IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No: HBA 21 of 2014
(Civil Case No. 197 of 2013)

BETWEEN	:	Vishay Kant
		Appellant
AND	:	Pacific Agencies (Fiji) Limited
		Respondent
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr B C Patel (C.B Young with him) for the Appellant Ms B Narayan for the Respondent
Dates of Hearing	:	23 April and 6 May 2015
Date of Judgment	:	26 January 2016

JUDGMENT

1. This is an Appeal by the Appellant (the Plaintiff in the Court below) against the decision of the learned Magistrate given on 29 October 2014 whereby she dismissed the Appellant's claim against the Respondent (the Defendant in the court below) for $30,212.80, interest thereon and costs, and awarded the Respondent $1,500.00 as costs.

2. The Grounds of Appeal are, inter alia as follows:

   (1) The Magistrate was wrong in law and in fact to hold that there was no contract between the (Appellant) and the (Respondent) when the

evidence showed the former intended to and did contract with the latter and the Respondent had failed to discharge the onus upon it to prove that it had made clear to the Appellant that it was the agent of the Pacific Forum Line.

(2) The Magistrate did not appreciate that a contract could be made between the Appellant and the Respondent before the bill of lading was issued and that such contract would operate independently of the bill of lading.

(3) The Magistrate failed to consider that the Appellant had pleaded that even if the Respondent was an agent for a disclosed principal it was still liable to the Appellant because the parties had intended to deal with each other when making the contract, and such an agent could contract personally and incur personal liability.

(4) The Magistrate was wrong in law to hold the bill of lading applied and was binding on the Appellant when, inter alia, it had not been given to the Appellant and did not apply because of Article 1 of the Sea Carriage of Goods Act (Cap 231).

(5) The Magistrate misdirected herself in law by placing the burden on the Appellant to prove there was no negligence on his part in the absence of a pleading of contributory negligence by the Respondent.

(6) The Magistrate's decision was contrary to law as evidence was adduced by the Respondent in breach of the rule in *Browne v Dunn*.

3. The Appeal came up before me on 23 April 2015 and commenced with Counsel for the Appellant submitting that this was a claim arising from a contract made in April 2013 by the Appellant with the Respondent which the Respondent was denying. It was the Respondent's contention that the contract was between the Appellant and the Carrier by the bill of lading and that the Respondent was the agent of a disclosed principal.

4. The Appellant's contention was that he was dealing with the Respondent and never with the Carrier. The other companies involved were engaged by the Respondent and not by the Appellant. The bill of lading was Port to Port and

not a combined transport movement. Even if it were a combined transportation one, this would not help the Respondent because by the time the goods arrived at the wharf, they were already damaged. There was no basis in law and in fact for the Magistrate to make a finding that the Appellant knew by previous dealings that there was an agency.

5. There was an oral contract as shown by the e-mails at the material times. The bill of lading never came into the sight of the Appellant until the damage and the breach of contract had occurred. All communications were with the Respondent, and none with the Carrier. The Respondent cannot escape liability by saying it is an agent for the Carrier.

6. The contract came into existence before the bill of lading was signed. There was only one contract between the Appellant and the Respondent and there was no evidence that the Respondent had set himself up as a mere agent.

7. Counsel concluded by asking for the Appeal to be allowed, the Judgment set aside and judgment entered for the Appellant in the sum of $28,042.80, interest thereon compounded monthly and costs here and below.

8. Counsel for the Respondent confirmed the only issue is liability and there is no issue on quantum.

9. The hearing continued on 6 May 2015 with the Respondent's Counsel making her submission. She said the e-mails do not contain the terms of the contract but are a mere request to book a container. Para 2(a) of the (Appellant's) Reply to the Defence showed the Appellant was aware of the bill of lading.

10. The contract is in the bill of lading entered into by the Appellant with the Carrier prior to the damage to the goods and therefore the Respondent is entitled to exemption from liability to the Appellant. The Appellant was bound by his pleadings.

11. Counsel for the Appellant in his reply raised the *Browne v Dunn* principle and said it was never put by the Respondent's Counsel in her cross examination of the Appellant that the contract was with the Pacific Forum Line. The bill of lading never mentioned sub-contractors and everything happened before the Bill of Lading.

12. With the conclusion of the hearing. I reserved my judgment to a date to be notified. In the course of reaching my decision, I have perused:

(1) The Magistrates Court Records Volumes 1 and 11(AR 1 and AR 2).
(2) The Written Submission by the Appellant.
(3) The Written Submission by the Respondent.
(4) The Appellant's Bundle of Authorities.
(5) The Respondent's Authorities.

13. The sole issue for me to decide is whether there was a contract existing before the bill of lading. The leading case on this issue is the decision of the English High Court in: *The Ardennes (Owner of Cargo) v The Ardennes (Owners)* [1950] 2 K.B.D. 517 (the Ardennes). It was held the bill of lading was not in itself the contract between the shipowner and the shipper, and, therefore evidence was admissible of the contract which was made before the bill of lading was signed and which contained a different term.

14. I note from the above judgment that the defences raised were that there was no oral contract between the parties and that liability was excluded by one of the conditions in the bill of lading. The shipper relied on a promise made by the shipowner's agent that the ship would proceed direct to London, but she had instead proceeded to Antwerp first. The said clause in the bill of lading stated that the owners were at liberty to carry the goods to their port of destination by any route and whether directly or indirectly to such port. The defendants contended this clause was a complete defence and evidence of any other promise was not admissible.

15. Lord Goddard C.J in his judgment said: "It is I think, well settled that a bill of lading is not, in itself, the contract between the ship owner and the shipper of goods... The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board."

16. Here I note the Bill of Lading was unsigned and undated and the goods were never put on board the ship.

17. Therefore the crux of the matter is whether there was a contract, oral or otherwise between the Appellant and the Respondent before the signing of the Bill of Lading. The Appellant alludes in para 3 of the Amended Statement of Claim to a contract made in or about early April 2013 whereby "the Defendant agreed to ship one full container of Plaintiff's cargo of fresh dalo to New Zealand in a temperature controlled cooler container via ship Forum Fiji V120 to depart Suva on 7 May 2013 at a cost of $5,717.80."

18. The Respondent in its Statement of Defence denies there was any contract between the Appellant and it, and avers that the only contract entered into by the Appellant was the Bill of Lading being the contract of carriage between the Appellant (the shipper), the carrier and the consignee.

19. That being the state of the pleadings, the burden is on the Appellant to prove the existence of a contract between himself and the Respondent. This is because as Davies LJ said in: *Chapman v Oakleigh Animal Products Ltd* [1970] 8 KIR 1072 the golden rule is that the onus of proof is on the plaintiff. The Appellant seeks to establish the fact of a contract from the e-mails which are part of AR1. 'A' is the e-mail from Satish Nandan (Nandan) of the Respondent for the booking of one reefer container on the subject vessel. The reply to this e-mail is 'B' from Alveen Ashish stating "We will book upon confirmation of temperature." The confirmation of temperature was provided by the Appellant in 'D', his e-mail to Nandan stating "Please make a booking for container for export to NZ on forum Fiji v20. Temperature will be 10."

20. Therefore putting the e-mails together the existence of a binding contract between the Appellant and the Respondent becomes apparent with the salient terms quite patent. That this is so is confirmed by the Respondent's Counsel's cross-examination of the Appellant (page 446 of AR 2) which I reproduce below:

> "- You didn't sight bill of lading prior to being shown to it by your lawyer?
>
> Yes.
>
> - When you filed reply to Defendant the contract between Plaintiff and Defendant – bill of lading - you didn't deny?
>
> I didn't know about the contract –Email was contract.
>
> - You entered into a commercial shipment?
>
> All I know Defendant will arrange everything.
>
> - Defendant prepared customs loading - customs entry?
>
> Yes.
>
> When I ordered the container before – Defendant prepares the
>
> - You didn't verify with Defendant about temperature?
>
> Yes, I did – what temperature.
>
> - Defendant advised by you – he advised Alveen for +10?
>
> Yes.
>
> - During the process of documentation you were received bill of lading?
>
> I didn't.
>
> - Do you know about bill of lading?
>
> Bill of lading paid by Pacific Vision NZ."

21. I further note that 'F' the e-mail from Nandan at 9:53 am, 7 May 2013 states, "Hi All, as advised by Mere of container control please DO NOT load container PFLU6052315 because of temperature issues." This makes it crystal clear that the goods were never loaded on the ship and therefore applying Lord Goddard's words in "The Ardenness", the unsigned bill of lading here never came into operation.

22. I am therefore of opinion and I so find and hold that the Appellant is entitled to say that the only contract between him and the Respondent is that referred to para 19 above. It then only remains for me to consider whether the Respondent had breached it. It is clear that the loss suffered by the Appellant was the damage to the goods while they were with the Respondents or its agents.

23. Here, I will refer to what the Counsel for the Respondent informed the Magistrate in the course of the hearing (page 454 of AR2) that the Respondent would stick to their defence that the carrier, Forum Line Limited, is the correct party to be sued. The Respondent will not be making any claim against any of these subcontractors and (the next word should be "neither") are they saying the Appellant should be. In their defence the Respondent have said the carrier is the main party and they will show why.
In my view, the Respondent's Counsel's stand clearly shows that the subcontractors are not to held liable for the loss.

24. Further, the Appellant in his evidence (page 444 of AR2) testified that "George King said it was his fault – no temperature." (From the Minutes of Court Proceedings I note George King is the National Operations Manager of the Respondent). This piece of evidence was not challenged by Counsel for the Respondent in her cross-examination of the Appellant. Therefore applying *Browne v Dunn*, the inference is the Respondent does not intend to suggest the Appellant is not speaking the truth upon that particular point. (see *Browne v Dunn* [H.L] (1894) 6R page 67).

25. I find and so hold that the Appellant has suffered a loss due directly to the breach by the Respondent of its contractual obligation to keep the goods at the contractually stipulated temperature of +10 Celsius. This is clear from 'I' the e-mail on 7 May 2013 from Avinesh Prakash to the Appellant that: "The setpoint for the reefer unit is set as – 21 and the current cargo temperature is – 2.5."

26. Having found there was a contract, having found there was a breach of it by the Respondent, the only task left for me is to assess the loss. I am relieved of this responsibility because the quantum of it has been agreed by Counsel on both sides as $28,042.80. However, before I formally pronounce my judgment I will deal with the other issues that were raised.

27. The first is regarding Agency. I find this issue does not arise as I have already found the Bill of Lading is not operative in this case.

28. The second is the issue of compound interest raised by Counsel for the Appellant. I am unpersuaded that he is entitled to this for 2 reasons. Firstly because the claim (ii) in the Amended Statement of Claim is for interest at the rate of 8% p.a from 25 April 2013 to judgment and at the rate of 4% p.a. thereafter to date of payment. This clearly connotes simple interest. I agree with Lord Hope when he says at para [17] on page 666 of the report of the House of Lords decision in *Sempra Metals Ltd* (formerly Metallgesellschaft Ltd) *v Inland Revenue Commissioners* and another [2007] 4 All ER 657, that "the claimant must claim and prove his actual interest losses if he wishes to recover compound interest...."

29. Secondly the House of Lords in the above Appeal at page 658 held that the court had jurisdiction to award compound interest where the claimant sought a **restitutionary** (emphasis mine) remedy for the time value of money paid under a mistake. This is certainly not the case here. All the Appellant is claiming is compensation for a loss sustained.

30. In the result, I am unable to uphold the Magistrate's Judgment and I hereby allow the appeal and set aside her entire judgment.

31. Order XXXVII Rule 19 of the Magistrates' Courts Rules gives power to the appellate court to give any judgment and make any order that ought to have been made including as to costs. It is this that I am now exercising to give judgment to the Appellant and to make the following orders:

(1) The Respondent is to pay the Appellant the sum of $28,042.80 together with simple interest thereon at the rate of 8% per annum from 25 April 2013 to the date of this judgment and thereafter at the rate of 4% per annum to date of full payment.

(2) The Respondent is pay the Appellant costs, which I summarily assess at $1,500.00 in the court below and $2,000.00 here making a total of $3,500.00.

Dated at Suva this 26th day of January 2016

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David Alfred
Judge of the High Court of Fiji