IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 34 of 1977

Between :

A.D. SUTARIA & COMPANY Appellant

A n d :

ABDUL RAZAK & COMPANY Respondent

Mr. F. Lateef for the Appellant
Mr. S. Prasad for the Respondent

JUDGMENT OF COURT

This is an appeal against a judgment for $2527.98 and costs entered by Stuart J., against appellant in terms of a Cost Insurance & Freight Contract (C.I.F. contract) under which respondent purported to sell to appellant goods to that value. In January 1972 respondent's agent in Suva obtained an order for the supply of goods to be shipped from Singapore to Suva during March 1972. Payment was expressly agreed to be made by sight draft through the Bank of Baroda, Suva. A bill of lading was prepared and goods in accordance with the order were shipped at Singapore on the vessel Tairya Maru which sailed for Suva on March 30, 1972. The vessel never arrived. Its fate is uncertain. The bill of lading together with the invoice were duly endorsed by respondent and a

bill of exchange was drawn by respondent upon appellant to be presented through the Bank of Baroda, Suva, to pay to the order of the Bank of America the sum of £1308 and 23 pence in sterling. The consideration was stated to be for value received for the said goods. The invoice, bill of lading and bill of exchange were forwarded to the Bank of Baroda in Suva. Respondent did not provide an insurance cover. It was expressly agreed that the cover should be arranged by appellant with its own insurance company, the New India Assurance Company Limited which duly issued a cover. A financial adjustment was made between the parties for this departure from the usual course. It is conceded that the result was that the transaction had all the attributes of a C.I.F. contract.

When the documents were presented to appellant on April 14, 1972 the bill of exchange was answered with the endorsement "Documents in order - will pay on arrival of goods." Respondent was advised of this. There were negotiations between the parties. On February 2, 1973 the Bank of America advised the Bank of Baroda to hold the documents pending further instruction. On November 7, 1973 the Bank of America requested the Bank of Baroda to return all documents. This was done later the same month. The Bank of America was clearly the agent of respondent and may have been a financier. There were dealings between the parties concerning the claim for insurance. These will be examined later. It is sufficient to say here that an attempt by respondent to collect under the insurance policy failed on the ground, as stated by the insurance company, that the proprietary rights in the goods had not vested in appellant by virtue of its refusal to honour the relevant documents.

Respondent then sued for the price of the goods and recovered judgment. The course of the trial is important. Respondent put in certain documents by consent but otherwise relied on admissions in the pleadings. Appellant also put in documents by consent but called the evidence of two witnesses. One was a partner of appellant and the other was the manager of a Fiji firm which acted as agent for respondent in Fiji. The evidence of the second witness, Mr. Bhindi, is particularly relevant on the question of the claim for insurance and the submissions made on the legal consequences of the steps taken in making such unsuccessful claim.

At the trial counsel for appellant contended that the endorsement of the bill of exchange with the words "Documents in order - will pay on arrival of goods" was a contractual variation of the original contract making, in effect, actual delivery of the goods a condition of payment. The learned judge dismissed the argument in the following passage:

> "Both parties agree that this was a cost insurance freight contract, although Mr. Lateef argues that the answer which the defendants gave to the draft drawn on them in effect varied the contract. I cannot accept that argument. I am sure that the defendants' answer to the draft was not an attempt to vary the contract. The witness said it was defendants' usual practice."

This finding was challenged in ground (a) of the notice of appeal. The statement of claim clearly alleged a C.I.F. contract in the terms originally agreed on. This allegation was admitted in the S/Defence except that it was pleaded that any claim should be made against the New India Assurance Company Limited. This did not raise a question of variation of contract by reason of the answer given on presentation of the bill of exchange. In any event the failure of respondent to take steps at this time was no more than a forbearance. There was no proof either of a writing or consideration to support a variation of a contract which itself was required to be in writing, and was so recorded. The claim for a variation was, in short, never put in issue by appellant so that respondent could plead to it. Evidence was given that the course adopted by appellant was its "usual practice" or "normal practice". This contradicts the written agreement to pay by sight draft. Such evidence is inadmissible, and, in any event, such a term of contract was not pleaded.

To clarify the contractual position it is convenient to deal with the question of insurance before considering the main issue in the case. Appellant argued that the sole right of respondent was to claim against the insurance company and accordingly that appellant was discharged from any further liability under the C.I.F. contract. The learned judge said :

> "The burden of (appellant's) defence is that (respondent) should have claimed against the insurance company. "

He then went on to say that it was claimed that, since ownership of the goods had not passed, respondent must bear the loss. After dealing with an application by appellant for leave to amend the Statement of defence "by making an allegation that the (respondent) asked (appellant) for the insurance documents so that a claim could be made for insurance" the learned judge held as follows:-

> The (appellant) did not in any way convince me that (respondent) agreed to assume liability by taking away copies of the insurance documents.

We turn then to examine the evidence as to what happened to the claim for insurance. Mr. Sutaria said:-

> In June 1972 Manilal Bhindi came to my shop. At that time he was still employed by S.E. Tatham. He came to collect our insurance certificate to cover these particular goods to come from Singapore. I did not give him that, because it was for 110% to cover our profit. I was shown other certificates that he had collected from other traders. It was eventually given to him, because he persuaded us and said that other firms had given him their certificates because he told us plaintiff wanted to claim on the insurance company. He also brought a typed letter of authority for defendant to transfer its rights under policy to plaintiff. That was signed by one of our partners in my presence, and firm stamp placed on it. I was given to understand that was the end of the matter.

Mr. Bhindi said:-

> In June 1972 I was instructed that these goods were diverted to Indonesia and the shipment did not arrive in Suva. Hence the customers would

not pay. Then we received a letter from our principals.

COURT:

I am not prepared to accept secondary evidence of this in face of objection by plaintiffs.

WITNESS:

As a result I went to defendant and asked them to surrender the insurance policy to plaintiffs so that plaintiffs could claim on it. Defendants gave me the policy after I showed them policies other importers had given me. I had a letter of authority for defendants to sign, and they signed it. I drafted it and had it typed. I made a copy and there will be a copy at S.E. Tatham Ltd. I got this authority signed and I posted it to plaintiffs. I did not go back to defendants about this. Authority was sent by registered mail.

The authority was not produced nor were its contents proved by secondary evidence. Counsel for respondent drew the attention of the Court to the fact that appellant's discovery of documents did not disclose this authority but whether it should or should not disclose it we are not in a position to know. Suffice it to say that its contents are unknown and ought to have been proved if appellant wished to rely upon it. Counsel also pointed out that Mr. Sutaria said the insurance certificate was given to Mr. Bhindi. Yet it was still shown to be a document in the possession of appellant at the time of discovery.

Again we do not know the reason. We are of opinion that the learned judge was correct in holding that no agreement had been made that respondent had discharged appellant from liability in consideration of appellant assigning to respondent its rights (if any) against the insurance company for the loss of the goods. This disposes of ground (e) leaving the main issue still to be determined, namely, was appellant, in the proven circumstances of this case, liable to pay the price of the goods by virtue of the C.I.F. contract which appellant admitted had been entered into?

The legal incidents of a C.I.F. contract were set out by the learned judge. Both counsel have accepted that the law was correctly stated. We content ourselves with citing the same authorities. The first case is Clemens Horst v. Biddell Bros which was decided by Hamilton J., and reported in (1911) 1 KB 214, and, in the Court of Appeal in (1911) 1 KB 634, and, before the House of Lords in (1912) A.C.18. At p. 224 Hamilton J., whose judgment was restored and approved in the House of Lords, said:

> ".....the meaning of a contract of sale upon cost freight and insurance terms is so well settled that it is unnecessary to refer to authorities on the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract, secondly to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the parties : thirdly to arrange for an insurance upon the terms current in the trade which will be available for the buyer :

> fourthly to make out an invoice.....: and finally to tender those documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover their loss if they are lost in the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

The next case is Arnhold Karberg v. Blythe Green (1915) 2 KB 379 where Scrutton J., said at p. 388:

> "I am strongly of opinion that they key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods but a sale of documents relating to goods."

The third case is Smyth v. Bailey (1940) 3 All E.R. 60, where Lord Wright said at p. 70:

> ".....one peculiarity of the c.i.f. contract is that a sale can be completed after the loss of the goods by the transfer of the shipping documents. That does not mean that a c.i.f. contract is a sale of documents and not of goods. It contemplates the transfer of actual goods in the normal course but if the goods are lost, the insurance policy and bill of lading contract - that is the rights under them - are taken to be in a business sense, the equivalent of the goods."

The first question is whether goods in accordance with the contract were shipped to appellant. The learned judge so held and further stated that there had been no argument on this point. This finding has not been challenged. It is not disputed that documents in accordance with the C.I.F. contract were tendered to appellant. Appellant, on such tender, was bound to pay the agreed price by accepting the sight draft. By failing to do so appellant was in breach of its contract. We have earlier dealt with the effect of the answer given on the bill of exchange. Appellant had no legal right to impose a condition that payment would be made only on delivery. That was contrary to the express terms of the C.I.F. contract and was a breach of it. This disposes of ground (b) and related questions. Ground (b) read as follows:

> (b) The learned trial judge erred in law and in fact when he placed reliance on the insurance company's letter that the Defendant had declined acceptance of the draft when in fact the Defendant never declined acceptance.

Since appellant made default in payment it cannot escape liability unless it proves some ground which will have that effect. We have dealt with all grounds of appeal except grounds (c) and (d) which may now be dealt with together.

Grounds (c) and (d) are as follows:-

> (c) The learned trial judge erred in law in referring to Sec. 21 Rule V of the Sale of Goods Act (Cap. 206) in that there was no unconditional appropriation as

the Plaintiff by retaining the Bill of Lading retained title and control.

(d) That the property in the goods did not pass to the Defendant.

If appellant had taken out an insurance policy which covered the risk of loss of the goods in transit, appellant would have been able to recover the loss. It was the duty of respondent as a seller under a C.I.F. contract to provide a cover which could be assigned to appellant and handed over together with the other documents on payment of the price. But it was expressly agreed that appellant would obtain a cover for that risk and relieve respondent from its obligation to do so. An adjustment of price was made for the purpose. It will be seen later that this obligation is to obtain a proper cover of insurance over the risk of transit, so, if the goods do not arrive after the buyer has paid against the tender of documents, he can recover that price from the insurer. That is the cover which respondent was bound in the ordinary course to provide and appellant, by assuming that obligation, undertook to get such an insurance cover. Whether or not appellant did so is not known. The insurance company, chosen by appellant, asserted that the cover was only for goods in respect of which the property had vested in appellant. If that be so then appellant did not take out an insurance cover appropriate to a C.I.F. contract. We turn now to make some further observations on the general effect of C.I.F. contracts on the passing of the risk and of the property in goods and the nature of the insurance which is required to cover the risk of loss in transit.

A general statement on passing of the risk and the property in goods sold under a C.I.F. contract appears in Sassoon on C.I.F. and F.O.B. contracts, 2nd Edition, para. 202 p. 185 where the learned author states:-

> As a general rule in a contract for the sale of goods the property and the risk pass at the same time, but this not the usual case in a c.i.f. contract. Under a c.i.f. contract the buyer is in effect the insurer, as of the time of shipment. The transfer to him of the bill of lading and the policy of insurance giving him the right of action in respect of loss or damage to the goods has the effect of placing the goods at his risk on and after shipment. But the property in the goods may not, and generally does not, pass on shipment. It very often will not pass until tender and payment. The moment at which the property passes is entirely a question of intention to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

In Smyth v. Bailey (supra) Lord Wright said at p. 68:-

> On or after shipment (the seller) has to obtain proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer. As a general rule, he does so only against payment of the price, less the freight, which the buyer has to pay.

His Lordship then went on to say:

> The property which the seller retains while he or his agent, or the banker to whom he has pledged the documents, retains the bills of lading is the general property, and not a special property by way of security. In general, however, the importance of the retention of the property is not only to secure payment from the buyer

> but for purposes of finance. The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between shipment and the time of obtaining payments against documents. These credit facilities, which are of the first importance, would be completely unsettled if the incidence of the property were made a matter of doubt. By mercantile law, the bills of lading are the symbols of the goods. The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance. A mere unpaid seller's lien would, for obvious reasons, be/adequate and un- /in satisfactory. I need not observe that particular contracts may contain special terms, or otherwise indicate a special intention, taking the contract outside these rules.

Upon the facts of the present case and upon the above authorities, the claim that the property in the goods had not passed is irrelevant. A proper insurance, which appellant undertook to get, must be one which covered the risk of transit and not one which covered the loss of the goods only after the property had passed from respondent to appellant. Appellant should have taken out a policy in the terms of respondent's obligation, namely, as Lord Wright said, one which would enable the sale to be completed after the loss of the goods by re-imbursing the buyer for the price he had paid against the documents which represented the goods. Respondent carried out its part of the C.I.F. contract. Appellant was therefore liable to pay the price. Any failure to provide for insurance was a default of the express agreement of appellant and appellant cannot rely upon its own default to get relief from liability.

If appellant had effected a proper insurance to cover the risk of loss in transit appellant would have been entitled to indemnity against liability to pay on delivery of documents. The loss must therefore fall on appellant. Any defence founded on the question of when the property passed must fail since payment of the price did not depend upon that factor which ought to have been properly insured by appellant. Appellant's agreement to do so was a sufficient performance by respondent of its initial responsibility under a C.I.F. contract.

The appeal therefore fails on all grounds. It is accordingly dismissed and the judgment in the Supreme Court is affirmed. Appellant will pay costs to be fixed by the Registrar. Order accordingly.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL