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

CIVIL APPEAL NO.ABU0046 OF 1998S
(High Court Civil Action No.510 of 1992)

BETWEEN:

PORTS AUTHORITY OF FIJI

Appellant

AND:

SOFE SHIPPING ENTERPRISES LIMITED
(In the record wrongly called "Consort Shipping Line Limited ")

Respondent

Coram: The Hon. Mr Justice Jai Ram Reddy, President
The Hon. Mr Justice Ian Thompson, Justice of Appeal
The Hon. Mr Justice Ian Sheppard, Justice of Appeal

Hearing: Thursday, 4 May 2000, Suva

Counsel: Mr. A. Rabo for the Appellant
Mr. H. Lateef for the Respondent

Date of Judgment: Friday, 12 May 2000

JUDGMENT OF THE COURT

This appeal is brought against a judgment recovered by the respondent in proceedings brought by it against the appellant in the High Court. The proceedings were tried by Byrne J and resulted in judgment for the respondent in the sum of $326,670.00 which included the sum of $76,670.00 for interest. The amount of the respondent's claim exceeded the sum of $250,000.00, which was allowed by the primary judge, but was reduced in order to take account of the limitation provisions of s.47 of the Ports Authority of Fiji Act 1985 (cap. 181))("the Act"). Section 47 of the Act is in the following terms:

> *"47(1) The liability of the Authority for damages, where any loss or damage is caused to any vessel or to any goods thereon, shall not exceed an aggregate amount of $50,000.*

(2) The limitation of liability under this section shall relate to the aggregate of any losses and damages sustained upon any 1 distinct occasion, even though such losses or damages are sustained by more than 1 person, and shall apply whether the liability arises at common law or under the provisions of any written law and notwithstanding anything contained in such written law."

The respondent relied on two causes of action, one a cause of action for negligence under the general law, and the other for a breach of a statutory duty said to have been owed by the appellant to the respondent pursuant to the terms of s.10 of the Act. The learned primary judge upheld the respondent's case on both causes of action. No submissions were apparently made to his Lordship on whether the provisions of s.10 should be construed so as to give rise to the statutory cause of action upon which the respondent relied. Understandably no distinction was drawn by his Lordship in his statement of the two causes of action. Consistently with this approach, no submission was made to us concerning the question whether the respondent was entitled to rely on the statutory cause of action. That was so despite the fact that questions were asked by members of the Court about the availability of the statutory cause of action in the present case.

That being the position, we propose to take the same course as was taken by Byrne J. But we should say that, in doing so, we should not be taken as necessarily agreeing that the statutory cause of action was available. We express no view on the matter because we have heard no argument about it and it would seem that the case relied upon by the respondent may be based on the cause of action brought under the general law irrespective of whether or not the statutory cause of action is available. In passing, however, we refer to the discussion concerning the circumstances in which a cause of action based on the breach of a statutory provision will be found in The Law of Torts (6th ed, 1983) John G Fleming at 120 - 122 and Torts, Commentary and Materials (8th ed, 1993) W L Morison and C Sappideen at 779.

The respondent's case was based upon damage suffered by a ship, the Spirit of Free Enterprise, (for brevity "the Enterprise") which the respondent owned. It was said that, because the appellant had not provided a satisfactory berth for the vessel when it came to the port of Suva, it was damaged on five separate occasions with the consequence that it had to be taken to Auckland where it was dry docked and repaired. The problem was that the bed of the harbour adjacent to the wharf where the respondent was directed to berth the vessel was insufficiently deep, particularly at low tide, to permit the vessel to berth safely. The respondent's case was that the depth of water available beside the wharf was too shallow and that it was impossible for the vessel not to damage itself, particularly at low tide, when berthing. The problem was not one which occurred all the time. In the relevant period the vessel berthed at the wharf on either 52 or 57 occasions; the evidence on this is not entirely clear. On no more than five of these did she suffer damage. The principal reason for this state of affairs appears to have been that on a majority of occasions the vessel was able to berth when the tide was not low. But on the five occasions when problems occurred the vessel, according to the respondent's case, could not avoid berthing at that time.

Before we come to further facts of the matter, it is convenient to refer to the essential provisions of the Act. Section 4 establishes the Ports Authority of Fiji. We shall hereafter refer to the appellant as the "Authority". The Authority's functions and powers are provided for in s.10. Paragraph (a) of s.10 provides that the Authority is to provide and maintain adequate and efficient port services and facilities in ports or the approaches to ports, paragraph (b) provides that it is to regulate and control navigation within ports and the approaches to ports, paragraph (e) provides that it is to acquire such land and execute such works and do such things as may be necessary in respect of the functions of the Authority under the provisions of the Act and paragraph (f) provides that,

subject to the provisions to the Act, it is to do all things necessary or convenient to be done in connection with or incidental to the performance of its functions under the Act or any other written law.

By s.39, the Authority is to appoint a Port Master for the purpose of the Act and may also appoint such number of Deputy Port Masters as it may consider necessary for all or any of the purposes of the Act. Section 40 provides that, notwithstanding anything contained in the Act, the Port Master may within a port or the approaches to a port direct where any vessel shall be berthed, moored, or anchored and the method of anchoring, direct the removal of any vessel from any berth, station or anchorage to another berth, and regulate the movement of vessels generally. Section 40(2) provides that any person who, without lawful excuse, refuses or neglects to obey or comply with any direction given under s. 40(1) shall be guilty of an offence and on conviction liable to a fine not exceeding $2,000.00 or to imprisonment for a term not exceeding 6 months. Section 43 provides that the authority shall not be liable for any act, omission or default of the Port Master. Section 47 is the limitation provision earlier referred to and s. 49 provides that the Authority is not to be liable for the acts of its employees. No submission based on this section was relied upon by the appellant.

We next turn to the facts of the matter. We deal first of all with some findings made by his Lordship. Prior to 1991 the Enterprise, which is a cargo-passenger carrying roll-on vessel, berthed, when in Suva, at the south end of the main Princes Wharf. In 1991 following its acquisition of land and work facilities at Walu Bay, the Authority required all local shipping operations at Princes Wharf to be transferred to a new jetty at Walu Bay. Subsequently the Authority published a notice in the Fiji Times of 15 May 1991. It stated in part, "All Local Shipping

Operations at Princes Wharf in Suva are now closed as the area is now declared a Customs area and has been converted for overseas shipping operations". In a letter to the Maritime Officers and Seamen's Union dated 31 May 1991, the Director of Operations of the Authority stated that the Controller of Customs had directed "that henceforth no local vessels should utilise the Princes Wharf facilities as this is now part of the main wharf declared as the Customs area and only overseas vessels may be allowed to use this zone to load either passengers or cargo." His Lordship said that the letter had been written following concerns expressed by the Union at the grounding of the Enterprise on 24 May 1991 when, according to a press report, about 400 passengers were stranded on board the vessel which had returned from Savusavu/Taveuni/Koro Island with 60 motor vehicles, containers of canned fish from Levuka and other cargo. According to the press reports the passengers had to wait for 3 hours until high tide before they could leave and unload their cargo. He said that the report was never denied by the Authority.

Although the notice in the Fiji Times and the letter to the Union were dated in May 1991, it needs to be clear that much earlier than May directions had been given requiring the Enterprise to berth at No.1 jetty Walu Bay. This appears to have occurred either in December 1990 or January 1991. Until about the end of May 1991, No. 1 jetty was the only available jetty at which vessels could berth at Walu Bay. No.2 jetty did not become available until some time after the end of May.

His Lordship dealt with submissions concerning the competency of the Master of the Enterprise. No submission was developed in this appeal challenging his Lordship's finding that the Master, Captain Vuiberata, was a competent Master and handled the Enterprise as well as the

circumstances prevailing at the time of the groundings allowed him to do. We do not refer further to that part of his Lordship's judgment.

His Lordship said that it was suggested by Captain Peckham, the Port Master, "and to some extent by the Port Engineer, that the Master of the Enterprise should not have berthed at the designated berth, Muaiwalu No.1 if he felt that it was not safe to do so. Captain Peckham, so his Lordship said, further suggested that the Master could have or should have disobeyed the directions given to him by the Authority to berth at Muaiwalu No.1 if he thought it was unsafe to do so. He gave instances of Masters of overseas vessels who had declined to berth at a particular place when they thought that it was unsafe. Captain Peckham said that in the end the final decision whether to accept the berth or not rested on the Master of a ship notwithstanding the provisions of s.40 of the Act. On the other hand Captain Vuiberata stated that, as Captain, he had no real say in where he could berth the vessel but had to accept directions from the Authority through the Port Master. On arrival in Suva from the other islands the Port Master directed by radio telephone where an arriving vessel should berth. Captain Vuiberata said that, despite his misgivings about the berth, "he was forced to go there". His Lordship also referred to the evidence of Mr Maharaj, a Hydrographic Surveyor, Mr Vata, the Assistant Director of Marine and formerly the Principal Surveyor, and Mr Dunlop, a Naval Architect of 30 years experience who gave evidence to the same effect. His Lordship continued:

> *"In the light of this evidence I have little doubt that whereas the Defendant would not prosecute a Master of an overseas ship for refusing to berth where directed it would not necessarily adopt the same attitude towards the Master of a local vessel in similar circumstances. In this regard it is necessary to consider the reality of the situation from the point of view of the Master of a local vessel such as SOFE.*

[the Enterprise]. On arrival he is told by a representative of the Port Master that he must berth, as in the case of SOFE, at Muaiwalu No.1. If he refuses he will probably not be given any other berth leaving all his passengers stranded. Further SOFE is a vessel which has a regular schedule which she must follow and carries cargo and passengers to and from their homes in the islands served by the ship. Indeed the Authority recognised this when Captain Kaukimoce wrote to the Maritime Officers and Seamen's Union that priority of berthing was given to those vessels which had set schedules like that of SOFE.

.....

In these circumstances I consider that on the five occasions on which Captain Vuiberata attempted unsuccessfully to berth he felt obliged to make the attempts for the reasons I have given."

In the course of the hearing at first instance, much was made by counsel for the Authority of Captain Vuiberata's inability to read and understand one of the ship's records known as the Stability Book. This could have been used to work out the draft and trim of the vessel. Of this matter his Lordship said that he was satisfied that Captain Vuiberata knew the draft of the ship before and after loading and knew it both for the bow of the vessel and for the stern. Nothing was made about the draft of the vessel, nor about Captain Vuiberata's lack of knowledge of the Stability Book, at the hearing before us.

His Lordship said that the Authority had maintained throughout that before requiring the Enterprise to berth at Muaiwalu No.1, it had satisfied itself by calculations of depth of water that it was safe for the vessel to berth. It had informed the respondent of this. The evidence was that the Authority had assured the respondent that the depth at Muaiwalu No.1 was 6 metres. We assume that this is a reference to the depth at low tide. Captain Vuiberata said that he took no sounding when approaching the berth because the Authority had given him a chart. He believed that if he remained on the channel shown on the chart it would be safe to berth at the wharf. Both Mr Worthington, a Marine Surveyor, and Mr Maharaj gave evidence to the effect that a Master would

be justified in berthing at a wharf where the depth was said to be 6 metres. Mr Maharaj also said, "If I were assured that the depth is all right, you are putting a Captain in an impossible position because in a country like Fiji with its bureaucracy it would be very hard to countermand such a direction. You would need to be a very strong Captain to do so when you have a ship with cargo and passengers." His Lordship also referred to the evidence of Mr Walker, a marine surveyor, that if he had been in Fiji at the time he would never have allowed the Enterprise to berth at Muaiwalu No.1. His Lordship said that this evidence alone was sufficient to absolve Captain Vuiberata from any responsibility for the grounding of the vessel.

Later his Lordship said:

"In his evidence Captain Worthington stated that a ship has three types of draught namely:

(i) registered;
(ii) critical; and
(iii) maximum

SOFE's registered draught according to Lloyd's Register of Shipping is 4.763m. The critical draught is the draught which would endanger a ship possibly by introducing sea water to her externals. In the case of SOFE he said it is 5.75. The maximum draught for SOFE to berth at any port is 5.004m so that for her to berth safely there had to be a maximum depth of 5.004m plus 10% which equals 5.504m minimum depth.

In my judgment this evidence leads inescapably to the conclusion that the calculations by the Defendant as to the required depth necessary for SOFE at Muaiwalu No.1 were wrong and that berth was never deepened sufficiently to enable the ship to berth safely there."

Eventually His Lordship said that after many complaints of grounding received from

the respondent, Captain Vata, then the Principal Surveyor, recommended that the berth be dredged down to 6 metres, that wrecks in the vicinity be removed and cleared and that the Enterprise not be berthed at Muaiwalu No.1 until this work had been carried out. His Lordship concluded that the Authority had failed in its duty to the respondent by not providing a berth of adequate depth for the Enterprise to use. He went on to deal with damages. We shall come to these when we later deal with the question of limitation of liability.

In order that evidence referred to by his Lordship may be better understood, we propose to refer to a little of the detail of it. We first refer to the evidence of the Master of the vessel, Captain Vuibureta. He said that he had held a Master's Certificate since 1950. He had been the Master of the Enterprise since 18 August 1986 when the respondent bought the vessel. He is familiar with Fiji waters. He said that the vessel initially berthed at Kings Wharf (sic) even when she was owned by a previous owner. There are apparently two wharves in the overseas wharf area, one known as the Princes Wharf and the other as the Kings Wharf. Sometimes the two names appear to have been used interchangeably in the evidence. Nothing turns on this.

The vessel continued to berth at either Princes Wharf or Kings Wharf until December 1990 when the owners were told that the Enterprise would have to berth at Muaiwalu No.1. Captain Vuiberata said that he had not agreed with this instruction because, "I knew it would cause harm to the vessel". As mentioned, he said that, as Captain, he had no real say in where he could berth the vessel but was obliged to accept directions from the Ports Authority through the Port Master. He explained that when the vessel arrived in Suva he was directed by the Port Controller by radio telephone where it was to berth. He remembered that early in January 1991, he berthed at

Muaiwalu No.1 on a few occasions. There were some complaints and the area was re-dredged. The vessel was permitted to berth at Kings Wharf for two weeks whilst this was going on. At the end of January he was told to return to the Muaiwalu jetty. He said that the first berthing there was on 29 January 1991 at high tide. The first time difficulty was encountered in berthing was 8 February 1991. Records would suggest that he must have meant 6 February. When the ship arrived it could not berth. The engine and the ship's lines were used and he managed to berth the vessel after about 20 minutes. He wrote a letter to his employer referring to the matter. The letter to which he referred is in fact a document described as a voyage report. It is dated 6 February 1991. Relevantly he said that on the morning of 6 February, berthing proved that the depth on the approach to the wharf was not deep enough for the vessel's draft. He added, "We tried with difficulties to berth by pulling by the stern lines and back springs before managed to berth". He said that he was of the firm opinion that the dredged area was again filling with mud due to currents every day.

On 8 February 1991 the respondent wrote to the Port Master reporting that the Master of the Enterprise had again complained about the draft of the Walu Bay berth. He said that the vessel had had to be pulled to her berth with the assistance of two stern lines and stern springs. The letter continued,

"Again we register our concern, as manoeuvering with this restrictive draft, we are risking the intake of mud and sand into our engines' cooling system. Your co-operation in rectifying the matter is urgently requested, keeping in mind that any mishap to our operation will be a financial disaster to Company, and disruption to the movements of passenger and cargo to the outer-islands."

Captain Vuiberata said that the next difficulty he encountered occurred on 15 May 1991. A letter from the Chief Engineer of the vessel to the company's fleet superintendent dated 15 May 1991 said that, as the ship was approaching its berth at Walu Bay, it went aground due to insufficient depth of water. Sand and silt was stirred up by the propellers and the main engines were stopped. The rudder did not respond "to required command". On checking it was found that the shaft gland had been pushed up and had stripped the holding down studs which had to be replaced. The letter said that the area was "a danger zone for the vessel."

In evidence is a diving report dated 15 May. There is nothing to indicate who made the report but in it recommendations are made for levelling the bottom surface. The report recommended that ship owners should be made to trim their ships to suit existing facilities. It was also recommended that the dispersal of silt should be carried out regularly by the Authority.

The Chief Engineer wrote a further letter to the fleet superintendent on 21 May 1991. He said that the matter of the ship touching the bottom of the sea bed while approaching the berth at Walu Bay was being raised. No date of an incident was provided but he said that the vessel started to drag on the bottom as silt and sand were again churned up by the propellers. The main engine had to be stopped and the ship was warped to the berth. He said that the continuous stirring of sand and silt entering the engine block and coolers and filters was a worry as it could cause damage and over heating. He said the rudder shaft was still leaking but repairs would be made when there was "ample time".

We are puzzled about when the incident referred to by the Chief Engineer occured.

It seems unlikely that he was referring to the incident on 15 May. On the other hand, Captain Vuiberata said that the next difficulty the vessel encountered was on the 24 May 1991 at 0855 hours when the ship grounded whilst berthing. We shall come to this incident in a moment but it would appear that there must have been an incident after 15 May but either on or before 21 May when the Chief Engineer wrote the letter to the fleet superintendent.

According to Captain Vuiberata a berthing on 21 May was without trouble. It was on 22 May and 24 May that difficulty was encountered. There is a voyage report which is dated 22 May 1991 at the commencement of it but 24 May 1991 under the signature of the Master which appears at the end. The report appears to deal with two incidents, one on 22 May and the other on 24 May 1991. The report deals with water entering the steering flat on 22 May. We do not go to the detail of this. The report then says that on the morning of 24 May 1991 the vessel was grounded approximately 45 feet to the west end of the jetty. Attempts were made to move in with the help of the engines. The berthing operation occupied one hour and 46 minutes. The Chief Officer took soundings. His report dated 24 May 1991 is in evidence. He found the depth to be 5 fathoms around the bow at both sides, 4 fathoms from below the side doors, 3 fathoms from below both funnels and 2 fathoms around the stern area. The draft forward was 12.5 feet and the draft aft was 18 feet. It is perhaps unnecessary to add that 12.5 feet is just over 2 fathoms and 18 feet is 3 fathoms. If the draft aft was 18 feet or 3 fathoms and the sounding indicated a depth of water of 2 fathoms, the vessel must have been intruding into the mud by about 1 fathom at the stern. Captain Vuiberata said that after that experience the vessel berthed at Muaiwalu jetty only at high tide. From early June it berthed at Kings Wharf again because of the difficulties at the Muaiwalu jetty. That was until the No.2 jetty at Walu Bay became available.

Mr Smith, the Managing Director of the respondent gave evidence. We do not refer to the detail of his evidence except to mention that he gave an account of complaints made from time to time to the Port Master and the Port Authority. In evidence are a number of letters written by him in February, April and May 1991 about the problem that was being encountered. There is also a letter from the Authority dated 10 May 1991 in which it is clear that the Authority was not taking the complaints seriously. Indeed the letter described one of the complaints made by the Master as "a whim". The letter however concluded by saying that the Authority was continuing its improvement programme and was always willing to help the local shipping industry. Of course the Master of the vessel was invariably allocated the berth at Walu Bay. That was so notwithstanding the various complaints and the problems that were being encountered.

It seems clear on the face of the evidence that between February and May 1991 there was a stand-off between the respondent and its employees and the Authority. The Authority took the view that either there was no problem or that such problems as there were were being badly overstated by the respondent and its Master. On the other hand, the vessel, on the face of the evidence, appears to have been having very real problems in docking safely when the tide was low. His Lordship found that the problems claimed to exist by the respondent were real ones and not imagined or exaggerated. He made these findings, not only on the basis of the evidence of the Master and Mr Smith but also on the basis of expert evidence to which he has referred in his judgment. We do not find it necessary to go to the detail of all the expert evidence but it is as well that we mention some of it.

Before we do so, we should refer to another document. We are uncertain of its status

but it is in evidence. It is referred to in his Lordship's judgment. It is dated 23 May 1991 and purports to be a memorandum from Captain Vata who is described as the principal surveyor, to the secretary of the Fiji Marine Board. There is no mention of the Authority or the Port Master in the memorandum nor is there evidence that either received a copy of it. The memorandum said that several accounts of grounding whilst berthing at the Muaiwalu jetty had been received from the Master of the Enterprise. He said that upon investigation a number of conclusions were evident. These were expressed as follows:

> *"i) The average deepest draught of the Spirit of Free Enterprise on arrivals at the berth is 17 feet (5.18 metres) which, when compared to the least available depth depth at chart datum of 3.1 metres alongside the berth, is too deep.*
>
> *ii) Taking into account that the SOFE discharges and loads through the stern ramp the change in trim aft worsens as the heavily laden trucks start to move towards the ramp away from centre of flotation thus aggravating the situation.*
>
> *iii) The very close proximity of the wrecks to the berth leaves no room for escape in an emergency or for berthing comfortably in strong southerly winds bearing in mind the enormous windage area that the SOFE presents broadside to.*
>
> *iv) The idea of deballasting the vessel completely to lighten her prior to arriving at the berth could be dangerous exercise for the stability of the ship."*

Captain Vata made three recommendations. These were that the berth be dredged down to 6 metres, that the wrecks in the area be removed and cleared and that the Enterprise "for her own safety" not be berthed at Muaiwalu jetty.

At the bottom of the memorandum is a date stamp bearing the date 27 May 1991. That

would suggest that the memorandum was received by the Marine Board on that day. It seems likely that it was that memorandum that led to the No.1 jetty no longer being allocated to the Enterprise.

We return to the evidence of some of the expert witnesses. Mr. D.E. Worthington is the Managing Director of a firm of Marine Surveyors known as Toplis Cargo & Marine. On 5 March 1993 he reported, not in relation to the No.1 wharf to which the vessel had been directed early in 1991, but in relation to Muaiwalu No.2 berth at Walu Bay. The reason for the report was to provide an assurance to the respondent that it could safely berth at the No.2 berth as distinct from No.1. Mr Worthington is a qualified marine surveyor. In the course of the report he dealt with a number of questions concerning the draft of vessels and of the Enterprise. The report said that the professional mariner's rule of thumb in respect of underkeel clearance was that a minimum 10% of maximum draft be available at all times under the keel for manouevering of the vessel. He said that this clearance was considered more than adequate with a vessel actually in a berth. The 10% would adequately allow for the minimum effects of squat where the vessel tended to increase its draft when under way while in close proximity to the ground. Mr Worthington expressed the view that a safe depth of water required to manoeuvre the vessel would be 5.504 metres minimum. He concluded that there were over 6 metres of water at the No.2 berth and that it was therefore safe for the vessel to dock there. The figure of 5.504 metres minimum is referred to in the primary judge's judgment.

In his oral evidence Mr Worthington said that if he were the Master of the ship and was told the depth in port was over 6 metres he would feel safe in berthing.

Mr Maharaj is a hydrographic surveyor. He said he is employed by the Government of Fiji. Part of his job involves his measuring the depth of water over the sea bed to define the topography of it. He said that the No.1 berth was 60 metres long. The length of the Enterprise was 80 metres. He took the Enterprise's draft as being 4.763 metres. He said that, upon his calculations, 50% of the vessel was over water which was less in depth than 4.763 metres. He said that on his figures depending on the tide and load of the vessel, she could berth at No.1 wharf if she were light but not necessarily if she were loaded. He said that it was possible for the vessel to berth without trouble at high tide but if the tide dropped she could be temporarily grounded. He said that the Enterprise could push herself through mud although damaging herself in the process. He said that lots of vessels did this. We do not find it necessary to refer to the evidence of the remaining experts.

The principal witness called by the Authority was Captain Peckham. At the time he gave his evidence in 1997 he was the Director of Marine Services and Port Master appointed under the Act. He has a Masters Certificate and a Masters Licence for all ports in Fiji. He is a registered Ship Surveyor. He explained restrictions upon his certificate. He was appointed Port Master for the Authority in February 1988. He said that the Port Master had the job of looking after the ports of Suva, Lautoka and Levuka. He had three deputies who carried out some of his work in these ports. The Port Master's job also required him to see to the upkeep of navigational lanes within the ports and approaches to ports. He said that the importance of the draft of a vessel was that the master, when taking his vessel into unknown waters, must know how much allowance he has for his vessel before she will ground. It also enables him to tell whether he is overloaded, whether he can load more cargo, and how much cargo he has on board. Captain Peckham does not mention the need to know the draft for the purpose of berthing. But it is obvious that one would need to know, not only the draft

of one's vessel but also the available depth of water at the berth. Unless one had this information one could not, short of taking soundings as one approached the berth, ever determine whether the berth was safe for the vessel. We would have thought that, for the purposes of this case, that was the critical consideration.

Captain Peckham's evidence does not deal with the question of the available depth of water at least in any direct way. It is clear that Captain Peckham relied upon the calculations and observations of others for any belief which he had that the available depth of water was sufficient. His Lordship found the depth insufficient at least at low tide. That made the berth, if not unsafe, then at least unsatisfactory for the berthing of the Enterprise if the tide were low. But the objective evidence establishes that, although that was the case, the Authority continued to allocate the berth to the Enterprise whenever she came to Suva in the first half of 1991 with the consequence that the vessel continued to have the experiences of grounding and propelling itself through mud in the way that is described in the evidence.

In the course of his cross-examination, Captain Peckham gave an important piece of evidence about maritime practice. This was referred to by his Lordship. Captain Peckham said:

> *"The Authority provides facilities for ships and what we do - what the employees of the Authority do is we allocate berths for vessels - now some Masters can refuse to use a particular berth which is what we often have for instance we take the Walu Bay berth of Kings Wharf. Some Masters feel they don't like a narrow berth so they say we don't want to go there we'll stay at anchor until you can give me another berth that I can use (b) as professional pilots can or normally what we do is we talk to the Master and say that berth is safe enough for you and we try and get him to go in but the Master has the last say - it is his ship and if it is damaged he answers for it,*

nobody else, the pilot, the agent or the owners - the Master is responsible. If he damages his vessel he could be fined for it or lose his job so normally if a Master says "I don't want to use that berth" then we let it be but then we have to find an alternative and sometimes the alternative may not come within a day the Master would have to decide whether he stays at anchor or waits for that berth or if thereis no need for a berth he stays at anchor and just leaves from anchorage - now this is to do with foreign going-going vessels - with local vessels we have a similar set-up where you have berths for local vessels. However with roll-on ships we have special berths for them vice versa. At the Kings Wharf we have special places where roll-on vessels come in and ramp down the reason being we have to allocate a special place for the roll-on vessel because of the ramp- some ramps weigh up to anything up to 3 - 4 hundred tonnes."

This passage from Captain Peckham's oral evidence is correctly transcribed but there are obviously contains errors in the transcript. The passage is an important one and we believe the sense of it is clear.

In the passage, Captain Peckham has given evidence of his understanding of maritime practice but his understanding of practice of a master berthing a vessel in port may not accord with the requirements of the law. That is because he leaves out of account the responsibility of those who provide and allocate berths to ships. It is convenient at this point to refer to some authorities.

In Halsbury's Laws of England, 4th ed. Vol.36 Para 538, the authors deal with the liabilities of dock owners and wharfingers. The authors say:

"The duty of dock owners to the ships using their docks frequently depends on the statutes which regulate their authority, as well as on the condition and situation of the dock.

Generally speaking, their duty is to take reasonable care that ships entering and using their docks may do so in safety, as regards both the ships themselves and the persons connected with their work. If a ship is damaged by an obstruction, such as an accumulation of mud, or something sunk, or

a snag they are liable if they either knew of the obstruction and failed to remove it or to give warning of it, or if they had the means of knowing of it and neglected to use those means. Thus, where the defendants opened a dock for public use, when the channels leading to it were in such a state as to be dangerous to ships of large size, the defendants were held to be negligent. If the dock is obviously not a dry dock, but is represented by the proper representative of the dock owners to be fit for use as such and as having a level bottom, the owners are liable if, in consequence of so using the dock, the vessel is injured by the bottom being uneven.

The owner of a wharf who for reward or benefit invites a vessel to berth there owes a duty to take reasonable care to see that the berth is safe for the vessel to lie at or, failing that, to give warning that he has not done so."

Footnotes have been omitted.

Earlier the authors had said (para 533) that, subject to the terms of its special Act, if any, a harbour authority which takes tolls for the use of a harbour must use reasonable care to see that the harbour is in a fit condition for a vessel to resort to it. In para 534 the authors deal with liability for the depth of approaches. There it is said that, where a harbour authority holds out that there is a certain depth of water at a part of a harbour over which vessels may be obliged to pass, it must use reasonable care to provide that the approaches to that part are sufficient, under normal conditions, to enable a vessel to pass over it or give warning that the advertised depth has not been maintained.

A number of authorities are cited in support of the propositions propounded by the authors of Halsbury. The most relevant of these for the present case is The Moorcock (1889) 14 P.D.64. There the defendants who were wharfingers, in consideration of charges for landing and storing cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty which extended into the River Thames where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in another body. The defendants had no control over the bed of the river and had taken no steps to ascertain whether it was or was not a safe place for

the vessel to lie. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty. It was held that the defendants were liable because the use of their premises by the plaintiff could not under the circumstances be had without the vessel grounding and the defendants must therefore be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

In the course of his judgment Lord Esher M.R. said (at 66 - 7):

"Such a vessel as the Moorcock could not be moored to this wharf without taking the ground at low water on every tide; therefore, in order that the wharf may be used so that the appellants may earn profit, a vessel must be moored to their wharf, and at the front of it, under such circumstances that she must take the ground at every tide. Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships to this wharf have no reasonable means of discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time."

Later Lord Esher said (at 67):

"The appellants can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is there by sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly earn what they are desiring to earn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then either

> *have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That I think is the least that can be implied as their duty, and this is what I understand the learned judge has implied, and then he finds as a matter of fact that they did not take reasonable means in this case, and in that view also I agree. I therefore think the appellants broke their contract, and that they are liable to the respondent for the injury which his vessel sustained."*

See also the judgment of Bowen L J at 69.

Of course a complicating question in the present case is that the respondent had a number of experiences with the unsatisfactory depth of water at the jetty in question and knew, at least after one or two groundings, that there was or might be a problem. Because of the state of the records and the uncertainties of the witnesses it is not a straightforward task to identify the dates of the five occasions on which the vessel grounded. That she did ground on five occasions is not in issue. That was the finding of the learned primary judge and there is no challenge to it. It would seem that the likely dates of the five occasions were the initial grounding on 6 February 1991 and then the groundings in May which appear to have occurred on 15 May, either 21 May or between 15 and 21 May, 22 May and 24 May.

Because there was a substantial interval between the grounding on 6 February and the next grounding on 15 May, it seems not unreasonable to take the view that the Master had no reason to doubt the satisfactory state of the berth when it was allocated to him on 15 May. Over three months had gone past. There is reference in some of the evidence to the movement of mud and silt in the harbour and, for all he knew, further dredging may have been carried out which had cured the problem. But by the time of the second grounding on 15 May, it must have been clear, as the letters written by the respondent to the Authority indicate, that there was a continuing problem. So the

question arises whether the Master acted reasonably in berthing his vessel at low tide at the wharf when he knew there was likely to be trouble. It is the Authority's submission that the Master was not justified in berthing at low tide at the allocated berth at least after the incident on 15 May. In the Authority's submission, any damage done to the vessel as a consequence of berthings which occurred after 15 May was the responsibility of the respondent and not the Authority.

In the submission of counsel for the Authority the question arises whether the Master's reliance on the direction to berth at Muaiwalu No.1 was reasonable in all the circumstances. We agree that this is the question which has to be addressed. Counsel for the appellant says that the respondent acted unreasonably. In substance it contends that, at least after the second occasion upon which a grounding occurred, the Master knew, or should have known, that each time he came into the harbour at Suva and was allocated the No.1 berth, it was likely that, if the tide were low, the vessel would have, or might well have, problems. It would not be unlikely that it would have to drag itself in using its lines and its engines. Counsel contends that the actions of the Master in persisting to use the No.1 berth at low tide were such as to involve him in hazarding his ship each time that this occurred. If he did not in fact realise that this was the case, he ought to have done so.

In considering the correctness or otherwise of the submission one has to bring to the problem not only reasonableness, but also a degree of realism. The evidence establishes that the Enterprise fulfils a substantial need in the Fiji Islands. It has a busy schedule transporting passengers and their goods, and other cargo, between islands in the Fiji group. In 1991 when the problem occurred it had operated successfully, from Kings Wharf and Princes Wharf, for some 5 years. The trouble only arose when Customs brought about a situation which prevented local shipping from

docking there so that the Authority had to find a site for a new terminal. The new wharf was satisfactory in conditions of high tide and probably in conditions as low as half tide. For vessels with a lesser draft than the Enterprise it was probably satisfactory at any tide. But for the Enterprise it was when the tide fell below half tide that the problem would be likely to be encountered. It would seem that the Master, confronted with the situation which he was, had three options. He could berth as he endeavoured to do; he could lay off the berth until the tide had become high enough for him to berth safely or he could simply say that the berth allocated to him was unsatisfactory for his vessel and rely on s.40(2) of the Act in order to overcome the penal consequences of that provision. In the way that the Authority was approaching the matter in the early months of 1991, it would seem that it would have been unlikely to have allocated a different berth for the vessel even in conditions of low tide. There is evidence to the contrary of this by Captain Peckham. But he was not in Suva at the relevant time and letters were being written by the Authority which were quite unsympathetic to the respondent's position. His Lordship does not deal with this aspect of Captain Peckham's evidence. There is no finding about it. And, in any event, it is one thing for Captain Peckham with the advantage of hindsight to say what he would have done. What has to be considered is what the Authority in fact did. It seems that its lack of sympathy for the respondent's problem arose because it did not think that the vessel had any real difficulty in berthing at the No.1 berth even in conditions of low tide. In one letter reference is made to the Master's concerns being a whim. If that were the attitude it was then adopting, it would have not been likely that the Authority would have taken any action if the respondent had tried to bring matters to a head. Indeed it seems probable that the action that was taken about the end of May 1991 was taken because of the impact the earlier quoted report from Captain Vata must have had. Nevertheless, the question remains whether the respondent acted reasonably in continuing to expose its vessel to a serious problem that must have become apparent

to it, if not on 15 May, then by 21 May.

Of course, the Authority had a continuing obligation to provide the vessel with a safe berth or to inform the respondent that there was no satisfactory berth at least at low tide. The obligation found by the Court in The Moorcock arose each time the vessel entered the Port of Suva. It was not an obligation the Authority could shed unless it told the respondent that it had no satisfactory berth for the vessel or at least gave it adequate warning that the only berth which could be provided was available only when the tide was at least half full. The Authority did not do this. It continued to allocate the No.1 berth for the vessel each time it arrived. It gave no indication that the berth was not satisfactory for it at low tide. Really the Authority's case is that the respondent, although being instructed in effect to berth the vessel at low tide at the No.1 berth, should not have done so because of its knowledge of what was likely to happen.

The Master's objection to waiting for low tide was based on a number of practical considerations. He had a large number of passengers, not infrequently two or three hundred, who would be likely to become impatient if the vessel approached the berth but he did not go in and berth at the scheduled time. He feared that numbers of passengers would jump off the vessel and endeavour to swim ashore. Furthermore, the vessel's schedule would have been badly disrupted so that the unloading of goods would have been seriously delayed and the loading of freight to be carried from Suva to other Fiji ports would also have been put back. Eventually this would cause disruptions to the ship's overall schedule and its ability to maintain its commitments. Furthermore, the vessel did not encounter difficulty on many occasions. There were five occasions only during the period of February and May 1991. There are varying figures given in the material but it would appear that

either the vessel docked uneventfully on 47 out of 52 occasions or on 52 occasions out of 57.

In our opinion, all the considerations which we have mentioned have relevance but the principal one is the fact that the Authority remained under a continuing obligation to provide a satisfactory berth. It continued to hold out the No.1 berth as being a satisfactory berth at which the vessel could dock. It was the Authority which had control of the harbour and it knew the condition of the harbour. Really it placed the respondent in a dilemma. It allocated the berth unconditionally. It did not say that the berth was unsafe in conditions of low tide and yet maintained that, because of the respondent's knowledge of the state of the berth, it should not have docked when it did.

We have reached the conclusion that the proper way of looking at this matter is to say that the Authority was not excused from performing the obligation which it had undertaken to provide a safe berth by the knowledge which the respondent had acquired. As earlier said, it could not shed its obligation at least without qualifying its instructions by saying that the vessel could only berth at or above half tide. We are therefore of opinion that the Authority's submission should be rejected. It may be that a defence of contributory negligence would have been available to the Authority. Contributory negligence was in fact pleaded. No finding about it was made by the primary judge. It would seem that he was not asked to make a such finding. No point about contributory negligence has been taken on the appeal. The onus of establishing contributory negligence lay upon the Authority. It may have been able to rely upon the evidence which has been led in the case especially so much of the evidence as established the knowledge the respondent must have acquired as a consequence or its experiences of groundings. But in the absence of any submission about the matter, it does not seem appropriate for the court to deal with it. The respondent has not been heard in

relation to it and it would seem wrong if the court were to enter into a degree of speculation about it and reach a conclusion without hearing either of the parties on the matter. We therefore put contributory negligence aside.

The next submission which we need to consider in depth is a submission relating to damages and the effect of the limitation provisions provided for in s.47 of the Act. Before we come to damages and limitations, there are, however, some other submissions with which we should briefly deal.

The first submission with which we deal is that based upon s.43 of the Act which provides that the Authority shall not be liable for any act, omission or default of the Port Master. In our opinion this was not an act, omission or default of the Port Master. The Port Master did no more than direct the vessel to a berth in the only wharf terminal that was available. That was pursuant to a clear policy formulated by the Authority. The evidence establishes that that was the policy which it implemented at the request of Customs once Customs decided to declare the Kings Wharf area a Customs area. In order properly to administer Customs legislation, Customs needed to have control of the entirety of the wharf area. If local shipping had come in to the same area, the security which it wished to maintain would have been jeopardised. That was why local shipping coming in to Suva was directed to the facility at Walu Bay.

Section 43 contemplates acts, omissions or defaults by the Port Master in the carrying out of the Port Master's function. The section does not appear to be directed to situations such as the present where the Port Master was simply implementing what was the policy that the Authority had

evolved. The Port Master or a deputy may have been instrumental in carrying out that policy but it does not make what the Port Master or a deputy committed an act, omission or default for the purpose of the section. Accordingly we reject the submission based upon s.43.

Then it was said that there was ample evidence that the authority did its "reasonable best" to provide a suitable berth for the Enterprise at the No.1 Wharf at Walu Bay. The evidence establishes that, "reasonable best" or not, it was not good enough. The berth was unsatisfactory until the No.2 wharf became available later in the year. It was also said that the duty of the appellant under s.10 and s.40 was not absolute. We do not have a problem with this. We agree that the duty is not an absolute one. But the evidence establishes that at all times relevant to the damage suffered by the vessel, the berth was deficient because the depth of water at low tide was too shallow. Furthermore, the Authority continued to hold out the berth as satisfactory. It was thus in breach of its obligation to provide a safe berth. It carried out its function negligently because it did not provide a sufficient depth of water, although it claimed that it had. That forms the basis for the cause of action in negligence under the general law. Of course the duty of care which is imposed is not absolute. It is a question of what is reasonable in all the circumstances. What seems to us not to have been reasonable is to have made a facility available upon a false basis namely that it was suitable to take a vessel of the draft of the Enterprise.

Submissions were made based on a supposed statutory duty on the part of a Master whose vessel suffers an accident within Fiji waters to report the accident to the Director of Marine. Reference was made to ss.5 and 86 of the Marine Act 1996. Reliance was also placed upon regulation 41and Schedule 2 Part B of the Marine (Masters and Seamen) Regulations 1990. The purpose of the

submission appears to have been to persuade us that, because there was no report of any accident, there was no reliable evidence of any grounding. Such a conclusion would fly in the face of a great deal of the evidence and his Lordship's findings. We have dealt with this matter earlier. We reject the submission.

There was then a submission that it was not reasonable for the vessel to have been taken to New Zealand to be slipped and repaired. We reject the submission. There is no issue between the parties that the cost of repairs to the vessel and of moving the vessel to and from New Zealand amounted to $386,358.62. No submission was made challenging the amount which was claimed and which, subject to the matter of s.47 of the Act, his Lordship would have awarded by way of damages. The sum which is claimed includes the sum of $50,188.27 for fuel oil to travel to and from New Zealand, a further sum of $14,836.78 for the wages of the crew for the voyage and $2,283.90 for crew victualling costs. Also included in the overall amount is the sum of $171,033.00 for loss of income.

The Authority's submission appears to be based on the evidence of Mr Houston . He is a marine surveyor and marine manager of a marine survey and adjusting business which is carried on in Auckland. Mr Houston went through the accounts for the various items making up the repair bill for the vessel. In the course of his evidence he cast substantial doubt on whether it was reasonable for the vessel to be taken to New Zealand to be slipped and repaired. He referred in detail to a number of the items in the accounts and raised concerns whether the slipping in 1991 was justified bearing in mind that the vessel had had a regular dry docking during the previous year.

We have not had the benefit of submissions, whether written or oral, taking us through the detail of the various items in order to put us in a position properly to consider whether the slipping of the vessel was reasonable in the circumstances. The acceptance by the Authority of the amount found by his Lordship to be the total cost of repairs and other expenses suggests that the submission is no longer a live one. His Lordship said that were it not for s.47 of the Act, he would have had no hesitation in awarding the respondent the full amount of its claim. He said that he considered that the damage it suffered in the five groundings was the natural consequence of the failure by the defendant to give the respondent accurate and reliable information about the depth of water available at the berth and its failure sufficiently to dredge the area in which the ship had to berth to enable it to do so safely. His Lordship mentioned no argument made to him about the reasonableness of the overall amount of the claim. There was no submission to us that his Lordship had failed to address a submission which was made to him about the amount of damages. In all these circumstances we find it very difficult to see how we can come to grips with the submission let alone give effect to it. Accordingly, we reject it.

That leaves the question of the limitation of liability. His Lordship said:

> *"However that does not end the matter because under Section 47 of the Ports Authority of Fiji Act the liability of the Authority for damages where any loss or damage is caused to any vessel or to any goods thereon, shall not exceed an aggregate amount of $50,000.00. This limitation of liability relates to the aggregate of any losses or damages sustained upon any one distinct occasion.*
>
> *The Plaintiff concedes that it is impossible to say how much damage SOFE suffered on each of the five groundings but invites the Court to award damages of $50,000.00 in respect of each grounding."*

His Lordship said that he accepted the respondent's submission on damages and

awarded it the sum of $250,000 in damages. He then dealt with interest.

The respondent's submissions on this aspect of the case are extremely brief. In fact, we were given no real help in the task which we have of applying s.47 . Counsel said that there was ample evidence that the Enterprise was grounded on five distinct occasions in the period complained of and that the Authority was put on notice on each occasion either by the master, the engineer or the owners. Furthermore, so counsel submitted, it was conceded by the Authority and accepted by his Lordship that it would be impossible to ascertain the exact damages on each grounding. Reference was made to the total cost of repairs, $386,538.62 and the fact that the respondent invited his Lordship to award damages of $50,000 for each distinct grounding. This, as counsel pointed out, was less than the actual loss suffered by the respondent. That is the sum total of the substance of counsel's submissions on this point.

In the course of his oral submissions, counsel was questioned about the matter but he was quite unable to add anything to what he had said in the written submission. In the result we are left to do the best we can in the circumstances. Obviously the problem is not without difficulty. That no doubt explains the fact that counsel was unable to formulate any satisfactory submission about the matter. The difficulty is that, although the vessel grounded on 5 occasions, it is impossible to say to what extent it was damaged on each occasion. What is clear is that, as a consequence of the groundings, a total repair bill of $386,000.00 was incurred, but it may not be right to do what his Lordship did and award $50,000.00 in respect of each grounding because some groundings may have resulted in comparatively little damage, perhaps even no damage, whilst others may have involved sums well in excess of $50,000.00. Moreover, some damage, particularly damage to the vessel's

steering, appears to have been repaired at or about the time it occurred. No separate claim is made for these repairs.

Section 47 must be applied and given effect. It is for the respondent to prove its case on damages and to prove, if it wishes to maintain the finding made in its favour by his Lordship, that at least $50,000.00 worth of damage was suffered in each incident. That is not, we think, something that the respondent has achieved and we cannot do it ourselves. What we can do, however, is to look at the list of items which make up the repair bill and reach some conclusions about the nature of and reason for some of the expenditure. As earlier indicated, some of the expenditure appears to have been related solely to the cost of the voyage to New Zealand and back to Suva. If the necessity to take the vessel to New Zealand was occasioned by more than one incident, it may be correct to award damages, if not for the five incidents, then for more than one. There is also the claim for loss of profits which has been earlier mentioned. But even then one cannot with any certainty say that the vessel had to be taken to New Zealand as a result of each of the groundings. It is entirely possible that one, two or more of the groundings might not have yielded damage sufficient to warrant that course.

As we read the items in the account and also the surveyor's reports and evidence, including Mr Houston's evidence, it seems that one of the matters which needed to be attended to with a degree of urgency was the painting of the under side of the vessel. Apparently it had been stripped of almost all its paint work. The paint work served two important purposes. It protected the vessel against corrosion. Additionally its hull was coated with anti-fouling paint to protect it against marine growth. The evidence was that, if the vessel remained without the protection that this painting

would give her, she was likely to suffer serious corrosion. That is what made it necessary to slip the vessel.

Earlier we have given an account of the problems the vessel had in docking on the five occasions found by his Lordship. On two of these it had to be dragged ashore by the use of its engines and lines attached to the wharf. Undoubtedly this dragged the vessel through the mud. That is what almost certainly stripped the paint work from it. As mentioned, the detailed particulars show that fuel costs for the voyage were over $50,000.00, crew wages for the voyage were almost $15,000.00 and victualling over $2,000.00. There were survey report fees of almost $8,000.00. Additionally there were dry-dock charges of $31,000.00, charges for blasting the underwater hull in preparation for the repainting amounting to $9,500.00, charges for the provision of underwater anti-fouling painting, some lesser charges for various matters such as marine service charges, berth hire, vessel movement to dock and back, refuse removal, fresh water and some other charges all of which came to over $5,000.00. And of course there was the claim for loss of profits.

Some of the items were expressed in New Zealand currency rather then in the currency of Fiji. At the relevant time, the New Zealand dollar was worth less than the Fijian dollar. The New Zealand dollar amounts were converted to Fijian currency using an exchange rate of 1.1480 New Zealand dollars for each Fijian dollar. The amounts incurred for expenditure in New Zealand were reduced to give effect to the difference in the value of the currencies but the reduction makes no significant difference to the question whether the overall amounts, whether they were incurred in Fiji or in New Zealand, amounted to at least $150,000.00 and probably more.

Nevertheless, the question of the amount of damages, if any, remains. We think that we must ask ourselves the question whether the respondent has established that every incident involved some damage which had to be repaired in New Zealand. We do not think that one can take the view that that matter was established. And even if it were, the further question would arise as to what amount of damage was suffered on each occasion.

It seems to us that the reality of the situation is that only if it can be confidently concluded that at least $50,000.00 was caused in one or more incidents can the respondent succeed. Otherwise the evidence does not permit a finding of the amount of damages suffered in any particular incident. The amount of damages found by his Lordship of $386,000.00 suggests that it would be an affront to common sense if the court were not to find any damages. But the task of reaching a conclusion on the amount of a proper award is a most difficult one. As earlier said, the principal reason that the vessel had to be taken to New Zealand to be slipped was the need to restore its underwater paint work. There is a question whether we can infer that particular incidents were the cause of the damage to the paint work which was suffered. The evidence to which we have referred establishes that there were two occasions when the vessel was driven through the mud. The first of these was on 6 February and the second on 24 May. That was the most serious incident. We think that it is safe to infer bearing in mind the various costs to which we have referred that damages in excess of $50,000.00 must have been incurred on each of these two occasions.

It does not seem to us that we can safely award any other damages notwithstanding that there were certainly five occasions on which the vessel had problems in berthing and that she probably suffered some damage on each of those occasions. The trouble is that, as mentioned, damage to the steering which occurred on two occasions appears to have been repaired in Fiji and there are no occasions other than the two we have mentioned on which the vessel appears to have been subjected to being winched or pulled through the mud. That means that his Lordship's award of $50,000.00 for each of the five incidents yielding a sum of $250,000.00 must be reduced. We think that the respondent has established on a balance of probabilities that on 6 February and 24 May the vessel did suffer damage which on each occasion exceeded $50,000.00.

Accordingly, the amount of $250,000.00 thought by his Lordship to be appropriate must be reduced to $100,000.00. To that must be added interest. The total amount of interest awarded by his Lordship was $76,760.00. That sum must be reduced to $30,704.00. In the result the amount of the judgment directed to be entered by his Lordship must be reduced to $130,704.00. In relation to costs, each party has had a measure of success. The appropriate order is that there should be no order as to the costs of the appeal.

The orders we make are:

(a) The appeal be allowed in part;

(b) The amount of the judgment directed to be entered by the High Court on 22 June 1998 be varied by reducing the amount of it to $130,704.00;

(c) The appeal be otherwise dismissed;

(d) There be no order as to the costs of the appeal.

.....
Mr Justice Jai Ram Reddy
President

FIJI COURT OF APPEAL

.....
Mr Justice Ian Thompson
Justice of Appeal

.....
Mr Justice Ian Sheppard
Justice of Appeal

Solicitors:

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