

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION
CIVIL ACTION No. 292/2011

BETWEEN

Hong S. Hwang

Plaintiff

Agape Fishing Enterprises Limited

Defendant

COUNSEL: Mr G. O'Driscoll for the plaintiff

Ms M.Tikosuva for the defendant

Date of hearing: 1st July, 2015

Date of Judgment: 6th September, 2016

JUDGMENT

1. In these proceedings, the plaintiff alleges that the defendant fraudulently sold his vessel, the "Oryong 81", without his knowledge and approval. The plaintiff seeks a declaration that that he is the owner of the vessel and the defendant acted unlawfully in selling it. He claims the purchase price of the vessel, the monies he expended on repairing the vessel, interest and costs. The defendant states that it was authorized by the registered owner of the vessel, to sell the vessel. The defendant counterclaims for watchman and mooring charges it paid to the Fiji Ports Corporation Ltd.

2. *The amended statement of claim*

3. The plaintiff, in his amended statement of claim states that he purchased vessel "MV Oryong 81" on 1st February, 2003, from Kum Chand Industry Development Co. Ltd, (KCIDCL) a Korean based company for USD\$30,000. The vessel was de-registered on 25th February, 2003, in Korea. It was re-registered in the Republic of Panama, on 13th October, 2004, as "Western Pacific No. 1" by a Western Pacific Fisheries Company "without any colour of right", while the ownership of the vessel was with the plaintiff. On 19th November, 2009, the defendant unlawfully sold his vessel to South Pacific Metal Limited, without his knowledge and approval. The plaintiff lodged a complaint to the Police.

The amended defence and counter-claim

4. The defendant, in its amended defence and counter-claim states that it was authorized in writing by Eric Yu aka Yu Check Fai of Western Pacific Fisheries Corp, the owner of vessel, "Western Pacific No. 1" (registered in the Republic of Panama, on 13th October, 2004) to "use, operate and manage" and "arrange sale of the vessel."

5. The amended defence and counter-claim continues to state that the defendant received statutory demands from Fiji Ports Corporation Limited for mooring charges. On 8th December, 2008, the Harbour Master in Suva ordered the defendant to remove the derelict vessel within three days, failing which the vessel was to be sold or destroyed. The defendant counterclaims for expenses incurred of \$50,422.00 paid to “*Punt Hire and Watchman*” and mooring charges of \$15,909 paid to Fiji Ports Corporation Limited together with interest.

The amended reply

6. The plaintiff, in its reply joins issue with the defendant and states that the vessel was registered in Korea and discharged on 25th February, 2003, as it caught fire in Fiji waters, in January, 2003. Eric Yu aka Yu Check Fai is a fictitious name. He did not have any authority to issue instructions for the sale of the vessel. The Police Investigation is ongoing.

7. *The hearing*

(i) *PW1*

PW1, (the plaintiff) in his evidence said that he purchased the vessel “*Oryong 81*” from KCIDCL in 2003, for \$30,000. In support, he produced a Vessel Sales Agreement dated 1st February, 2003, entered between KCIDCL and himself, an invoice stating US\$10,000 was paid at the time the agreement was entered into and a telegraphic transfer for the balance amount. The boat was registered in Korea.

PW1 said that he had repairs done to the vessel for a sum of \$121,500 by HIW Marine and Industrial Engineering Ltd, as set out in the invoices he produced. He did not change the registration. He tied the vessel in Suva Harbour, as to repair the major damage caused to the engine by a fire in Fiji waters would have cost half a million dollars. It remained for six years in the Harbour, while he went overseas. There were no charges levied by the Harbour in 2003 and 2004.

He produced a document titled “*Original De-register of Vessel*” and a “*Certificate of Vessel's Nationality*” of 20th March, 1995. The vessel was launched on 25th January, 1980.

PW1 produced a certificate of registration of the vessel “*WESTERN PACIFIC No.1*”. The certificate states that the previous name was “*ORYONG 81*”. The date of construction of the vessel was given as 1986.

On 19th November, 2009, his boat was sold by the defendant to South Pacific Metal Limited. He made a Police complaint on 7th May, 2010. The defendant had not made a demand of its counterclaim on him.

At the commencement of the cross-examination of PW1, Ms Tikosuva, counsel for the defendant sought to produce documents attached to the defendant's application to strike out the plaintiff's statement of claim.

I declined the application. I upheld the objection of Mr O' Driscoll, counsel for the plaintiff that the documents were not disclosed to the plaintiff, prior to the hearing.

It was put to the witness that the name of the owner in the "*Certificate of Vessel's Nationality*" was "*H.S.Hung*", while his name is "*H.S.Hwang*" and the document was issued on 20th March, 2005, at a time he was not the owner of the vessel. The witness agreed that the document does not bear a correct statement of facts. He was not the owner at that date.

PW1 agreed that at the time he signed the Sale Agreement, the vessel was owned by KCIDCL, while the document titled "*Original De-registration of Vessel*" provides that the vessel was owned by Sajo Industry Co. Ltd and de-registered on 25th February, 2003.

It transpired that PW1 was a Director of HIW Marine and Industrial Engineering Ltd, when the invoice for repairs was issued. He agreed that his company benefitted from that payment. It was pointed out to the witness that his statement to the Police states a Korean fisherman informed him that his vessel "*MV Oryong*" was sold, but the sale and purchase agreement entered between the defendant and South Pacific Metal Ltd refers to the vessel "*Western Pacific 1*". He said that the name was changed to "*Western Pacific 1*".

It was put to him that he did not care for the boat and hence did not see or know that its name was changed from "*Oryong 81*" to "*WESTERN PACIFIC No 1*", despite the name sign being displayed on the vessel. He said that he did not see the sign.

PW1 said that he had heard of Eric Yu of the defendant company, but never had a business relationship with him. He denied that Eric Yu had forwarded payments to him for fuel for his vessel through Betty Wong, Director of the defendant Company. He said that he knew Betty Wong for 17 years.

He was unaware that the defendant paid mooring charges.

He denied that he entered into an agreement in 2004, to sell the vessel "*Western Pacific 1*".

In re-examination, PW1 said that KCIDCL purchased the vessel from Sajo Industry Co. Ltd and sold it to him. The vessel was de-registered, since it caught fire. He left a watchman in charge of the boat for two years, when he went overseas.

He said that he was one of the three shareholders of HIW Marine and Industrial Engineering Ltd. He had a 40% shareholding in that company.

He went with the Police to the South Pacific Metal Limited's factory and saw the boat being cut up.

(ii) *DW1*

DW1, (*Suparat Adithyangkul aka Betty Wong, Managing Director of the defendant company*) said that in early 2003, she was approached by the plaintiff to introduce him to her “good friend”, Eric Yu, to do business together. Eric Yu was in the business of trading shark fin. She said that “*Mr Hwang*”, (the plaintiff) had a boat to deliver shark meat and fin to Hong Kong and Korea. They were supposed to do that business, but she did not follow it up.

DW1 said that Eric Yu contacted her to sell the vessel “*Western Pacific No.1*”. He gave power of attorney to the defendant, to use or sell it. He told her that he had the registration papers of the vessel. He came to Fiji sometimes. Occasionally, he told her to give money to the plaintiff for fuel.

DW1 said that she looked after Eric Yu’s boat on behalf of him. The plaintiff was not involved in looking after the boat. She did not see the plaintiff after 2004.

The previous name of “*Western Pacific No.1*” was “*Oryong 81*”. The boat came to Fiji under the name of “*Oryong 81*”. Eric Yu registered the boat in Korea.

She paid mooring fees to the Ports Authority, after 2006. She did not ask the plaintiff to pay the watchman and mooring charges, as he was not the owner of the vessel.

She could not continue to keep the boat in the Harbour, as the Ports Authority repeatedly asked to tow it away. The vessel could be seen by anybody at the Harbour. It was sold for \$38,000 for scrap material to South Pacific Engineering Metal Ltd, as it was not seaworthy..

In cross-examination, she said that she was not aware that the “*call sign*” allocated to a vessel on registration cannot be changed. The “*Call Sign*” in “*MV Oryong 81*” was “*6 N.V.O*”, while the “*CALL LETTERS*” in the “*Western Pacific No.1*” was “*HO-3733*”. Mr O’ Driscoll commented that the name of a vessel could change, but not its call sign.

It transpired that the power of attorney Eric Yu gave her in August, 2006, was not registered. She had not paid any stamp duty. She said that Eric Yu, by word, asked her to look after the vessel from 2004.

The registration of the vessel was done in Panama, using the flag of convenience. She was aware that it was not necessary for a vessel to be in Panama, to have it registered in that country.

DW1 was asked why the defendant has made a counterclaim against the plaintiff, if he was not the owner of the vessel and no demand was sent to him. Her response was that her lawyer made the claim.

Mr O' Driscoll commented that the witness was silent, when it was put to her that she had no business relationship with PW1 and did not have any evidence in the form of receipts of payments made for watchman and charges levied by the Ports Authority.

She agreed that the sale proceeds of the vessel, which she stated in evidence in chief was a sum of \$ 38,000, should have been offset against the counter-claim of \$ 66,000.

It was put to her that she had no right to sell the vessel.

She knew the plaintiff had a fishing boat and his father-in-law was a Captain. It was put to her that the defendant fabricated the Panama certificate of registration and sold the boat for scrap for \$ 38,000, as the plaintiff was not in the country between 2003 and 2010. Her response was that she did not know that the plaintiff was not in Fiji. She took the boat because Eric Yu asked her to look after it. She said that the boat did not run from 2003 to 2010. It was in in the Harbour. Everyone could see it.

In re-examination, DW1 said that the Panama certificate refers to "*call letters*" not "*call sign*". She said that Eric Yu gave her power of attorney in 2006, as he was her friend and customer. She was not involved in the registration of the vessel in Panama. She was unaware if the plaintiff was in Fiji or not, when the vessel was sold. Finally, she maintained that she had a right to sell the vehicle and denied that she committed a fraud with Eric Yu.

The determination

8. The case for the plaintiff is that his vessel, the "*Oryong 81*" was re-registered by Western Pacific Fisheries Corp in the Republic of Panama as "*Western Pacific No.1*", and fraudulently sold by the defendant to South Pacific Metal Ltd, when he was overseas.
9. In support of his ownership of the vessel, PW1 produced the vessel sales agreement of 1st February,2003, he entered into with KCIDCL, to purchase vessel "*Oryong 81*", an Invoice for the purchase price of US\$30,000.00 stating US\$10,000.00 was paid upon the signing of the agreement and a telegraphic transfer from ANZ for the balance US\$ 20,000 he paid on 18th February,2003.
10. Ms Tikosuva contended that PW1's claim to ownership in terms of the sale agreement of 1st February,2003, was contradicted by two other documents he produced: the "*Certificate of Vessel's Nationality*" and the document titled "*Original De-register of Vessel*".

11. She pointed out that the *Certificate of Vessel's Nationality* was dated 20 March, 1995, and provided that his name was "H.S. HUNG" not "H.S.HWANG", as was his name. PW1 accepted that the document appears to be incorrect, as he was not the owner of the vessel at that time.
12. The second inconsistency was in the document the "*Original De-register of Vessel*" provided that the vessel was owned by Sajo Industry Co. Ltd as at 25th February, 2003, but the telegraphic transfer for the ultimate payment for the vessel was dated 18th February, 2003.
13. On a review of the plaintiff's evidence as a whole, I accept that he was the owner of the vessel "*Oryong 81*". I am satisfied that the vessel was sold by Sajo Industry Co. Ltd to KCIDCL, which sold it to the plaintiff, as clarified by the plaintiff, in re-examination.
14. The defendant denies that the plaintiff was the registered owner of the vessel and states in its amended defence that it was authorised "*in writing on 18th August, 2006*", by the owner of the vessel, Eric Yu of Western Pacific Fisheries Corp, to sell the vessel "*Western Pacific No.1*".
15. The authority in writing was not produced at the hearing. In cross-examination, DW1 said that Eric Yu had asked her "*by word*" to look after his vessel from 2004.
16. The defence relies on the certificate of registration issued by the Republic of Panama, which provides that the vessel was registered in Panama as "*Western Pacific No.1*" on 13th October, 2004.
17. Mr O' Driscoll pointed out the following distinct discrepancies between the *Original De-register of Vessel*", the document issued in Korea, (as relied on by the plaintiff) and the Panama certificate.
18. Firstly, the Korean document gives the name of the vessel as "*No 81 Oryong*". The certificate issued by the Republic of Panama provides that its previous name was "*Oryong 81*".

19. Secondly, the Korean document gives the "Call Sign" of the vessel as "6 N.V.O". The "CALL LETTERS" in the other certificate is stated to be "HO-3733".
20. In the cross-examination of DW1, it was pointed out that the name of a vessel could change, but not its call sign or call letters, as it is also termed. DW1 said that she had not paid attention to the call sign on the vessel and was unaware that it could not be changed, albeit it transpired that she had purchased fishing vessels from Korea.
21. Finally, the certificate issued by the Republic of Panama provides that the date of construction of the vessel was 1986. The Korean Certificate provides that the date of launch for "Oryong No. 81" was 25 January, 1980. This corresponds with the launch date set out in the particulars contained in the Vessel Sales Agreement, as also does the "Call Sign" and the vessel no.
22. I am satisfied that there are several discrepancies in the Panama certificate of registration vis a vis the Korean certificate.
23. I reproduce an extract of the cross-examination of DW1, on the procedure adopted in Panama, a flag of nation country, to register vessels:
- Q. *Are you aware that Panama is very much..a flag of convenience country? You do not necessarily have to have your vessel there in Panama, to have it registered in that country.*
- A. *Thats what I heard from all the Korean fishing industry talking about.*
- Q. *You can ring Panama and say I want you to register my vessel and Panama makes no check at all.*
- A. *.. That's what everybody using.*
- Q. *Is that correct? So Panama, would you agree does not confirm the ownership before it issues the certificate?*
- A. *...I am not aware of what (Eric Yu) did.*
24. I agree with Mr O'Driscoll that the defence has not produced any evidence to rebut the inescapable conclusion that PW1's vessel was re-registered in Panama, by Western Pacific Fisheries Corp in the Republic of Panama, while he was the owner.
25. PW1 said that in 2003, he anchored the vessel in the Suva Harbour, and went overseas, since it would cost half a million dollars to repair the damage caused to his vessel.

25. In my view, the evidence establishes with sufficient certainty that DW1 was aware that PW1 was not in Fiji between 2005 and 2010, when she sold his vessel to South Pacific Metal Limited on 19th November, 2009, without his knowledge and approval.
26. DW1 said that she had not seen PW1 after 2004. It transpired that PW1 and DW1 knew each other for a span of 15 to 17 years. She knew he owned a fishing boat. She admitted in cross-examination that the vessel was grounded in the Suva Harbour from 2003, where *“everyone could see it”*.
27. In my judgment, the plaintiff is entitled to claim damages from the defendant for unlawfully selling his vessel, in a sum of US\$30,000.00, being the price he paid to purchase the unseaworthy vessel.
28. The plaintiff has claimed interest. No evidence was led on this claim, nor has it been addressed in the closing submissions filed on behalf of the plaintiff.
29. The plaintiff claims that he expended repairs in a sum of FJ\$121,500.00, for work done by HIW Marine & Industrial Engineering Ltd, as contained in the invoices he produced.
30. I find it most unlikely that the plaintiff expended that sum of money on repairs, in the light of his pleading in his statement of claim that he *“purchased (the vessel) to be resold to a scrap metal buyer as the same has been in a demised state and the likelihood of it being repaired for re-use was minimal”*.
31. Moreover, Ms Tikoisuva, in the cross-examination of PW1 elicited that he was a Director of HIW Marine & Industrial Engineering Ltd at the time the invoices were issued. He had a 40% shareholding in that company and was one of its three directors.
32. I do not accept the authenticity of the invoices produced. I decline the plaintiff’s claim for the sum of FJ\$ 121,500.00.

The defendant's counterclaim

33. The defendant in its counterclaim states that “[i]f the court finds that the vessel at the time of sale from the Defendant to South Pacific Metal Limited was owned by the Plaintiff, which the Defendant denies, then the Defendant claims from the Plaintiff expenses for managing the vessel from 2006 to 2009.
34. Mr O’Driscoll asked DW1 why she makes a counterclaim against the plaintiff, when her position was that he was not the owner of the vessel. Her response was that her lawyer made the claim.
35. She maintained complete silence, when she was confronted in cross-examination with the fact that she had not produced any evidence of payment of watchman and mooring charges to the Fiji Ports Corporation Ltd.
36. In my judgment, the counterclaim cannot be maintained and is declined.
37. **Orders**
- (i) I grant the plaintiff a declaration that he was the owner of the vessel “*Oryong 81*” and the defendant acted unlawfully in selling his vessel.
 - (ii) The defendant shall pay the plaintiff a sum of US\$30,000.
 - (iii) I decline the plaintiff’s claim for FJ\$121,500.00
 - (iv) I decline the defendant’s counterclaim for \$ 66,331.82.
 - (v) The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 2500.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
JUDGE

6th September, 2016