defendant an employee. That can be analogous to any recruiting agency. The payments in local currency to the only two locals through the Defendant, will not meet the requirements of employer under the circumstances. This is analogous to payment of salary through a bank or other organization, and would not make it employer. In the circumstances I would dismiss the claim of the Plaintiff and each party has to bear its own costs.

E. FINAL ORDERS

a. The writ of summons and the statement of claim of the Plaintiff is struck off.
b. Each party to bear their own costs.

Dated at **Suva** this **12th day** of **August, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva