

S/General

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

CV. 685 of 2007.

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BETWEEN: FRESHA EXPORT LIMITED - Plaintiff

**AND : FUNG SHING DEVELOPMENT CO. LTD.
- Defendant**

BEFORE THE HON. JUSTICE ANDREW

Counsel : Ms Bing for the plaintiff and
Mr Kaufusi for the defendant.

Date of hearing: 14 September 2007.

Date of ruling: 17 September 2007.

Ruling

This is an application to have the defendants in this matter committed for contempt of Court for non-compliance with orders of this Court. That is, it is an application that Fung Shing Development Co. Ltd and Raymond Yu as Director of Fung Shing Development Co. Ltd, be held in contempt of Court.

Briefly stated the Plaintiffs commenced proceeding's against Fung Shing Development Company for what is commonly known as "passing off". That is, it is alleged that the defendant was importing and selling items of its Ocean Queen Mackerel AI brand which were copies of the plaintiffs products. The Plaintiffs made an ex parte application seeking orders that:

"The defendants and its servants, agents, associates, companies and related persons shall forthwith:

- (i) Lease and desist from selling or dealing with passed-off canned mackerel purporting to be Ocean Queen A1 Mackerel in Tomato Sauce and Ocean Queen A1 Mackerel in Natural Oil (Ocean Queen A1 Mackerel brands" ; and
- (ii) Deliver up all stock of chinese copies of Ocean Queen A1 Mackerel brands to the custody of His Majesty's Customs Service pending resolution of these proceedings ; and
- (iii) Leave and desist from importing more chinese copies of Ocean Queen A1 Mackerel brands to Tonga ; and
- (iv) Deliver up Accounts and sales and profits in favour of the Plaintiffs between November 2005 until the present in respect of sales of the passed-off chinese copies of Ocean Queen A1 Mackerel brands ; and
- (v) Deliver up relevant business documents, including but not limited to, the Defendant's inventories, invoices, import entries (due for the Revenue Services Department) bank deposit slips, current stock records, sales invoices records, accounts and customs declarations are respect of importation and sales of the passed-off Ocean Queen A1 Mackerel brands ; and
- (vi) The plaintiff must within 7 days of the date of this order serve copies of the application for injunction the affidavit a support and the statement of claim on the defendant.
- (vii) The defendant may apply to the Court to discharge or vary these orders, upon provision of 3 working days notice to the Plaintiff and service of such application and evidence upon the plaintiff."

On the basis that there was prima facie evidence of the passing-off of the Plaintiffs goods and in order to protect the Plaintiffs position, the above orders were granted.

The plaintiff says that they have suffered loss of sales and cancellation of orders and loss of reputation and good will which has caused them substituted damage.

The plaintiff says there has been no compliance with these orders and seeks the orders for contempt of Court.

The defendants did however in compliance with order (vii), seek to vary the orders on the basis that their financial records or many of them were destroyed in the riots of what is known as 16/11. That is especially so for the records from 2005 until the fire. They also

sought further time as they needed to recruit further accounting staff. That order was ultimately refused ; they had sought a further 30 days and that period had almost expired by the time of the application to vary.

Since these events the defendants have filed a defence to the claim. They admit that the Plaintiff holds the exclusive right to sell the Ocean Queen Mackerel A1 brands but denies, inter alia, the allegation of passing off.

The power to order committal for civil contempt is a power to be exercised with great care. The Court will only push for disobedience to an order for the Court ... if satisfied that the terms of the order or undertaking are clear and unambiguous ; that the defendant has proper notice of the terms ; and that a breach of the order or undertaking has been proved beyond reasonable doubt. *GORCE v MILLER* [2003] TOSC. Fa42/2003 28th November 2003.

The defendants did move to vary the orders. There may be some practical difficulty in complying with all orders in relation to documentation from 2005 until 16/11. Some documentation has been provided in relation to importation of goods. The allegations are denied. The defendants may not have any control over stock which had already reached various retailers. The Plaintiffs remedy will be in damages. I think the orders have gone towards protecting their position. I do not think that in all the circumstance that any non-compliance has yet reached a stage which would justify a level of contempt deserving of an order for committal for civil contempt. The plaintiff also sought orders that the defendants comply with the orders by the 17 September, that is several days after the application for contempt. I think the current application for contempt is premature in all of the circumstances.

Costs of this application to be costs in the cause.

DATED: 17 September 2007.



[Signature]
JUDGE