HIGH COURT OF SOLOMON ISLANDS

IAN T. PUIA -V- TJ OCEAN ENTERPRISES

Civil Case No. 312 of 2002

Honiara: Brown PJ

Date of Hearing: 13, 16 May 2003
Date of Judgment: 19 August 2003

Gabriel Suri for the Plaintiff
Andrew G. H. Nori for the Defendant

Contract — *charter party – "time" and "purpose" clause – interpretation – various other purposeful charters not envisaged by original agreement – interpretation of intent of parties – court powers*

Practice & Procedure — *summons seeking orders by way of declarations – couched as statement of claim – difficulty of pleading – elucidation of issues to enable resolution – applicability of declaratory orders in matters where terms of agreement in issue and argument over oral agreement to material variations.*

The parties fell out over the terms of a charter agreement over MV Hamakyo Maru 38 During the period of the agreement, the defendant sought to terminate for breach and the plaintiff sought orders of specific performance. The facts are set out in the judgment.

Held 1. The declaration sought that "the defendant breached the agreement" cannot be irreducibly brought to the conclusion sought by the plaintiff when the plaintiffs' acts in going outside the terms of the agreement so intermixed the business of the charterer and client as to deny the plaintiff such relief.

2. The plaintiffs claim for a declaration that the defendant had "no unilateral right to terminate the charter" is refused for the plaintiff has proceeded on the basis the letter of termination is evidence of the defendant's breach of contract and consequently the plaintiff seeks to terminate the contract in the alternative and seek damages for breach.

3. An order for specific performance is refused for the plaintiff's acts in arranging special charters on its own account during the period of the charter effectively precluded this courts consideration of this equitable relief.

4. The damages for breach of contract shall be related to the cost of wages paid the crew at the commencement of the charter to work the vessel.

5 The defendant is entitled to possession of the vessel and its release from arrest.

Originating Summons seeking declarations

Reasons for Decision

The plaintiff originally, by summons filed on the 10th December 2002, sought specific performance of "Marine Vessel Charter Agreement dated 20th June 2002" for that agreement provided, in clause 2, that the charterer have the particular vessel for a period of six months from the date of the first trip. It was uncontested, that the first trip commenced on the 1st August 2002. The suggestion was, on the face of the agreement, that when the vessel was commandeered by the owner on the 9th December 2002 pursuant to a notice of termination of agreement, the time allowed the charterer had not expired, rather almost two months were still to run. In addition, the charterer sought the Admiralty Marshall's assistance to arrest the vessel and then have the vessel released to the charterer for the balance of his charter. On the 6th January 2003, the plaintiff filed a statement of claim n which he sought the following relief:

1. *a declaration that the defendant had breached the charter agreement, before the expiration of the agreement and before the plaintiff could recover his costs of repair, maintenance etc.*

2. *a declaration that the defendant had no unilateral right to terminate the charter and that the termination letter was null and void.*

3. *an order for specific performance and release of the vessel to the plaintiff.*

4. *An order preventing the defendant from interfering with the plaintiffs' use of the vessel.*

5. *an order that the defendant pay damages for breach.*

6. *Costs.*

The orders sought then, may be split up into those seeking equitable relief by way of specific performance by the defendants by allowing the plaintiff the use of the ship, or by the defendant's breach of contract, the plaintiff is entitled to terminate the agreement, with a commensurate right to damages.

The Earlier Orders

On the 10th January, the application to arrest the vessel came before the Court. After hearing Mr. Suri and reading the material in support (set out in the order), this court made the following orders on the 13 January 2003.

ORDERS

1. Leave is given to substitute the Statement of Claim on file with a Writ of Summons in an action in rem in accordance with the Administration of Justice Act 1956 (UK).

2. This leave is granted pursuant to Order 31 of the High Court Rules.

3. I further order, upon the filing of the plaintiff's undertaking as to damages, and to keep the Marshall harmless of costs and expenses, that a warrant for the arrest of MV Hamakyo Maru 38, be issued in form to be settled by me.

4. The summons shall be returnable 8 days from the date of service by affixing it to the mast of the aforementioned vessel.

5. I further order that the plaintiff lodge a bank letter of credit for the sum of $4,000 or pay into court that sum as security for the costs of the Marshall.

6. The costs of the proceedings before me on the urgent application are reserved.

7. Liberty is granted to either party to apply to the Court on 2 days notice.

8. Liberty is granted to have the summons and warrant settled by me at short notice.

The ship was subsequently arrested by the Admiralty Marshall pursuant to the courts powers found in the Administration of Justice Act 1956 (UK) Part 1, Section 1 and reasons were published.

Some part of the reasons for decision

At page 8, I said:

I would say that, whilst the charter party agreement and the letter of termination have been included in my reasons, and whilst both form part of an affidavit of the plaintiff, that affidavit has not been read, rather the documents themselves have been tendered into evidence so that I was in a position, on material before me, to determine whether the plaintiff had a triable issue in seeking possession of the ship, and to not merely accept the assertion in the plaintiff's pleadings in his statement of claim.

Having heard Mr. Suri, I am satisfied on the pleadings filed in the plaintiff's statement of claim, that the plaintiff has disclosed a cause of action for recovery of MV Hamakyo Maru 38 from the plaintiff. This Court has jurisdiction to entertain such an action.

The Admiralty Division, its practice and procedures, is the appropriate means, for the plaintiff seeks an order for possession under Ss 1(i)(a) of the adopted U.K. Act. I am further satisfied, having regard to Schedule 3 to the Constitution, that the Administration of Justice Act 1956 (UK) has full force and effect in the Solomon Islands. The United Kingdom Act, Section 1 came into force before the 1st January 1961, to wit; January 1957 and applies here as part of the law of Solomon Islands.

The copy of the warrant of arrest was sellotaped to the port bridge window by the Registrar of the High Court, acting Admiralty Marshall, the Sheriff or Admiralty Marshall being on leave.

Mr. Presley Watts appeared for the defendant. An affidavit in reply by the defendant was filed on the 30th January 2003.

No defence was filed.

On the 3rd February, the plaintiff sought an order that the Admiralty Marshall release the vessel, Hamakyo Maru 38 to the plaintiff, and in the alternative an order that persons objecting to the release of the vessel to the plaintiff lodge security in the sum of $10,000.00 (before they could be heard).

On the same day, the plaintiff also filed a notice of motion under O29 r.8 seeking judgment in default of defence. This motion addressed the claim by the plaintiff to damages for breach of contract.

The summons and motion were both listed for the 11th February 2003.

On that day Mr. Watts filed a Notice of Motion seeking the release of the vessel from arrest, "to sort out the registration of ownership issue" and a statement purporting to be under Order 58 rule 4. (0.58 r.4 deals with the requirement of evidence to support a plaintiff's application for a declaratory order by way of summons). Both documents had been entitled with the defendant in the proceedings named as the plaintiff in other words they were defective as to form and should have been rejected. There was no summons for declaratory relief filed and in the proceedings before me, still no defence.

In the normal course, these documents would not have been accepted for filing, but obviously since they were filed on the day for hearing of the plaintiff's summons and motion, they were not detected as deficient. The notice of motion of the 11 February is struck out.

On the 11th February 2003 the following orders were made by consent of the parties.

1. The plaintiff's Notice of Motion for judgment in default filed on 6th February 2003 and the Defendant's Notice of Motion for enlargement of time to file defence be stayed. Either party shall have the liberty to apply for the re-listing on seven (7) days notice.

2. The Admiralty Marshall at 12.00 noon on Thursday 13th February 2003 released the vessel MV Hamakyo Maru 38 to the Plaintiff for it to continue with its charters under the Charter party agreement dated 20th June 2002 for completion of three trips to the Indispensable Reef, subject to compliance with the requirements of the Shipping Act.

3. The Parties do prepare and settle account on liabilities and payments due under the charter party agreement.

4. Liberty to apply.

On the 18th March, Mr. Nori of Bridge Lawyers took carriage of the action on the defendant's behalf by filing a notice of change and on the 22nd April by way of amended Notice of Motion, the defendant sought orders setting aside the consent orders of 12th February and the warrant of arrest. As well, the defendant sought possession of the fishing vessel Kamakyo Maru 38. The defendant also sought an extension of time to file a defence. That motion relied upon the following grounds:

(a) the charter had expired

(b) the plaintiff had failed to justify the right to a lien over the vessel for he had not shown any debt owing to the plaintiff by the defendant or:

(c) in the alternative, the plaintiff had retained and converted to his own use moneys due to the defendant in excess of any debt due under cl.1.3 of the charter agreement and

(d) the plaintiff does not have a valid Provincial Government licence to fish the Indispensable Reefs.

In effect, then, the defendant has, by his Notice of Motion, joined issue with the plaintiff's statement of claim. Quite frankly the plaintiff's pleadings are defective for where the plaintiff seeks to vary the terms of the written charter agreement by introducing evidence of other arrangements for other charters during the period of the charter, and to seek a *"declaration that the defendant had breached the charter agreement"* illustrates the fact. In the Statement of Claim the plaintiff could have pleaded the agreement, then set out the facts on which it relies in support of its assertion the defendant had breached just what agreements and then included in its claim for relief, the effects which flow from the breach of the agreements.

In his paper work, Mr Suri leaves it to the court to find the facts of various agreements (for the additional charters were the subject of particular meetings with a view to settling the terms between these parties) then breach of the agreements from the voluminous affidavits filed in support. The issues in dispute relating to the various charters, the unforeseen costs and outlays and who is liable to pay, had not been attempted by pleadings.

On the 25th April, the plaintiff filed an affidavit in reply to the defendant's affidavits in support of its motion, so the parties had had the opportunity to address the material each had raised in his case.

I indicated when the case came on for hearing on the 13th May that I proposed to deal with the matter as a contested hearing on all the issues elicited by the affidavits and argument was directed to that end.

The chronology of events

Mr. Nori prepared a summary which shows:

Date	Event
20/6/02	Parties entered into a charter agreement
01/8/02	First trip to the Indispensable Reefs which lasted 45 days
29/9/02	Second trip made to Renbel Province which lasted 7 days
29/10/02	Third trip, made to Indispensable Reefs which lasted for 29 days
28/11/02	Fourth trip, made to Ontong Java which lasted for 5 days
04/12/02	Fifth trip, made to Renbel Province, which lasted 5 days
09/12/02	Defendant purports to terminate agreement

His chronology then deals with the court proceedings

Date	Event
10/12/02	Plaintiff filed action the High Court (HC-CC312/02)
10/12/02	Plaintiff field ex parte summons seeking orders to restrain managers, servants, agents and directors of the Defendant from removing the vessel "MV Hamakyo Maru 38" ("Vessel") from the possession of the Plaintiff. The summons was returnable the next day, 11/12/02
11/12/02	Orders made that the Ex-parte Summons be stood over and for documents to be served
10/01/03	Ex-parte Summons re-heard after proof of service
13/01/03	Court orders, inter alia, that the statement of claim be substituted with a Writ of Summons in an action in rem and for the issue of a warrant of arrest of the vessel.
15/01/03	Warrant of Arrest filed and served
03/02/03	Plaintiff filed a summons for release of vessel to Plaintiff
06/02/03	Plaintiff file a notice of motion seeking, inter alia, judgment in default of defence
10/02/03	Defendant files a notice of motion seeking, inter alia, the lifting of the warrant of arrest over the vessel and for the release of the said vessel to the Defendant

11/02/03	Plaintiff's summons and Defendant's notice of motion heard but stayed, pending negotiation between parties
12/02/03	Consent Order filed (the defendant now denies that it gave consent to the terms of the said order)

I should shortly say, in relation to the consent order of the 12th February that Mr. Nori's assertion the defendant denies that it gave consent, cannot succeed. At the time of the consent order, Mr. Watts was the lawyer on record. He had filed an affidavit by Dennis Tepuke of White River, company director, who asserted that he was a director of T. J. Ocean Enterprises Ltd. At the time of the hearing before me, Mr. Nori had Mr. Jorge Teikanoa in court and his affidavit of the 7th April was read with that earlier affidavit of Dennis Tepuke. In the latter affidavit, Mr. Tekanoa said, in para 21 that *"in or about the 17th March 2003, I decided to change the company's solicitor because I learned that our former solicitor has entered into a consent order with the Plaintiff which was contrary to instructions. At no time have I agreed for the vessel to be released to the Plaintiff."*

Mr. Dennis Tepuke was not called on the point, in fact the consent orders have been ignored by the defendant, who does not bother to state grounds for seeking the courts order setting aside the earlier consent orders of 12th February. That attitude seems to have permeated the course of proceedings, for while at no time may Jorge Teckanoa *"have agreed for the vessel to be released to the plaintiff"*, this court ordered the release by consent. If this was not by consent, then the affidavit of Dennis Tepuke would have been expected, recounting the clear absence of proper instructions in Mr. Watts at the time of the consent order, but there was no attempt whatsoever, to explain, rather the bold assertion by Jorge Teckanoa in his affidavit, an assertion which wholly ignores the fact of the court order. This court cannot adopt Mr. Teckanoa's attitude, and conveniently ignore its own order, so the orders of the 12th February stand, to be considered (in light of all the other conflicting evidence) now as to how best this court can deal with the apparent act in the defendant, of ignoring them. Perhaps the defendant was acting on advice of the new lawyer, or being just plain contrary. It was open to come back at once, since liberty, to apply had been included, yet the defendant appeared to have patiently ignored them.

Whatever the reasons, the defendant felt that it need not show cause why it should not be dealt with for apparent contempt, but the facts of the case may go some way towards ameliorating the defendants apparent contempt, for the understanding of the parties about their supposed arrangements in any event, leaves the court in some difficulty.
My order of the 11 February was by consent. A court is bound to stand by its orders, unless those orders are overturned on appeal. As I have said no attempt has been made by the defendant, in pleadings, or by motion, to address the fact of these orders.

I am satisfied, having regard to the defendant's attitude that to seek to enforce an order that the vessel be given the plaintiff for any length of time, (as envisaged by Order 2) would only create greater animosity between these parties and cannot be countenanced.

The Argument on the Agreement

The defendant says that the charter party agreement has lapsed, for the time period in the agreement was for trips to be completed within six months from the date of the first trip.

The six months has passed from the commencement of the 1st charter on the 1 August last year.

Clearly the acts of the defendants in sending the purported letter of termination of agreement, and the vessels seizure on the 9 December last, coupled with its complete disregard of the consent order,

2. *The Admiralty Marshall at 12.00 noon on Thursday 13th February 2003 release the vessel MV Hamakyo Maru 38 to the Plaintiff for it to continue with its charters under the Charterparty agreement dated 20 June 2002 for completion of three trips to the indispensable reef, subject to compliance with the requirements of the Shipping Act.*

satisfies me the defendant has repudiated the contract and that the plaintiff may terminate it for breach (where Time stipulation in the contract is essential term – see *Bunge Corp New York -v.- Tradax Export SA Panama* (1981) 1 WLR 711). Here, the defendant had not given the plaintiff the full six months of the contract, and that was an essential term.

But I am not satisfied the number of trips to the Indespensabel Reefs fall with in that category. The way the clause is written does not permit of an either/or interpretation.

Clause 1.0 of the Agreement provides

"Uvea will charter from the Owner a vessel (with all its equipment, facilities and crew without limiting the generality of these definitions) for a minimum of five trips. It is also agreed that the trip must be complete within six months from the date of the first trip".

9. The "trip" referred to diving trips to the Indispensable Reefs. The use of the word "must" in the latter part of the clause makes the time of six months mandatory. But once the vessel was in the control of the plaintiff, by virtue of the agreement, then it was not for the defendant to dictate how the plaintiff was to manage his diving trips. In fact the plaintiff saw fit to carry out other charter work. It is uncontested that 5 diving trips were not completed only two were carried out. But it is not an essential condition of the contract, in the sense that the time stipulation was, for it lay with the plaintiff whether or not to dive for *bech de mere.* The plaintiff chose other charter work, (and sought to renegotiate the terms of these "special charters") so cannot now complain his failure to go to the Indispensable Reefs was brought about by the

defendant. Consequently this assertion, calling for the remaining trips, to fall within an essential term category, must fail.

It follows the part of the consent order of the 11 February 2003, dealing with 3 remaining trips to the Indispensable Reefs, has no basis in law. The defendant has raised a valid point which I accept.

The orders may be revisited, and whilst the defendant's action in refuting them in this fashion does not follow proper, practice, the order should not be allowed to stand for it is based on a false premise. "Five trips" to the Indispensable Reefs was not a condition of the contract, the trips were descriptive of the purpose for the charter, fishing.

I consequently revoke that order and discharge the original order for seizure by the Admiralty Marshall. The ship shall revert the owner.

On the 3rd February the plaintiff sought summary judgment but by the consent order of the 11 February, 2003 that motion for judgment was stayed. As I have stated, since then the defendant has, by its motion of the 22 April, joined issue with the plaintiff yet while seeking time to file a defence, had taken no steps to do so before the hearing of these various motions and applications. The application for time to file a defence is formally refused.

The hearing of these proceedings afforded the parties sufficient opportunity to address their respective claims.

The defendant's application for further time in which to file a defence is denied, for the defendant has had sufficient time to couch a motion in form of a defence, and has been afforded the opportunity, at trial, to make its defence. Clearly on the evidence, Jorge Teikanoa denied the extraneous sub-charters (if I may so call them) were to be treated differently from the trips to the Indespensible Reef.

In cross examination he said, about the meeting at the plaintiff's residence to discuss the 1st extraneous charter to the Renbel Province, there was disagreement about the share of the charter price. Mr. Suri put to him that Mr. Puia would do the charter, receive the proceeds and pay $10,000. Mr. Teikanoa refused to acknowledge any such agreement. (It was clear that these other charters had nothing to do with *beche-de mere* fishing, and were not envisaged or allowed for in terms of the original agreement)

In re-examination, he acknowledged the meeting in Mr. Puia's house before the 1st charter to Renbel.

In the circumstances, with the hearing in fact, being a trial on all issues, the plaintiff's motion to seek "judgment in default of defence" is no longer available and in reality, was not likely to succeed for the defendant's first affidavit in reply was filed on the 30

January and it was open to the court to treat that affidavit as a pleading to the claim for declarations, and a joinder of issue, so that the motion for judgment in default of defence, at this stage, has been subsumed by the subsequent hearing.

I wish to come back, as it were, to the issue of the sub-charters, whether or not they fall to be included in terms of the charter agreement, or were they trips which, by oral variation to the agreement, were to be treated separately. Mr. Jorge Teikanoa says they fell within the terms of the agreement. Mr. Dennis Tepuke, in his affidavit, related the sub-charter or special trips, to the original charter agreement. He did not concede any arrangement which varied the charter agreement.

The evidence about the "special charters" was brought out in Mr. Suri's cross examination of Jorge Teikanoa. There was apparently a meeting at Ian Puia's residence. Also there were one Wanga and David Dennis.

Q. Was it discussed who would receive proceeds of the charter (by Renbel Province)

A. It was I should arrange for charter and receive goods.

Q. The result was, Ian Puia would do the charter, receive the proceeds and pay you $10,000.00

A. No, I didn't agree.

Q. What was the agreement, then?

A. We did not resolve any agreement

This dispute over his way to treat these special charters culminated, it would seem, in the defendant's act purporting to terminate the charter agreement by letter on the 9 December 2002.

Mr. Suri sought to show the defendant had agreed to the suggested "special charters" on the basis of the payment of $10,000 with respect to the Renbel charter, for he sought to show an amount of $2,000 was paid to Jorge Teikanoa, for his mother, and $7,000 for crew's wages about this time, on the 2 October.
The issue seems to be however, who was principally responsible for crews wages in any event, for the plaintiff says the defendant was, and consequently moneys paid for wages of the crew were really moneys due to the defendant, while the defendant seems to be saying moneys paid the crew were the plaintiff's responsibility for they were working on the plaintiff's business.

It is plain from the charter agreement the responsibility for crews wages remained with the owner, for the first clause provided for the charter of the vessel with crew. Nevertheless, I am satisfied the plaintiff was obliged to advance moneys from time to

time for crews wages, so as to have the ship sail. The evidence of Jorge Teikanoa accepts this fact, although as best as I can make out, the defendant does not concede he should be responsible for the crews wages for the special charters.

The problem remains, however, how to treat these "special charters", as falling within the terms of the charter agreement, or hot. Clearly the plaintiff sought to exclude them, as a separate, ancillary agreement.

Ian Puia's affidavit of the 25 April 2003 sets out his recollection of the arrangements:

(4) There was meeting between Jorge Teikanoa, Wanga (a Taiwanese), David Dennis and myself at my home at Lengakiki before the first permissive charter on or about 30th September 2002. At that meeting we reached an understanding and agreed that when we ran charters other than trips to Indispensable Reef, we would pay the 10% of net proceeds as stipulated in clause 1.2 of the Charter party agreement and as read with clause 1.6. That would be treated as 10% of net proceeds of sale of bech-demer as contemplated by clauses 1.2 and 1.6.

(5) Everyone at the meeting discussed freely. The meeting was convened because the Province wanted to charter the vessel and we had to resolve the point as to who would receive the proceeds of the charter because it was not a trip to the Indispensable Reef as contemplated by the Charter party agreement.

(6) All subsequent permissive charters were done in consultation with the Defendant or with their full knowledge and acquiescence and with the understanding that the Defendant would be entitled to 10% of net proceeds only as previously agreed but always subject to our right to recover costs first as stipulated in clause 1.3.

This affidavit principally argues the outcome which the plaintiff seeks. It does not recount conversations or seek to introduce any minutes of the meeting, rather a legalistic conclusion which the plaintiff may have unilaterally reached, but does not reflect facts which clearly show no agreement had been reached about how to treat the special charters, hence the meetings and eventually the defendant's letter seeking to terminate the charter.

I am satisfied the plaintiff has not given any sufficient facts to support his conclusions that he purports to depose to in this affidavit. I am not prepared to try and make an agreement between these parties where they so obviously have fallen out over the particular terms of this charter party. The variations proposed by the plaintiff to the terms of the written charter agreement are of a most material nature. In the absence of clear facts on which this court can draw conclusions, the court should not make an "agreement" which will materially alter the effect of the original contract.

In para (2) and (3) of Ian Puia's affidavit, for instance, he says:

(2) *From the day we ran the first permissive charter (by the province), we began to receive threats by Jorge Teikanoa to take away the ship from us.*

(3) *This led us to consider options to satisfy the Defendant. We, therefore, suggested a payment limit of $20,000.00 per month. That was one of the many suggestions put to him. There were no final decisions made on these suggestions.*

Clearly there was no agreement reached on the "special charters". This court cannot now seek to make an agreement to cover the new terms and changes to the various trips, brought about by sickness, engine troubles, Marine requirements after the commencement.

In the absence of matters in issue, it is not for this court to embark on an exercise to imply terms into this charter agreement and subsequently, oral variations (if any) brought about by these "special charters".

As I have said, the affidavit of Ian Puia is couched in conclusions rather than factual evidence. The evidence of Jorge Teikanoa is not sufficiently credible as to afford the court any confidence that it could reliably find express or implied terms, for instance, in relation to the plaintiff's wish for oral variations to the charter agreement.

The veracity of Jorge Teikanoa is discredited when one has regard to his evidence in cross examination about his knowledge of the arrest of the vessel. (He did admit that his brother, Dennis had authority to give legal instructions) Jorge Teikanoa said he was in "Renbel" from 28 November to 7 December 2002, then the vessel was commandeered by the defendant on the 10 December. He was seen by the plaintiff at Point Cruz on the 16 December, he refused service of the Court documents. Dennis, his brother, refused to accept service on the 21 December at Wharf 1, the papers were left with him.

Jorge said that he had received no papers before he went back home to "Renbel" on the 28 January 2003. The vessel was arrested on 17 January. When asked if he knew of the ships' arrest he said "No, I received no papers before I went back home. I was at home then" (at the time of the ships' arrest) Dennis was not in court at the time of this hearing, for, as Jorge said "he is working on the bus".

Frankly I was not impressed by the defendant's evidence or Jorges' veracity. It is impossible, in these circumstances, to attempt any variations on the theme of the charter agreement.

Finding on the period the agreement

The agreement was for six months. The defendant breached the agreement. The plaintiff is entitled to treat the breach as fatal, and terminate the agreement, but not entitled to the alternative, specific performance.

The damages which arise from the termination, relate to the moneys advanced the defendant for crews' wages.

The manner in which this charter party agreement has collapsed, does not in my view, call for this court to try and reach a settlement between the parties where the parties themselves, cannot recite the issues in dispute, rather leave it to this court to sort out the muddle. The persistence of the plaintiff, in seeking to enforce his extraneous "special charter" arrangements in the clear absence of agreement with the defendant cannot now result in this court ordering further fishing trips, as I have explained. The plaintiff sought and obtained the use of the vessel for these extraneous trips, and the costs and benefits, if any shall lie where they fall.

An appropriate way to assess damages, in the absence of any real argument on the issue, is to order reimbursement to the plaintiff of wages which have been paid the defendant's crew, a cost to the defendant under the original agreement.

This sum amounts to $7,000 paid on the 24 July 2002. Other salary paid has been treated by the plaintiff as part of the charter moneys advanced the defendant, although the defendant seems not to know just what moneys were paid to the crew.

Ian Puia, in his affidavit of the 25 April, said payment of wages were made in lieu of charters.

The plaintiff's claim for relief

1. The court refuses to make a declaration in the terms sought for the charter agreement cannot be irreducibly brought to the conclusion sought by the plaintiff because of the plaintiff's actions in procuring these "special charters" (and thereby admittedly varying the agreement) within the time frame of the 6 month charter period for the plaintiff's acts so intermixed the business of the charterer and client as to deny the plaintiff such relief.

2. This claim has been dealt with in terms of the courts' decision of the 13 January 2003 and result in my finding today that the plaintiff may treat the defendant's action in writing the letter and repossessing the vessel as a breach of the contract entitling the plaintiff to terminate, and seek damages.

3. The claim for specific performance and possession of the ship fails for the reasons given, the plaintiff chose not to exercise his rights to fish bur rather, sought "special charters" not envisaged in the original agreement, and the equitable remedy is refused since the plaintiff should not benefit from its own actions which cause the time period to principally expire.

4. This claim fails for the plaintiff is not entitled to possession of the vessel.

5. This claim for loss of income fails, for the loss or benefit of the various charters shall remain where they fall, although a fair measure of damages for the defendant's breach is the sum for wages advanced at the beginning of the charter, to have the crew work the vessel.

6. The plaintiff has succeeded to part of its claim and is entitled to its costs.

7. The vessel shall be immediately released, (if the terms of the order of the 12 February had not been implemented by the Admiralty Marshall) to the possession of the defendant and the Admiralty Marshall shall account for the balance, if any, of the costs of the Marshall to the plaintiff of the sum of $4,000 set aside for that purpose, and if such sum was secured by letter of credit, claim on such letter the amount of his costs as aforesaid.

J.R. Brown
Judge