

IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

CV 50 of 2018

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**BETWEEN:**            **LEISA MARIE FRANCIS**

- **Plaintiff**

**AND:**                **LOLESIO SUSITIANO LUI**

- **Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:**        **Mr. S. Fonua for the plaintiff**

**Date of Ruling: 4 September 2018**

**RULING ON INJUNCTION APPLICATION**

- [1] This ruling concerns an *ex parte* application for a Mareva Injunction and ancillary relief.
- [2] The plaintiff and the defendant lived together in a domestic relationship and have two children. The plaintiff is Australian and the defendant is Tongan.
- [3] The parties had a whale watching and sports fishing business at Vava'u. In July 2017 they separated and in October 2017 the plaintiff returned to Australia and took the children with her.
- [4] In this action the plaintiff alleges that she had a verbal partnership agreement with the defendant to operate the whale watching and sports fishing business and that she paid for all the major assets of the business including four boats, a trailer and fishing gear. The plaintiff further alleges that the partnership agreement was terminated by the defendant and that she is entitled to the return of her contributions to the partnership

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namely the boats, trailer and fishing gear. She also claims what are described as 'damages' for set up costs of the business and a substantial sum she said she spent to renovate a family dwelling.

[5] The claim has not yet been served on the defendant and has been filed along with an application for a Mareva Injunction and ancillary orders. The principal relief sought can be summarised as:

- (a) An order prohibiting the defendant from disposing or otherwise dealing with the partnership assets (the boats, trailer etc) and that he be required to keep them safe and fully insured pending further order of the Court;
- (b) That the Police be required to regularly inspect and report on the assets; and
- (c) That the defendant be required to provide reports on the business to an accountant nominated by the plaintiff.

#### **The relevant principles**

[6] The relevant principles upon which the Court will act in relation to such applications were recently set out in *Wallace v Tupou and Tuita* (Unreported, Supreme Court, CV 53 of 2017, 11 December 2017, Paulsen LCJ). As I stated at [5]-[8] of that ruling:

[5] There is no doubt that this Court has jurisdiction to grant a Mareva injunction in an appropriate case. It also has power to make ancillary orders. (Order 22 Supreme Court Rules)

[6] I have been referred to the seminal decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's LR 509 and the New Zealand High Court decision in *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 454 (HC) which is commonly cited in New Zealand as a convenient summation of the relevant legal principles (*Wellington Tenth's v Skiffington* [2017] NZHC 1646 per Clark. J).

[7] An applicant for a Mareva injunction must show the following

(a) A good arguable case on its substantive claim. In this regard I note that in *Hawkins Gault*. J accepted that this is a more onerous requirement than that normally applied in cases of interlocutory injunctions of a serious question to be determined.

(b) That there are assets of the defendant within the jurisdiction to which the orders can apply.

(c) That there is a real risk the defendant will dissipate or dispose of assets and render itself judgment proof. A mere assertion that the defendant will dissipate assets is insufficient. There must be evidence of a real danger of the dissipation of assets (*Hawkins* at pg 454)

[8] In addition to those requirements, the needs of a plaintiff to be afforded protection must be balanced against any prejudice or hardship to the defendant and third parties. In *Hawkins Gault*. J [at pg 452] said that

Generally this is a requirement that consideration must be given to the requirement for overall justice in the circumstances.

### Discussion

[7] Whilst I have sympathy for the plaintiff's position and her concern to protect the assets pending the hearing of this action she has failed to make out the grounds for the making of an *ex parte* Mareva Injunction.

[8] I am prepared to accept for present purposes that the plaintiff has established a substantive claim and that there are assets in the jurisdiction to which orders can apply. However, there is a lack of evidence of any real or substantial risk that the defendant may dissipate those assets and the indications are that he intends to continue to retain the assets to operate the business.

[9] The plaintiff's affidavit is extremely brief and does not contain the sort of detail that one would expect to be provided detailing the matters that show a risk of dissipation of the

assets. She says that she wants to stop the defendant from disposing of the assets but not why she considers that there is a risk that he may do so.

- [10] There are other reasons why it is inappropriate to make the orders sought. The evidence is that the parties separated in July 2017 and so it has now been well over a year since that occurred and the plaintiff has taken no steps to issue proceedings until now indicating a lack of urgency. There is nothing to suggest that anything has happened recently that has increased any risk that has existed since July 2017 that the defendant might dispose of the assets.
- [11] Whilst it is not determinative of this application the plaintiff has given an undertaking as to damages but no evidence of her ability to support the undertaking if called upon to do so. I have endeavored to make clear to Counsel in the past that such undertakings are of little value unless the Court can be satisfied that the applicant is able to honour them.
- [12] Related to this, in his memorandum the plaintiff's counsel says that there is little risk that the defendant will suffer damage if the injunction is granted but there is no evidence to substantiate that either.
- [13] Finally, I would note that even if I had been prepared to grant an injunction at this stage I would not have imposed on the Tonga Police an obligation to monitor and report on the assets; that is clearly not an appropriate use of public resources.

**Result**

- [14] The application for an *ex parte* injunction is refused.
- [15] I am prepared to deal with the application for injunction on notice. I direct that the plaintiff is to serve the defendant with the proceedings along with this ruling and the application for injunction and supporting documents forthwith.
- [16] The defendant is to file any opposition to the plaintiff's application for injunction by 21 September 2018.

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[17] This case will be called before me for mention at **9am on Friday, 28 September 2018**.

[18] Finally I note that if the plaintiff becomes aware of any circumstance that gives her real concern that the defendant is or intends to dispose of the assets she may reapply at any time.



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen

**LORD CHIEF JUSTICE**

**NUKU'ALOFA: 4 September 2018.**