IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL N0. ABU0037OF 2003S
(High Court Civil Action No.HBC507 of 1999S

BETWEEN:

FILIMONE RAIBOSA

Appellant

AND:

AIR PACIFIC LIMITED

Respondent

Coram: Tompkins, JA
Gallen, JA
Ellis, JA

Hearing: Wednesday 10th March 2004, Suva

Counsel: Mr. Gavin O'Driscoll for the Appellant
Mr. R.A. Smith for the Respondent

Date of Judgment: Friday 19th March 20004

JUDGMENT OF THE COURT

The appellant consigned a container of fresh taro to the respondent for carriage by air from Nadi to Sydney on 2 May 1999. The consignment was 4300 kgs of taro packed in 20 kg bags and loaded into the container. The sale price of the taro was A$2.70 per kg so the total value was $A11,610-. After taking delivery of the consignment in Sydney on 4 May 1999 the consignee found this 700 kgs of taro were damaged beyond saleability and the balance so damaged, that after 3 days of cleaning it was sold for only $A6745. For present purposes the damage to the taro was caused by the respondents failure to store the container in a cool store.

It is agreed that the container was delivered to the consignee on 4 May 1999 and that notice of the damage was not given to the respondent until 25 May 1999.

The appellant then claimed damages from the respondent for his losses. The claim is governed by the "Warsaw Convention as amended the Hague 1955" which is incorporated into the law of Fiji by the Civil Aviation Act (Cap 174) and reproduced in the Carriage by Air (Overseas Territories) Order 1967. The respondent's defence to the claim was that as the consignor had not complained within 14 days of the receipt of the cargo the claim was barred. Articles 18 and 26 provide:

> *"18 (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.*
>
> *(2) The carriage by air within the meaning of paragraph (1) comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board in aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.*
>
> *(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."*
>
> *"26(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date of which the baggage or cargo have been placed at his disposal."*

At trial before Singh J. the appellant called evidence as to the condition of the taro when consigned and when received, the action taken to salvage and the resulting sale of part of the cargo. The respondent did not call evidence or challenge the evidence called. The case turned on whether or not the cargo had been destroyed or only damaged. If it had been destroyed, no complaint is required by the convention. Singh J held that the cargo had not been destroyed but only damaged. That finding is now challenged on appeal.

It is well established that the interpretation of the Convention should be uniform throughout the world or at least in the jurisdiction of the parties. The approach to the question of destruction or damage is now the subject of at least two leading cases. In *Fothergill v. Monarch Airlines Ltd*. [1980] 1 All ER 696 the House of Lords was seized of a case where a plaintiff claimed he had noticed that one side seam of his suit case had been completely torn away. He reported this to the airlines immediately, but discovered more than 7 days later that articles were missing from the suitcase. He claimed damages for the loss. The opinions analysed all the law to date and their Lordships held, (we quote the head note:-

> *"Although on a literal interpretation in an English legal context 'loss' was to be differentiated from 'damage', that was not an appropriate method of interpretation of an international convention, such as the Warsaw Convention, which was incorporated by statue into English law. Instead, a purposive construction was to be adopted, and that was reinforced by the fact that the English and French texts were inconclusive whether damage included loss, and was supported by the consensus of international jurists. Having regard, therefore, to the purpose of art 26 of the convention which was to ensure that the airline received prompt notice to enable it to take the necessary steps in regard to damage to baggage or cargo including, if possible recovery of objects lost, on its true construction art 26 applied both to damage to baggage (and the contents) and to loss of contents. The plaintiff was therefore required to lodge a complaint for the lost articles within seven days of receiving his baggage, and as the only complaint he had made did not refer to the loss of any articles but only the damage to his suitcase his claimed failed."*

In particular Lord Wilberforce said at p.702 after reviewing the international literature:

> *"My Lord, this consensus is impressive. It supports an interpretation of art. 26(2) to which a purposive construction, as I hope to have shown, clearly points. The language of both texts is unsatisfactory: some strain, if not distortion seems inevitable, but of the governing French text it can at least be said that it does not exclude partial loss from the scope of the paragraph. I am of opinion therefore, on the whole, that following the sense of the matter and the continental writers, we should hold that partial loss of contents is included in 'damage' and that consequent action may be barred in the absence of a timeous complaint."*

and Lord Frazer said at page 710 "we should hold that partial loss of contents is included in "damage" in art. 26(2). "

In ***Dalton v. Delta Airlines Inc.*** (1978) 570 F 2d 1244 the United States Court of Appeal for the Fifth Circuit was considering a case where the plaintiff had consigned 5 racing dogs for carriage from Ireland to Florida. Through the negligence of the airlines they suffocated and died in transit. The question of notice under art. 26(2) was in issue and whether the cargo had been destroyed or damaged. The Court's opinion was delivered by Brown CJ who said at pages 1246-7.

> *"There is obviously a great similarity between the loss of goods and the destruction of goods. Lost, of course, means that the location or even the existence of, the goods is not known or reasonably ascertainable. But the common factor of lost or destroyed goods is that, in either case, they are wholly without economic value or utility to the shipper/consignee beyond mere scrap value. Of course the situation of destruction of goods poses factual problems not present with lost goods, since, on our approach, there is for Article 26 purposes a decisive distinction between goods that are damaged – even severely – and those which are destroyed but this is inherent in many cases of carrier liability. A demijohn of rare brandy falling 15 feet off the conveyor belt to the airports concrete apron is no longer that when the container is smashed and the contents run off in the view of covetous eyes. So it is with dogs, dogs bred born and trained for kennel racing, not just for flesh, hide or hair. Recognizing, as we must, that live dogs are goods, when dead they are no longer just damaged goods. They are not at all the thing shipped, No one better than the carrier knows this fact. Notice is not needed since notice would serve no useful purpose to the carrier.*

> *"The facts of this case demonstrate the wisdom of the "notice, needed for destroyed goods" rule. The shipper's representative presumably a trained dog handler, was at the Miami airport to pick up the dogs. Due to security restraints, he was unable to go directly to the plane. The dogs were to be brought by Delta to him at the designated pickup. When Delta'a agent got there he brought, not dogs, but the sad news that the dogs were dead. Delta recognized this fact by arranging mutually, with the shipper for an autopsy by a veterinarian used and selected by Delta."*

The Court decided that in this case the cargo of dogs had been destroyed for the purposes of Article 26.

The position up to the present time is summarized in Shawcross and Beaumont Air Law 4th edition (as at August 2003) para. 832 in the section dealing with principles of liability in baggage cases:

> *"Notice of complaint is not required in the case of total loss or destruction. Goods may be treated for this purpose as having been destroyed, even if they still physically exist, if they have lost all economic value and utility, being reduced in effect to scrap., but it has been held that this principle can only be applied where the effective destruction is 'both total and obvious."*

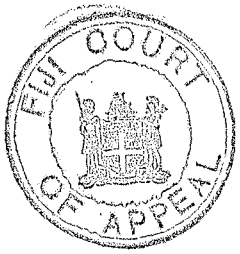
> *So, in cargo cases, the death of racing greyhounds and of breeding pigs has been held to amount to their destruction, despite an argument in the latter case that the pigs retained some economic value as food. Alcoholic drink carried as baggage will similarly be destroyed if the container is broken so that the drink drains away.; the loss of refrigerant gas may have the same effect. However, the dropping of crates containing television parts, the resulting damage not being both total and obvious, has been regarded as a case of damage. Similarly, where a pharmaceutical product was left unrefrigerated for some days, and was returned at the request of the consignor for examination lest (as turned out to be the case) it had been rendered useless, it was held that notice of complaint was required as the damage was not a foregone conclusion. However if a package is actually delivered, it has been held that it cannot be said to be 'lost' even if all its original contents (jewellery in the instant case) are missing."*

and

> *"The distinction between destruction and damage will be drawn for this purpose on the basis of the facts at the time of delivery. So an animal which dies some time after delivery, as a direct result of temperature fluctuations on board the aircraft during flight, will be regarded as 'damaged' rather than destroyed. Similarly, if a container of alcoholic drink is cracked, it will be treated as a case of damage even if the contents are wholly lost as a result of seepage occurring after delivery."*

We agree with Singh J. that on the application of the above statements of law the cargo of taro was "damaged" and not "destroyed" in terms of Article 26(2) and accordingly the appeal must be dismissed. The respondent is entitled to costs which we fix at $500 plus disbursements if any to be fixed by the Registrar if they cannot be agreed.

Tompkins, JA



Gallen, JA

Ellis, JA

Solicitors:

Messrs. O'Driscoll & Shivam and Company, Suva for the Appellant
Munro Leys, Suva for the Respondent

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