

JOHN EDWARD McQUADE AND LORRAINE McQUADE -v- ROBIN BYCROFT AND BYCROFT EARTHMOVING PTY. LIMITED

HIGH COURT OF SOLOMON ISLANDS
(F.O. KABUI, J.)

Civil Case No. 041 of 1999

Date of Hearing: 21st August 2002
Date of Ruling: 29th August 2002

Mr C. Ashley for the 1st and 2nd Plaintiffs
Mr D. McGuire for the 1st and 2nd Defendants

RULING

Kabui, J. This case was listed before me to be heard on 17th July 2002 but was deleted from the cause list. It reappeared on the cause list on 26th July 2002. After a short hearing, I adjourned the hearing to a date to be fixed. The next hearing was fixed for 13th August 2002. Again, I adjourned the hearing to 9.30am the next day. Again, I adjourned the hearing on 14th August 2002 for a date to be fixed. I finally heard this case on 21st August 2002. The request for the hearing was at the instance of Mr. McGuire, the Solicitor for the 1st and 2nd Defendants. Mr. McGuire filed no Court papers to commence the application in Court. So I was not sure what relief Mr. McGuire was seeking from the Court. At the hearing on 26th July 2002 above, Mr. McGuire told me that his application was a continuation of the Notice of Motion filed on 11th October 2001. He also made reference to the hearing by the Registrar on 22nd May 2002 and the orders he made. I did not understand Mr. McGuire's intention then for I had delivered the judgment on the Notice of Motion referred to by Mr. McGuire on 29th November 2001. I however did notice that the Registrar had listed the case as arising under Order 37, rule 2 of the High Court (Civil Procedure Rules) "**the Rules.**" I had in mind however that I had made an order on 15th January 2002 requesting the parties to state a special case for the Court's opinion as to the ownership of the MV Delores. I had earlier refused an application by Mr. Sullivan seeking an order to vary the order I had made on 15th January 2002 in my ruling on 21st June 2002. I was rather apprehensive of Mr. McGuire's motive in coming back to Court in case he wanted to press for the same order that Mr. Sullivan had previously sought and I had rejected. Mr. McGuire's position became clear only when he handed up a copy of his submissions from the bar table. The submissions were prefaced with the indication that the question to be determined was the construction of certain documents relating to the transfer of title in the MV Delores. Although Order 58 of the High Court Rules was not cited, the application can be placed under 58 above. This application is clearly in line with the terms of the order I made on 15th January 2002 above. I accept it for consideration on this basis.

The Background

By Writ of Summons filed on 2nd February 1999, the 1st Plaintiff claims, amongst other things, the ownership of the MV Delores from the 1st Defendant. Sol-Law entered a Memorandum of Appearance for the 1st Defendant on 11th February 2001. By notice filed on 7th March 2000, Mr. Ashley of A & A Legal Service became the Solicitor for the 1st Plaintiff. An amended Writ of Summons was later filed on 5th May 2000 citing Lorraine McQuade as the 2nd Plaintiff and Bycroft Earthmoving Pty. Ltd. as the 2nd Defendant. The Statement of Claim was also amended accordingly. The defence was filed on 14th June 2000 together with a counter-claim followed by another amended defence and a counter-claim filed on 18th September 2001. By Notice of Motion filed on 11th October 2001, the 1st and 2nd Defendants, amongst other things, sought final judgment against the 1st and 2nd Plaintiffs in default of

filing a defence to the counter-claim filed by the 1st and 2nd Defendants. I thought the case could be settled by applying Order 37, rule 2 of the High Court Rules without proceeding to trial. I acted accordingly and made the order under Order 37, rule 2 above in my judgment dated 29th November 2001.

The Deed signed on 24th December 1996

The parties to this Deed were the 1st Plaintiff, the 1st and 2nd Defendants, Raymond Courtland George Marks and Atina Therese Marks and Indian Pacific Fisheries Limited. There were two claims pending against the 1st Plaintiff in the Supreme Court of Queensland and in the High Court of Solomon Islands in 1996. The amount in dispute was \$AU715,000.00 plus 15% interest. The parties however had agreed to settle the dispute out of Court. The Deed became the embodiment of the terms of the settlement. All rights, title and interest in debts of the 1st and 2nd Defendants in Transworld Commodities (No.2) Pty. Ltd. (in liquidation), Transworld Investment Pty. Ltd. (in liquidation), Indian Pacific Fisheries Limited, Indian Pacific Seafoods Limited, Ray and Atina Marks and McQuade had been transferred to Mr. McQuade and/or his nominees to off-set his indebtedness to the 2nd Defendant being the subject of the two claims pending in the Supreme Court of Queensland and in the High Court of Solomon Islands. The 2nd Defendant then undertook to discontinue its claims against the 1st Plaintiff. Likewise, the 1st Plaintiff undertook to discontinue his defence and any counter-claim against the 2nd Defendant. As a collateral for the assignment, the vessel MV Delores would be transferred to the 2nd Defendant for the value of the assigned debt plus an undertaking to set aside completely all previous documentation involving the parties to the Deed, an undertaking by Indian Pacific Fisheries and McQuade not to purchase or charter any vessel without the prior written consent of the 2nd Defendant and a guarantee by Indian Pacific Fisheries to allocate 60 % of its audited pre-tax profit against the purchase price of the vessel being AUS715,000.00 plus agreed interest. As a condition precedent to the transfer of the vessel as a collateral for the assignment of the debt, the vessel was to be chartered from the 2nd Defendant for 6 months upon terms and conditions. The relevant terms and conditions were that the vessel was to undergo survey in Solomon Islands at the expense of Indian Pacific Fisheries by 10th February, 1997, the vessel was to be insured in the name of the 2nd Defendant for the sum of AUS 350,000.00 and Indian Pacific Fisheries was to pay a charter fee of AUS 10,000.00 per month failing this McQuade would pay the charter fee. If the charter was proved to be a success, the 2nd Defendant would transfer title to Indian Pacific Fisheries. If not, the 2nd Defendant had two options. If the assigned debt was only in part (say 50%), it could agree to an extension of the charter, or it could take away the vessel and end the charter. If any of the conditions in the assignment of debt had not been fulfilled, the 2nd Defendant would be at liberty to open up the litigation that had been previously compromised between the parties. The Deed was to be effective on 7th January 1997. Pursuant to the said Deed, McQuade executed a Bill of Sale over the MV Delores on 21st February 1997 in favour of the 2nd Defendant.

Deed of Assignment, Acknowledgment and Release executed on 7th May 1999

The parties to this Deed were the 1st and 2nd Plaintiffs, the 1st and 2nd Defendants, Gemstar Commodities Limited and Indian Pacific Fisheries. The parties did acknowledge that there had been dispute over the ownership of MV Delores between the parties to the Deed. This Deed was the embodiment of the compromise reached by the parties on this the issue of the ownership of the MV Delores. Under this Deed, the 1st Plaintiff acknowledged that the 2nd Defendant was the owner of the MV Delores and that he did not hold any interest in the vessel nor on trust for anyone for that matter. The 1st Plaintiff nor Indian Pacific Fisheries would prevent the 2nd Defendant from disposing of the vessel as it saw fit. The 1st Plaintiff and Indian Pacific Fisheries were both willing to do all things to ensure that title went to the 2nd Defendant. Claims pending against the 1st Plaintiff, the 2nd Defendant, Gemstar and Indian Pacific Fisheries and vice versa were also compromised plus cross-indemnities. The 1st Plaintiff, Gemstar and Indian Pacific Fisheries had also agreed to give up their claim to the MV

Delores under this Deed. This Deed however was to be construed and governed by the law of the State of Queensland and that the parties would submit to the jurisdiction of the Courts of the State of Queensland.

Who then is the owner of the MV Delores?

(a) The Law.

The law that applied at the relevant time in Solomon Islands was the Merchant Shipping Act, 1894 of the United Kingdom as per Schedule 3 to the Constitution. The Shipping Act, 1998 of Solomon Islands, has now repealed this Act. Section 24 of the Merchant Shipping Act, 1894 governed the transfer of ships and shares in them by way of a bill of sale. The bill of sale would contain the description of the ship as shown in the surveyor's certificate or other description capable of satisfying the registrar as to the identity of the ship. The bill of sale must be executed by the transferor in the presence of and attested by a witness or witnesses. Section 25 required a declaration by the transferee that the transferee was qualified to own a British ship and that as far as was known, no unqualified person was entitled to be owner of the ship legally or beneficially. The transferee must sign the declaration. Section 26 provided for the bill of sale to be produced and be registered by the registrar and an entry made in the register book in respect of the ship being registered. Section 57 however protected equitable interests in ships or shares in them against the rights of the legal owner. The provisions cited above are similar to the provisions in the Shipping Registration Act, 1981 of the Commonwealth of Australia. (See sections 36, 41, 45 and 47). Similar provisions can also be found in the Solomon Islands Shipping Act, 1998.

(b) The Evidence.

It is not disputed that the 1st Plaintiff built the MV Delores in 1982 in the State of New South Wales, Australia. She was registered in Australia in 1986. The owner was Jack Edward McQuade of the 64 shares in the vessel. This information was obtained from Mr Kevin Cross, the Registrar of Ships in Australia on 28th October 1999. However, registration was removed from the registry on 23rd February 1995 at the request of the registered owner, Jack Edward McQuade. This information was again provided by Mr. Kevin Cross on 3rd April 2000. Already in 1994, the MV Delores was in Solomon Islands on charter for 6 months by Indian Pacific Fisheries Limited. She had undergone marine survey and was temporarily registered in the Solomon Islands register as a British ship. The owners were stated as J. & L. McQuade. By letter dated 18th January 1995, the Operation Manager of Indian Pacific Fisheries Limited wrote to the Comptroller of Customs and Excise of Solomon Islands pointing out that the temporary registration was about to expire and that the MV Delores should be fully registered by transferring the vessel to Indian Pacific Fisheries Limited. In response, Mr. Kuma, the Principal Collector of Customs, by letter date 19th January 1994, told the Operation Manager of Indian Pacific Fisheries Limited that the temporary registration had been extended for 30 days. In addition, Mr. Kuma told him that evidence of de-registration in Australia was required plus title and a builder's certificate. By letter dated 24th March 1994, the 1st Plaintiff told the Registrar of ships in Solomon Islands that J.& L. McQuade was the owner of the MV Delores. The next event that took place was the signing of a Deed on 24th December 1996. In terms of clause 2.2 of the Deed, the MV Delores was to be transferred to the 2nd Defendant on 7th January 1997. The bill of sale (Exhibit "RB3") was however executed on 21st February 1997 in favour of the 2nd Defendant.

Is the bill of sale valid under Australian law?

This question does raise the issue of conflict of laws regarding the validity of the bill of sale. It is not disputed that the bill of sale was executed in Australia under Australian law being the Shipping Registration Act of the Commonwealth 1981. Section 36 of that Act governs the transfer of ship or

share by bill of sale. This section was considered in **Ontario Ltd. v. Commissioner of Stamps** (1988-90) 53 S. A. S. R. 274. In that case there was an agreement whereby the vendor would purchase a sea-going vessel. It was a condition in the agreement that at settlement, the vendor would transfer good title to the purchaser by executing all documents and to do all things necessary to effect the transfer. The question was whether or not the bill of sale was within section 31(1) of the Stamp Duties Act 1923 for the purpose of assessing stamp duty. The purchaser argued that under (a) of section 31(1) above, an exception was created so that the property in the vessel would not vest in the purchaser until registration of the conveyance was effected. That is, the purchaser had disputed the assessment of stamp duty on that ground. The issue was put in the form of a case stated/appeal for the opinion of Bollen, J. His Honour upheld the assessment of the stamp duty. At page 277, His Honour said,

..."As I have said I think that the beneficial title passed at execution. What of the passing of the legal estate in the property agreed to be sold and purchased? Has that passed at execution? Does it pass at the signing or executing of the bill of sale (to be mentioned later)? Mr Quinlan, for the respondent, says that it passed at the signing of the bill of sale"... After discussing Mr. Quinlan's submissions, His Honour at page 281, concluded thus,

..."But I think that the disposal contemplated by s 45 comes after the recording of a bill of sale and has nothing to do with how a title has passed. Section 45 refers to "rights and powers" appearing in the Register. It is a "protection section". It takes the situation of title having passed and registration having been achieved. From that situation it says that he who has registered may dispose. It is not concerned with how title has been earlier passed from one person to the other. Section 36 remains the provision for the passing of title. Section 36(1) says that it is passed by a bill of sale. Baron Martin would think those words decisive. I think them rather ambiguous. But they are clarified by s 36 (2) and (3) and especially by the first clause in subs (2) which I repeat: "Where a ship ... is so transferred...". That connotes transfer by the bill of sale, by its execution or signing of the bill of sale. The subsection goes on to contemplate, in my opinion, a lodging of the bill with a declaration of transfer and then provides for registration. In so providing it is providing for the preparation of a declaration of something which has happened. The "something which has happened" is the passing of property. I think that those subsections support Mr Quinlan's argument. They contemplate passing of the legal estate by the execution or signing of the bill of sale prior to registration. I think that s 45 takes up its work after registration and it does that because that Act contemplates that registration will give notice and protection to those who wish to deal with interests in or to be created in a vessel. The Register is a record. I think that Mr Robertson has given rather too much emphasis to the word "owner". The Act uses that word as defined because it contemplates that dealings with vessels will be dependent on the Register.

I do not think that the legal title to a vessel, in particular this vessel, is "property which cannot vest in the purchaser except upon registration of a conveyance". The conveyance must be registered but the property has vested prior to registration"...

This then is the position in Australia or to be specific in the State of South Australia. In that ruling, His Honour cited a number of English authorities on the issue of ownership of ship. I do not need to repeat them here but they clearly affirm the position that title passes at the execution of the bill of sale unlike the situation with transfer of title to land. That position being that of Solomon Islands also is in my view at par with the position in Australia and so there is no conflict of laws on the point. In this case, the bill of sale being executed on 21st February 1997 passed title of ownership in the MV Delores to the 2nd Defendant. The fact that the MV Delores had ceased to be on the Australian Ship Register on 23rd February 1995 did not divest ownership of the 1st Plaintiff. The fact is that the MV Delores had not been re-registered in Solomon Islands. An attempt to so did not really succeed in the end. The Deed of Assignment, Acknowledgment and Release signed on 7th May 1999 is irrelevant for the determination of ownership. It is however further evidence of the ownership of the MV Delores by the 2nd Defendant. There is however the position of the 2nd Plaintiff to be considered. Exhibit "CKA1" attached to Mr.

Ashley's affidavit filed on 2nd August 2002 is a photocopy of a letter written by the 1st Plaintiff to the Registrar of Ships in Solomon Islands in which the 1st Plaintiff said that the MV Delores was owned by J& L McQuade. The letter was dated 24th March 1994. This information was then entered in Exhibit "CKA5" being a certificate of British Registry in Solomon Islands on 11th April 1994. Exhibit "CKA11" is a photocopy of a letter addressed to the 1st and 2nd Plaintiffs written by their accountants advising them that they would be regarded as joint owners of assets as partners for accounting purposes. This letter was dated 26th July 2002. There is no evidence to suggest that the 2nd Plaintiff is a joint owner of the MV Delores or a beneficiary of any trust for that matter. As far as the Ship Registry in Australia is concerned, the 1st Plaintiff was the registered owner of the MV Delores until registration was removed on 23rd February 1995. The only difference is that in the Australian Ship Registry, the 1st Plaintiff was entered as Jack Edward McQuade whereas in the bill of sale, he signed as John Edward McQuade. There is no evidence to suggest that Jack and John as first names in each case did indicate a different person from the other. The evidence so far is that the 1st Plaintiff was the sole owner of the MV Delores up until he executed the bill of sale on 21st February 1997. There might have been the intention for the 2nd Plaintiff to become part owner of the MV Delores or a beneficiary under a trust but the evidence so far does not bear that out so as to enable me to reach that conclusion. My determination is that the bill of sale executed by the 1st Plaintiff on 21st February 1997 had passed title in the MV Delores to the 2nd Defendant. The 2nd Defendant is the current owner of the MV Delores. I determine accordingly.

F. O. Kabui
Judge