

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 01 of 2013

BETWEEN: **K. K. KOMOVE LOGGING AND SAWMILLERS CO. LTD** a
limited liability company having its registered office at Nawai, Nadi.

PLAINTIFF

A N D: **CLAUDE BARBERA** of 35 Riverside, Street Pacific Harbour, Navua.

DEFENDANT

Appearances: Ms Aarti Swamy of Patel & Sharma for the Plaintiff
 Mr. Victor Sharma of Vijay Naidu & Associates for the Defendant
Date of Trial: 06 June 2016
Date of Ruling: 28 February 2020

JUDGMENT

INTRODUCTION

1. The plaintiff, K.K. Komove Logging & Saw Millers Company Ltd ("**KKKL**") is suing the defendant, Claude Barbera ("**DW1**") for some unpaid timber which KKKL exported to New Caledonia in 2012.
2. KKKL is also suing for some timber which was delivered to **DW1**'s yard in Navua.

3. The timber exported by KKKL to New Caledonia was made by an arrangement in which **DW1** was involved, one way or another. I say "one way or another" decidedly because, while it is not in dispute that **DW1** was involved, the capacity in which he was involved, is one of the main issues in this case is.
4. The total amount being claimed by KKKL for both the exported timber and local delivery is \$93,074.46.

TRIAL

5. The following witnesses gave evidence for KKKL at trial:
 - (i) **PW1** - Praneel Pranesh of Nalovo in Nadi. He is the Manager of KKK Logging and at the time of the trial, had been with KKKL for nine and a half (9 ½) years.
 - (ii) **PW2** - Anup Kumar of Natabua in Lautoka, Branch Manager of Carpenters Shipping.
6. **DW1** was the sole witness for his case.

UNDISPUTED FACTS

7. From the evidence that emerged at trial, the following would appear to be not in dispute:
 - (i) **DW1** visited KKKL's timber yard at some point in early 2012.
 - (ii) during that visit, **DW1** placed an Order for some timber.
 - (iii) KKKL did supply the timber ordered by **DW1**.
 - (iv) part of that timber supplied by KKKL was exported to New Caledonia.
 - (v) it was KKKL rather than **DW1** which was the shipper (or exporter) of the timber consignment to New Caledonia.
 - (vi) the other part of the timber which KKKL supplied was delivered to **DW1**'s yard in Navua.
 - (vii) KKKL has never been paid for the timber it exported to New Caledonia
 - (viii) KKKL also, has not been paid for the lot which it delivered to **DW1**'s yard in Navua.

- (ix) DW1 did raise a Bank of South Pacific cheque dated 30 November 2012 to the sum of \$10,000-00 (ten thousand dollars only) to the credit of KKKL. However, BSP dishonored the cheque when KKKL presented it.

AGREED ISSUES – PRE-TRIAL CONFERENCE MINUTES

8. The PTC Minutes executed by both counsel dated 26 February 2014 record the following issues:

1. *Whether there was an oral agreement made in early 2012 between the Plaintiff and Defendant, that the Defendant would purchase timber from the Plaintiff and the Plaintiff was to export these timbers to Bati Deck in New Caledonia.*
2. *Whether the timber which was sent by the Plaintiff to New Caledonia was in the sum of \$93,074.46.*
3. *Whether the particulars of the \$93,074.46 of timber sent by the Plaintiff to New Caledonia are as follows;*

DATE	REF. NO.	DESCRIPTION	CHARGES	PAYMENTS	BALANCE
17/07/12	6499	Delivery Invoice			
23/07/12	6283	Delivery Invoice			
25/07/12	6119	Delivery Invoice			
06/08/12	1609	Tax Invoice	\$17,000.00		\$17,000.00
07/09/12	7129	Delivery Invoice			
05/09/12	1617	Tax Invoice	\$18,879.57		\$35,879.57
17/09/12	1620	Tax Invoice	\$57,197.89		\$93,074.46

4. *Whether the Defendant at all material times acted as agent for one Mary Jacquies of Bati Deck from New Caledonia.*
5. *Whether the timber sent by the Plaintiff to New Caledonia was on the request and purchase of the Defendant or acted in his own capacity when he order timber to the quantity.*
6. *Whether the timber sent was rejected in New Caledonia and if so by whom in New Caledonia.*
7. *Whether the Bank of South Pacific cheque in the consideration sum of \$10,000 (Ten Thousand Dollars) drawn by the Defendant to the credit of the Plaintiff on the 30 of November 2012 was guarantee for the supply of timber by the Plaintiff to New Caledonia and if not why was the cheque by the Defendant to the Plaintiff.*
8. *Whether the Defendant is liable to pay the sum of \$93,074.46 to the Plaintiff and interest and at what rate of interest.*
9. *Costs.*

9. At the outset of trial, Mr. Victor Sharma advised the Court that **DW1** does not deny that he did raise a cheque to the sum of \$10,000. However, he said that a New Caledonian company called Sarl Bati Deck ("**SBD**") was the party that received the timber exported to New Caledonia.
10. Mr. Sharma added that **SBD** was responsible for the payment of the exported timber. He said **SBD** did send money to pay for the timber through **DW1**'s local bank account.
11. Mr. Sharma theorized that the transaction was actually between **KKKL** and the "purchaser" which was **SBD** and that it was **SBD** which **KKKL** should be suing to recover the outstanding monies. **DW1** was merely a middleman in that arrangement.

TIMBER EXPORTED TO NEW CALEDONIA "ON CREDIT" OR ON "OPEN ACCOUNT"

12. It is noteworthy that the timber exported to New Caledonia was sent on terms which the plaintiff described as being "**on credit**". I understand this to mean that there was a payment arrangement where **KKKL** ships timber to **SBD** without any payment by **SBD**. **SBD** is required to pay only upon receipt of the timber.
13. The oral contract in question is alleged to have been made on an open-account or credit basis.
14. Clearly, a seller who exports goods "on credit" or on an "open account" runs the risk that the buyer or consignee will not pay for the goods upon dispatch.

EXPORTER MAY DEAL THROUGH A LOCAL AGENT TO MINIMISE RISK

15. Such a seller may obviate or minimize their risk either by selling the goods directly to a local agent who then on-sells to the foreign buyer, or use the local agent to "**confirm the sale**".
16. An agent who "confirms the sale" may be liable to the seller if the international buyer does not pay upⁱ. Of course, an agent who does not "**confirm**" the goods for a foreign buyer cannot be liable for unpaid goods.

17. Both counsel have agreed at PTC that one of the issues in this case is whether DW1 "at all material times acted as agent for one Mary Jacquies of Bati Deck from New Caledonia". However the evidence is clear that DW1 was in fact an agent of some sort for Mary Jacquies and/or SBD, at all material times.
18. The issue is, what sort of agent was DW1? I discuss this further down, following my outline of the relevant findings of fact.

RELEVANT FINDINGS OF FACT

Timber Was Exported

19. It is common ground that KKKL did export timber directly to New Caledonia and that the consignment was received by Mary Jacquies and/or SBD. This was the evidence of PW1, and corroborated by PW2ⁱⁱ. He is the Branch Manager of Carpenters Shipping Limited ("CSL"). This is also confirmed by the various "shipping documents" which were referred to by all witnesses. By "shipping documents", I mean not only the relevant Bill of Lading for the particular timber consignment in question, but also the custom and quarantine documents such as the Export License with Fumigation Certificate and Phytosanitary Certificate.
20. DW1 himself confirmed the export to New Caledonia in cross-examination when he said the following to explain why the Bank had failed to honor his cheque of \$10,000:

I wrote letter to the Bank to stop payment because when the container was opened in New Caledonia, it did not have the full 249, but only had 207...

Exported Timber Was Of Good Quality

21. I also accept that the timber sent to New Caledonia was in good condition.
22. However contrary to what PW1 said, the fumigation and phytosanitary certificates merely confirm that the timber had been quarantined and treated. These certificates do not say anything about the grading or the quality of the timber.

23. Having said that, the onus is on DW1 to establish that the timber was not of good quality. I find that DW1 had not adduced any clear and reliable evidence that the timber was not of good quality. Again, DW1's evidence is that when the container was opened in New Caledonia, it did not have the full 249 pieces ordered. He said nothing about the standard or the quality of the timber.

Timber Was Delivered to DW1's Yard In Navua & It Was All Good In Quality

24. It is also common ground that some timber was delivered to DW1's yard in Navua. DW1 does not refute this. DW1 only raised an issue about the (alleged) rather sub-standard quality of the timber delivered to him. From his evidence in chief and also in cross-examination, it appears that this is the reason why DW1 refused to pay for this timber.
25. DW1 actually asked the Ministry for Forest to conduct a test on the timber at his yard in Navua. The following Report of the Ministry was tendered:

*Attn: Mr Claude
35 River Drive
Pacific Harbour
Deuba*

Re: Inspection Report

Upon the inspection carried out on Tuesday (05/02/13) in regards to the complaint lodged by Mr. Claude of the above address about some timbers believed to have been supplied by K K Komove. After the inspection these are the findings, visually most of the timbers (Vesi-Instia Bijuga) contains:

- 1) ***Sapwood those are the white patches on the wood.***
- 2) ***On the white patches are noticeable holes (pinholes).***
- 3) ***The conditions of the timber is bad (dust, fungus etc)***

Judging from the findings, the timber was delivered on the 17/07/12 and the inspection commences on the 05/02/13:

- 1) *Time of delivery of the timber was way back last year that is a contributing factor to
the defects*
- 2) *The storage facility of the timber is also a contributing factor to defects eg;
Uncovered, exposed to moisture/rain).*

Do not hesitate to contact the undersigned.

Thank you.

*Sgd: Tevita Kunadei (Timber Inspector)
For Principle Utilization Officer.*

26. The Report raises a lot of misgivings about DW1's allegations about the sub-standard quality of timber delivered to him. If anything, the Report appears to suggest that the quality of the timber had merely deteriorated due to the storage conditions at DW1's yard.
27. PW1 said that DW1 never ever raised any complaint to KKKL regarding the quality of the timber delivered in Navua, or the timber exported to New Caledonia. The only time DW1 raised this was after KKKL had filed the current proceedings in the High Court to recover payment. This assertion was left unrefuted by DW1.
28. I accept it as fact that DW1 never ever complained to KKKL about the quality of the timber until proceedings were filed in the High Court in Lautoka. Accordingly, I record here my rejection of DW1's allegation that the timber delivered at his yard in Navua by KKKL was of poor quality.
29. I must say that I found DW1 to be rather evasive in cross examination. It was put to DW1 in cross-examination that KKKL delivered timber to his yard in Navua on 15 July 2012, 17 July 2012, 23 July 2012 and finally on 07 September 2012. DW1's answers were either "maybe" or "I cannot confirm".

KKKL Has Never Been Paid For Timber Delivered

30. From all the above, I have no doubt that KKKL did export timber to SBD and also delivered some to Navua. I also have no doubt that KKKL has never been paid for the timber.
31. The question which arises at this stage is how much is KKKL owed on account for the unpaid timber and whether DW1 should be liable for this.

HOW MUCH IS OWED TO KKKL FOR TIMBER

32. As I have said above, the total amount being claimed by KKKL for both the exported timber and the timber that was delivered to **DW1** in Navua, is \$93,074.46. This sum accounts for the total deliveries to **DW1**'s yard in Navua and export to New Caledonia.
33. **PW1** said in chief that **DW1** had actually settled a sum of \$30,000 in cash in January 2012. He confirmed this by referring to a Bank of South Pacific Account operated by **DW1** and his wife.
34. How **PW1** explains this payment is rather confusing. At first, he appeared to refer to it as a "deposit". From what I gather, once **DW1** paid that deposit, **DW1** would then operate against it on a "drawdown" basis. In other words, **DW1** would then order timber from KKKL and the cost of every order was then debited against that deposit. As **PW1** described it:
- He (DW1) would take timber from us every now and then and we will deduct from \$30K. After they have exhausted \$30K, we started sending to New Caledonia and more timber to yard. He owes us \$93,146K plus. He still owes KKKL.*
35. **PW1** then appeared to account for the \$30,000 as payment for a first delivery to the value of \$13,000 to **DW1** and for the first export to New Caledonia to the value of \$17,000.
36. **PW1** appears to say that after that payment, there was an on-going arrangement whereby **DW1** would come to KKKL's Mill in Navua to select timber and KKKL would then deliver the timber.
37. He said there were altogether four deliveries to Pacific Harbour. These were made on the following dates (with the corresponding invoice numbers in brackets):
- (i) 17 July (6499),
 - (ii) 23 July (6283),
 - (iii) 25 July (6119) and
 - (iv) 07 September 2012 (7129).

38. The total raised from these invoices is \$57,194.87. PW1 said there was no purchase orders from these because these were local purchasers.
39. And then how the dishonored \$10,000 cheque written by DW1 fits into the scheme of things is totally beyond me.
40. As for the second shipment to New Caledonia, PW1 said that the purchase Order for this was \$18, 879.51.
41. The cross-examination did little to clarify these confusion. I accept that the total sum owing on account of unpaid timber supplied to DW1 and exported to New Caledonia is \$93,074 -46.

SHOULD DW1 BE HELD LIABLE FOR THE \$93,074.46?

42. The answer to this depends on what sort of agent DW1 was for Mary Jacquies and/or SBD and, in particular, as I have said above, whether or not DW1 did confirm the timber?

Was It Marie Or DW1 Who Arranged With KKKL?

43. DW1 said he was aware that Marie had been to Fiji on one previous occasion. On the said occasion, Marie actually met PW1. I note that this suggestion was never put to PW1 in cross-examination by Mr. Sharma and it offends the rule in *Browne v Dunn*ⁱⁱⁱ. This evidence appears to be totally contradictory to what DW1 said about his involvement with KKKL.
44. I find that what PW1 said is more in line with everything else that DW1 said, apart from DW1's allegation that Marie had been to KKKL herself.

It Was DW1 Who Placed The Order

45. The evidence is clear that DW1 went to KKKL's yard to personally select the timber for export and for delivery to his yard in Navua. This is confirmed by both PW1 and DW1.
46. PW1 said that KKKL sells timber locally and also for export overseas. They sell pine, *vesi*, *damanu*, *dakua*, *salusalu* and *yaka*. He identified DW1 in Court. He said

- DW1 came to KKKL's yard and wanted some timber. PW1 said that after showing DW1 around the yard, DW1 indicated that he wanted *vesi* in particular.
47. PW1 said that after the Order was placed, KKKL started cutting up the timber at its mill. After that, DW1 came with his foreman called Paul to inspect the timber and told KKKL where to send it to.
 48. Paul was present all the time.
 49. At some point, DW1 came to discuss how he (DW1) would pay as well as the quarantine certificates and the bill of lading and also about the issuing of the export license.
 50. PW1 said that normally, for export timber, after a purchaser has inspected timber and ascertained the standard, KKKL would then send the necessary documents to their head office in Suva to arrange for an export licence.
 51. The relevant Export License in this case (License No. CF246/12) was tendered in evidence confirming that the subject matter was to be a consignment of Vesi Timber and also other details such as volume.
 52. In chief, DW1 confirmed that he did go personally to KKKL yard where he spoke with one Shameem and one Prasad about buying timber. He reiterated the same in cross-examination.
 53. However, DW1 said that he did all this as middleman for SBD. When asked to explain what his role as middle man entailed, DW1 said he bought timber for SBD. He said he talked to PW1 and also to SBD in New Caledonia. It was SBD that gave him the Order.
 54. When asked in chief to explain how the Orders were made in relation to the timber in question, DW1 said he went to KKKL's yard to inspect timber. He said he then called SBD in New Caledonia to tell them of the timber he found there. SBD would then give him the "okay". DW1 said that SBD would then place a "container" order with KKKL. DW1 said SBD did not pay him for his services to SBD.

55. In cross-examination, DW1 said it was he who decided on the quality of timber. However, he said he had no say in how the timber was to be paid. Notably, DW1 had said earlier in chief that he decided not to pay KKKL for the timber delivered to Navua as the timber quality was not good. Furthermore, DW1 had said in chief that it was he who had advised SBD not to pay as the timber quality was not good.
56. When asked how SBD paid KKKL for the timber, DW1 said the payments were made directly from New Caledonia by SBD. However, in cross-examination, DW1 added that:
- "they (SBD) pay through my account".*
57. DW1 also said whenever he travelled to New Caledonia, Mariie, who is the Director of SBD, would ask him to look for timber for SBD here in Fiji. DW1 said Marie was in the business of buying and selling timber. However, in terms of the timber in question in this case, DW1 said that Mariie herself had travelled to Fiji and spoken with PW1. DW1 said on this occasion, it was Mariie herself who had ordered the timber.
58. I find it very hard to accord any seriousness to this evidence because DW1 contradicts himself by this evidence, having earlier said in chief that it was he who went personally to KKKL's yard to select the timber (see paragraph 11 above).
59. Clearly, to say the least, DW1 was involved in some oral discussions with KKKL at KKKL's yard, pursuant to which KKKL would then act to export and deliver timber to SBD in Noumea and also to DW1's yard in Navua.
60. There was not much forthcoming from DW1 as to his exact arrangement with SBD, although, he did say in evidence that he was not paid for any of the "services" he carried out for SBD. What seems clear at least is that there is a personal connection between DW1 and Mariie.
- Treating Timber & Quarantine Before Export*
61. PW1 said that KKKL would fill up a container with export timber for quarantine and fumigation procedures to rid the timber of any insect or soil. The timber is treated for 24 hours.

62. The relevant Fumigation Certificate conducted by a pest control company called Amalgamated Pest Control was tendered in evidence. It identifies the consignee as SBD in Noumea.
63. PW1 said he sent the consignment to New Caledonia on the directions and instructions of DW1. He said that DW1 actually kept following up with KKKL on how the consignment was sent.

The Arrangement Between DW1 & KKKL Was For C.O.D

64. PW1 said DW1 gave four orders. The first order was for *vesi*. This was all exported to New Caledonia. He said the order was C.O.D that is, that DW1 would pay directly to KKKL once shipment is done.
65. PW1 was shown a copy of the C.O.D order. He said DW1 came and placed the order and instructed KKKL to use Carpenters Shipping. He said KKKL got a Forestry Officer who graded the timber. This was necessary before the timber could be sent overseas.
66. PW1 said he (PW1) then arranged for fumigation with a Quarantine Officer who came to KKKL.
67. PW1 identified the two certificates. The Certificate of Quarantine and the Certificate of Fumigation.

It Was KKKL Which Exported The Timber – Not DW1

68. I accept that it was KKKL (and not DW1) which actually arranged for the shipment of the timber to New Caledonia and took care of all the documentation. This is confirmed by the application for Export Licence dated 01 August 2012 which was tendered in evidence which was signed by PW1 as exporter for KKKL. The evidence of PW1 is that it was DW1 who told KKKL to use CSL as shipping agent.
69. PW1 said they gave DW1 his order number and they supplied timber to New Caledonia and also to DW1's house in Navua.

70. PW1 was referred to document number 8 which is the Purchase Order. He identified DW1's name written on it as purchaser and also KKKL as vendor. The said Purchase Order actually identifies the following as purchaser:

Bati Deck
Claude Barbera
batideck@gmail.com
New Caledonia (687) 972 636

71. PW1 also read out the details about the shipments, destination in the Purchase Order as Bati Deck Noumea.

Invoices

72. PW1 said that after the first shipment, KKKL invoiced SBD for \$17,000.
73. Following that, DW1 wrote that cheque for \$10,000 which was rejected by the bank.
74. PW1 referred to document number 3 which was a copy of the cheque which DW1 had issued. The cheque is dated 30 November 2012 and was written to KKKL. PW1 tendered this and marked it PEX3.
75. PW1 said that after that KKKL followed up with DW1. They called him and emailed him on many occasions. At some point, DW1 stopped responding to KKKL's phone calls and emails.

ANALYSIS

76. KKKL's case is that DW1 entered into an oral agreement with KKKL. The agreement was that KKKL would supply DW1 timber to the total value of \$93,074.46, on credit.
77. There are two parts to the claim. The first part relates to timber exported to New Caledonia.
78. The second part relates to timber delivered to DW1's yard in Navua. The total value of this exceeds \$57,000.

79. As regards the second part, the reason why DW1 is avoiding payment is because of what he alleges was the poor quality of the timber. For that, he relies a lot on the Report from the Ministry for Forests. As I have said above, the Report seems to speak more of the deterioration in the quality of the timber in the hands of DW1 due to poor storage conditions. I find as fact that the timber delivered to DW1 was all of good quality and refute all his allegations.
80. As regards the first part, on the facts, it is clear to me that DW1 acted as an agent for SBD and/or Mariie at all material times.
81. The general rule is that, save in certain situations, an agent cannot be personally liable for a contract which the agent has entered into on the authority of his or her principal^{iv} (see Montgomerie v. U.K. Mutual S.S. Assn Ltd [1891] 1QB 370 at 371 cited in P.D. Patel & Co. Pty Ltd v Carpenters Shipping [2014] FJHC 647; HBC489.2004 (5 September 2014)).
82. An agent may be held personally liable where the agent has not disclosed the name of the principal, or, where the agent enters into a contract on behalf of a fictitious or non - existing principal or has contracted for an unnamed principal or where the principal, though disclosed, cannot be sued (see Bowstead on Agency 14th edition (1976)).
83. In this case, it seems clear from the export documents which KKKL executed that the consignee of the exported timber was identified positively as BDL in Noumea in New Caledonia.
84. It cannot therefore be said that the name or the identity of BDL was never disclosed to KKKL – nor can it be said that BDL was a fictitious or non-existent entity given that its (BDL's) registration certificate was produced and tendered in evidence.
85. An agent will also be held personally liable if he or she has agreed expressly to be personally liable on the contract (as, for example, where the agent gives a guarantee), will be bound to that agreement (see Montgomerie v U.K. Mutual S.S Assn [1891] 1 Q. B. 370 at page 372).
86. In this case, DW1 made no express undertaking and/or guarantee with KKKL that he (DW1) shall be personally liable to KKKL independent of SBD.

87. However, it can be implied from the pattern of conduct that DW1 flaunted throughout his dealings with KKKL that he was holding himself out to be privy to the arrangement concerning the export of timber to New Caledonia. In saying this, I take into account the fact that DW1:
- (i) visited KKKL's yard in Navua and personally selected all the timber
 - (ii) influenced KKKL into choosing CSL to be shipping agent
 - (iii) DW1's name as well as SBD are both listed on the Purchase Order as the consignee
 - (iv) DW1 obviously, was the agent through which payment from SBD was to have been made.
 - (v) DW1 actually influenced SBD not to pay for the timber because of the "poor quality". Yet the only poor quality in timber he made was about the one delivered to him in Navua. In contrast, for the timber exported to New Caledonia, the only complaint was that there was a shortage in volume.
 - (vi) all the arrangement between SBD and DW1, whatever it was, was done orally
88. An agent may also be held to be personally liable where the agent contracts for the sale or purchase of goods for a merchant residing abroad.
89. There used to be a general presumption in law that, in such a situation, the agent alone assumes personal liability. This is rebuttable by evidence of clear authority.
90. **Bowstead on Agency** 14th edition discusses the old cases on this view as follows at pages 233 to 234:

There long existed a strong presumption of fact^v (so strong that a court was "justified in treating it as a matter of law" [Armstrong v Stokes (1872) L.R. 7 Q. B. 598 at p. 605]) that where an agent in England contracted on behalf of a foreign principal the agent assumed personal liability and had no authority to pledge the principal's credit by establishing privity of contract between the principal and the third party^{vi}. The presumption could be displaced by clear evidence of authority. Further, the effect of the presumption was to render the agent alone liable on the contract; so that when it was clear that the agent contracted only as agent, and that it was not intended that he should be personally liable, there was no room for the presumption: it could not operate inconsistently with the clear purport of the contract [Miller, Gibb & Co. v. Smith &

Tyrer Ltd. [1917] 2 K.B. 141]. The presumption was not affected by the fact that the contract was in writing: most, if not all, of the cases concern such contracts.

The status of this presumption was discussed in many cases, and though it could be questioned, [See Miller, Gibb & Co. v. Smith & Tyrer Ltd., *supra*, at p. 162; Holt & Moseley v. Cunningham & Partners (1949) 83 L.L.Rep. 141] it did give some expression to the reluctance of businessman to enter into transactions which might involve them in problems of the conflict of laws or the possibility of having to sue in a foreign jurisdiction, or both: the banker's commercial credit system performs a similar function in to some extent localizing the transaction. More recent cases tended to treat the fact that the principal was foreign as one to be taken into account but no more^{vii}.

91. **Bowstead** then goes on to discuss Diplock LJ's view in the English Court of Appeal decision in Teheran-Europe Co. Ltd. V. S.T. Belton (Tractors) Ltd. [[1968] 2 Q.B. 545 at 558, where the Court held that, while the presumption itself no longer exists, the fact that the principal is foreign is still relevant.

"The fact that the principal is a foreigner is one of the circumstances to be taken into account in determining whether or not the other party to the contract was willing, or led the agent to believe that he was willing, to treat as a party to the contract the agent's principal, and, if he was so willing, whether the mutual intention of the other party and the agent was that the agent should be personally entitled to sue and liable to be sued on the contract as well as his principal. But it is only one of many circumstances, and as respects the creation of privity of contract between the other party and the principal its weight may be minimal, particularly in a case such as the present where the terms of payment are cash before delivery and no credit is extended by the other party to the principal. It may have considerably more weight in determining whether the mutual intention of the other party and the agent was that the agent should be personally liable to be sued as well as the principal, particularly if credit has been extended by the other party."

92. On the facts of this case, I am not inclined to believe that KKKL had treated SBD as a party to the contract, OR at least, had led DW1 to believe that this was the case. As is clear from the evidence of PW1, which I believe, he only dealt with DW1 and he only believed that he was contracting with DW1.
93. Furthermore, I reiterate the points I have made above that a seller who exports goods "on credit" or on an "open account" runs the risk that the buyer or consignee will not pay for the goods upon dispatch.

94. Where there is a local agent acting for the foreign buyer such as DW1, it is more believable and plausible and makes more business sense that the local seller will want to establish privity with the local agent to obviate or minimize their risk.

CONCLUSION

95. I find in favour of the plaintiffs and accordingly, enter judgment against the defendant in the sum of \$93,074.46 plus costs which I summarily assess at \$3,500 (three thousand and five hundred dollars only).



Anare Tuilevuka
JUDGE
Lautoka

28 February 2020

ⁱ See International Transactions - Trade and Investment, Law and Finance, by KCDM Wilde (ed) and MR Islam (assoc ed), Sydney, The Law Book Company Limited, 1993 – Chapter 3, 3. International payments / James L. Roberts.

ⁱⁱ PW2 said that he is the designated person who oversees the handling of shipments and cargo for Carpenters Shipping, which I gather is a shipping agent. PW2 said part of his job is to hold the Bill of Lading given by every shipper who uses the service of his company until the shipment is done and the relevant bills cleared. PW2 recalls KKKL preparing a Bill of Lading and giving it to Carpenters Shipping.

ⁱⁱⁱ (1893) 6 R. 67, H.L. that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.

^{iv} See Bowstead on Agency, Fourteenth Edition (1976) Chapter 8 at page 351.

^v The learned authors footnoted the following cases on this point:

Paterson v. Gandasequi (1812) 15 East 62; **Smyth v. Anderson** (1849) 7 C.B. 21; **Dramburg v. Pollitzer** (1872) 28 L.T. 470; **Glover v. Langford** (1892) 8 T. L. R 628; **Flinn (Malcolm) & Co. v Hoyle** (1893) 63 L.J.Q.B 1; **Harper & Sons v. Keller, Bryant and Co. Ltd.** (1915) 84 L.J.K.B. 1696]

^{vi} The learned authors footnoted the following cases on this point:

Armstrong v. Stokes, supra; **Elibinger, etc v. Claye** (1873) L.R. 8 Q.B. 313; **Hutton v. Bulloch** (1874) L.R. 9 Q.B. 572; and see cases cited in note 32, supra].

^{vii} The learned authors footnoted the following cases on this point:

H.O Brandt & Co. v Morris & Co. [1917] 2 K.B 784; **Rusholme and Bolton and Roberts Hadfield v. S. G. Read & Co.** [1955] 1 W.L.R. 146; **Maritime Stories v. H. P. Marshall & Co. Ltd.** [1963] 1 Lloyd's Rep. 602; **Cox v. Sorrell** [1960] 1 Lloyd's Rep. 471; **Anglo-African Shipping Co. of New York Inc. v. J. Mortner Ltd.** [1962] 1 Lloyd's Rep. 610 at pp. 917, 621.