IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0045 OF 1994
(High Court Civil Action No. 276 of 1991)

BETWEEN:

WILLIAMS & GOSLING LIMITED — APPELLANT

and

ATLAS TRADING COMPANY LIMITED — FIRST RESPONDENT

and

DANZAS PTY LIMITED — SECOND RESPONDENT

Mr. M. Stewart and Mr. H. Lateef for the Appellant
Mr. G. P. Lala & Mr. G. P. Shankar for the First Respondent
Mr. P. Knight for the Second Respondent

Date and Place of Hearing : 21 August 1995, Suva
Date of Delivery of Judgment : 25th August, 1995

JUDGMENT OF THE COURT

At the commencement of the hearing of this Appeal Mr. Stewart advised the Court that the appellant abandoned its appeal against the First Respondent. Mr. Lala sought the leave of the Court for Mr. Shankar and himself to withdraw. He did not seek costs. Leave was granted.

In the Court below the Second Respondent claimed damages from the Appellant for releasing cargo without collecting the price for the goods consigned.

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This then is an appeal against the Judgment given in the High Court by Scott J. in favour of the Second Respondent for :-

a) 75 % of the original claim of USD 52552.88;

b) interest on the reduced claim at the rate of 13% from the 1 October 1990 to the 9 September 1994;

c) 75 % of its costs to be taxed if the parties cannot agree.

Mr. Stewart advised the Court that this appeal would be limited to the first ground in the notice of appeal viz.

> *"The learned trial judge erred in apportioning 75% responsibility to the Appellant for releasing the cargo without collecting the price for the goods".*

The Appellant and the Second Respondent both specialize in the handling of International Air freight and the formalities associated with that industry. The Appellant with its Head office in Suva has acted as an agent in Fiji for the Second Respondent since the late 1980's. The Second Respondent has its Head office in Melbourne, Australia.

In August 1990 and in the course of its ordinary business operations the Second Respondent received two consignments of tanned leather that had been air freighted from

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Italy with instructions for both consignments to be air freighted forward to Suva. The Second Respondent completed the appropriate documentation in Sydney for this to be done and in the same month air freighted the two consignments to the Appellant as its agents in Suva.

What happened or did not happen after these, goods arrived in Suva has become the subject of these proceedings and this appeal.

THE DOCUMENTATION

The two primary documents accompanying these two consignments of tanned leather that were received by the Appellant are described as *"not negotiable - air waybill - air consignment note."* (hereinafter referred to as the "air waybill").

The first air waybill No. 75475 is addressed to Island Furniture at Suva as the consignee and upon which the sum of USD 19152.00 was payable prior to delivery to the consignee.

The second air waybill No. 75476 is addressed to Atlas Trading Company Limited also of Suva and upon which the sum of USD 33800.88 was payable prior to delivery to that consignee.

Both air waybills are over printed with two very large red stamps - C.O.D. Each air waybill has provision for the inclusion of special instructions. The following special instructions were printed on air waybill No. 75475

> *"Special Instructions. ATTENTION C.O.D. PLS RELEASE GOODS AND DOCUMENTS TO CNEE ONLY AGAINST IRREVOCABLE PAYMENT OF CNOR'S INVOICE WHOSE AMOUNT MUST BE SENT US BY BANK GUARANTEED CHEQUE AT CNOR'S ORDER. CHARGES-COMMIS. FOR CNEE'S ACCOUNT. AMOUNT TO REMIT USD. 19152.00"*

The same special instructions were printed on air waybill no. 75476 but the amount to be remitted is shown as USD 33,800.88.

While there is no dispute as to the contents of the two air waybills there is direct conflict as to the meaning of the term C.O.D. Mr. Aidney a Director of the Appellant stated that C.O.D. in Fiji is used to denote the collection of duty and freight charges. He explained how his firm has a C.O.D. stamp which is endorsed on any documents where fees on the goods exceed the credit terms that have been arranged by his company for the consignee of those goods. There is no doubt that policy would protect his company where credit terms have or are likely to be exceeded. However that does not explain the term C.O.D. already prominently endorsed in red on air waybills that accompany consignments when first handled by his Company. Mr. Aidney

conceded that the goods had been sent to his company on a C.O.D. basis.

Mr Hannen who operates Air Freight Consolidations Fiji in evidence explained how he had seen similar C.O.D air waybills; that it is a common practice; and that C.O.D is quite different from freight collect as claimed by the Appellant.

The evidence clearly establishes that air waybill - 75476 had the identification C.O.D prominently displayed in bold red letters and that C.O.D requires payment of the goods before delivery - i.e cash on delivery.

Apart altogether from that direction the air waybill contained the special instructions already referred to and which in greater detail established the meaning of COD and the necessity for prepayment by a Bank guaranteed cheque before the release of the goods. Mr. Aidney's frank explanation for the failure to comply with these quite specific instructions was that they had been overlooked by his staff; he agreed also that his staff had made a mistake in that respect and that his staff were not always as good as he would wish. To his credit Mr. Aidney conceded that in this case the special instructions which his staff had ignored were of particular importance set out as they were on the air waybill which he described as a critical document.

These concessions by Mr Aidney nothwithstanding, Mr Stewart submitted that there was no evidence to justify a finding that the Appellant had breached any duty which it owed to the Second Respondent. We do not accept that submission. However, the finding by the learned trial Judge that "both the Plaintiff and the Defendant must share some blame for what occurred" is in our opinion supported by the evidence presented.

CONTRIBUTORY NEGLIGENCE

Mr. Stewart conceded that the Appellant owed a contractual duty to the Second Respondent but denied that any breach of that duty had in fact occurred. Further he submitted that this duty co-existed with a duty in tort for the Second Respondent to take reasonable care in respect of that contractual relationship both parties had entered into.

In support of that argument Mr. Stewart referred to 3 exhibits - Nos. 4 - 8 and 36. He developed his arguments this way.

Exhibit 4 is an invoice from the Italian Company that originated the consignment to Atlas Trading Company Limited. This invoice identified that payment had been made by a Letter of Credit No. 2562/0000 drawn on the ANZ Bank. In addition the delivery instructions were shown as F.O.B. and not C.O.D. as subsequently altered in the documentation issued by the Second

Respondent. It is indeed correct as Mr. Stewart submitted that on the face of that document the goods had been paid for by a Letter of Credit and freight only was payable by the First Respondent.

Exhibit 8 is described as the Master air waybill prepared by the Second Respondent to accompany both consignments from Sydney via Auckland to Nadi. Mr. Stewart again quite correctly pointed out that on the face of that document there is no reference to C.O.D., or the collection of USD 52952.88 before delivery of the goods.

The third Exhibit Mr. Stewart asked us to consider is No. 36. This is described as a *"Stoploss Bulletin"* issued by Transport Mutual T. T. Club an organization dealing with International Air Sea and Land freight operations. It has offices in London, New York, San Francisco, Sydney and Hong Kong. The guidelines issued by that organisation warn of the dangers in dealing with C. O. D. Consignments and recommends -

> *"the sending office should check with the receiving office whether the latter can deal with the C.O.D. property."*

Added to that evidence Mr. Stewart also relied on what he termed as the Appellant's unsophisticated employees suggesting that the Second Respondent should have appreciated and realised that its agents in Fiji may not have been as experienced as themselves in Australia in dealing with consignments of this

nature. No evidence to justify that suggestion was produced by the Appellant and it is rejected.

However Mr. Knight conceded that " *.....in retrospect it may have been preferable to pre-warn .....*" the Appellant.

The learned trial judge shared that view when he said

> *"In my view the Plaintiff should have forewarned the Defendant for reasons of pure prudence that the shipment was arriving C.O.D. Such a forewarning is hardly a difficult exercise: all that is required is a telephone call or a facsimile message."*

We turn now to consider the Second Respondent's cross appeal which challenges the apportionment of responsibility on the part of the Appellant at 25%.

On all the evidence it was open to the learned trial judge to conclude that the Second Respondent owed some duty to the Appellant to warn it of the unusual features of this consignment. Such a warning could posssibly have prevented delivery without payment. In failing to give such a warning the Second Respondent was to an extent negligent in his duty to the Appellant. We therefore uphold the learned trial judge's conclusion on the issue of contributory negligence.

APPORTIONMENT

By its very nature apportionment of blameworthiness does not lend itself to a degree of precision. In the

circumstances the learned trial judge did the best he could on the material before him.

Bearing in mind the wide discretion available to his Lordship in assessing degrees of contributory negligence we cannot say that he erred in his proportionate assessment of blame.

Indeed we find that his apportionment of 75% against the Appellant and of 25% against the Second Respondent is reasonable.

ORDER

The order of the Court therefore is that both the appeal and cross appeal are dismissed. Each party will bear its own costs on this appeal and cross appeal.

Sir Moti Tikaram
President, Court of Appeal

Sir Edward Williams
Judge of Appeal

Mr Justice J.D. Dillon
Judge of Appeal

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