

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBG 01 of 2021

BETWEEN: **SOUTH PACIFIC FERTLIZERS LIMITED** a limited Company having its office at Waterfront Road, Veitari Road, Lautoka, Fiji.

PLAINTIFF

A N D: **AGROW PLANET PTE LTD** a private Company having its registered office at 28 Sin Ming Lane, #05-145, Midview City, Singapore (573972).

FIRST DEFENDANT

A N D: **MOTOR VESSEL UNIPROFIT**

SECOND DEFENDANT IN REM

Appearances: Mr. Charan for R. Patel Lawyers for the Plaintiff
Date of Hearing: 15.11.2021
Date of Ruling: 15.11.2021

R U L I N G

BACKGROUND

1. As I gather from the Writ of Summons and Statement of Claim filed on 01 September 2021 and an *ex-parte* Notice of Motion filed on 01 September 2021 with its Affidavit in Support, on 23 June 2021, South Pacific Fertilizers Limited (“SPFL”) placed an order with the first defendant Agrow Planet Pte Limited (“APPL”) for the supply of 8,000 MT +/-5% of *Sulphate of Ammonia*.
2. The supplier, who is not named, is based in China. The complete shipment would cost SPFL US\$2,435,400.00.
3. SPFL was dealing with APPL for the supplies rather than the supplier. That is a perfectly valid arrangement but its exact nature is not quite clear to me.
4. SPFL had paid APPL a total of US\$2,313 (sic). There is a balance of US\$ US\$484,000.00 outstanding.

5. Based on the sum already paid, APPL then shipped the 8,000 MT+/-5% of *Sulphate of Ammonia* to Lautoka – but it held on to the original Bill of Lading obviously, as security.
6. The shipment had been scheduled to arrive in Lautoka on 30 August 2021. On 23 August 2021, SPFL received an email from a Simon Lim who owns and operates APPL. Lim’s email, according to SPFL, states that Lim “*had misappropriated a sum of US\$484,000.00 from monies South Pacific Fertilizers sent him*”. All I would say on this email, which I have had a chance to read, is that it is open to interpretation.
7. Meanwhile the shipment had arrived in Lautoka. However, because APPL still held onto the original Bill of Lading, which is in accordance with standard practice to ensure that APPL retains ownership of the shipment as security against any unpaid sum, this meant that SPFL could not offload the cargo.
8. It would appear that there were issues between the parties concerned. The exact nature of these issues will be clearer once APPL files its statement of defence in this case. On 01 September 2021, SPFL filed a Writ of Summons and Statement of Claim against APPL and on the same date, obtained the following Order for Arrest on the Vessel “MV UNIPROFIT” from Mr. Justice Stuart.
 - (1) SPFL is to pay USD\$484,000.00 into Court.
 - (2) on payment of the amount of USD\$484,000.00 into Court, a Warrant of Arrest for the Vessel MV Uniprofit is to be issued and enforced by the High Court Registry Admiralty Division, Lautoka.
 - (3) leave is reserved to the owners of MV Uniprofit to apply to the Lautoka High Court for variations or setting aside of the Warrant of Arrest.
9. SPFL then served the Vessel with the Orders for Arrest and all other relevant documents through the Admiralty Marshall.

APPLICATION BEFORE THIS COURT

10. On 12 November 2021, R. Patel Lawyers filed an urgent *Ex-Parte* Notice of Motion seeking the following orders:
 - (1) that the sum of \$1,026,946.74 deposited in the High Court by the Plaintiff be paid out to R. Patel Lawyers Trust Account.
 - (2) that cost of this application be costs in the cause.
11. The application is supported by an affidavit of Kaushik Maharaj of Lautoka, Chief Executive Officer of SPFL.

AFFIDAVIT IN SUPPORT & COMMENTARY

12. Maharaj deposes that there was some settlement talks between the ship owners, the local shipping agents and "our clients". After settlement talks, it was agreed that SPFL would release the "MV UNIPROFIT" from arrest.
13. I observe that the alleged settlement is not documented. There is no trail of emails or letters or any other record of electronic communication of the sort annexed to Maharaj's affidavit to substantiate the alleged settlement.
14. I assume that if any settlement was reached at all, it would have to be properly contextualized against the fact that at the time the parties were talking things over, SPFL would already have posted the sum of USD\$484,000.00 into Court pursuant to Stuart J's Orders of 01 September 2021.
15. On 17 September 2021, the Court granted an Order for Release for Arrest. The vessel has already sailed out of Fiji after it was released from arrest.
16. Maharaj further deposes that it is now more than 42 days since the documents were served on the Vessel and there has been no application lodged against any of the funds we had deposited into Court as security for the arrest.
17. However, I observe that there is no record that SPFL has ever served APPL the Writ of Summons and Statement of Claim, let alone, that SPFL has ever applied to this Court to seek leave to serve these processes out of jurisdiction.
18. Maharaj then deposes of the advice that he has received from his Solicitors namely that "*more than enough time has passed for the Vessel Owners to make an application if they had any claim to our funds*". He seeks an Order that "*our monies be released back to our Solicitors*".
19. On this note, I am inclined to believe that APPL would have come to the table so to speak and engage in the settlement talks, if ever there was one, and agreed to whatever arrangement it reached with SPFL, comforted by the knowledge that the sum of USD\$484,000.00 had already securely deposited into Court. As Maharaj deposes, the USD\$484,000.00 was actually posted into Court by SPFL on 01 September 2021.

COMMENTS

20. There are a couple of questions about this case that trouble me:
 - (a) if SPFL has indeed paid the entire amount of the shipment at the outset, as Mr. Charran appears to suggest in Court, then what was the need for APPL to retain the Bill of Lading given that a shipper would only need to retain the

original **Bill of Lading** to retain ownership of the cargo and to leverage the instrument as **security** to ensure that they receive the balance payment for the goods.

- (b) why would SPFL want the money released now? Does not APPL have a potential interest over the money?
- (c) if APPL does not have any interest in the sum, who is SPFL to be telling the court so without any credible documentary proof?
- (d) why has not SPFL sought leave to serve the Writ of Summons and Statement of Claim to AGGL's registered office abroad?

- 21. I get an uneasy feeling that this application now before me is not a *bona fides* application. The picture which the applicant tries to paint is so riddled with loopholes and incompleteness that leaves one wondering what all this is really about.
- 22. In my view, Stuart J. would have felt that the sum of USD\$484,000.00 represented the sum which is potentially in dispute between the parties, and so he ordered that to be posted as security. That was the most appropriate thing to do, since an order for the arrest of the vessel and the release of the cargo would have prejudiced APPL's interest and rendered useless the security value of the Bill of Lading.
- 23. I refuse to grant the orders sought. I am of the view that the most appropriate thing to do is to dismiss this application. SPFL is free to file a fresh application once the documents are in order and there is proof that APPL has been served. Service of course will have to follow the granting of leave to serve the processes out of jurisdiction.


Anare Tuilevuka
JUDGE
Lautoka

15 November 2021