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

CIVIL APPEAL NO.ABU 09 OF 2018
(High Court of Suva Civil Action No. HBA 21 of 2014
Magistrate Court of Suva Civil Action No. 197 of 2013)

BETWEEN : **PACIFIC AGENCIES (FIJI) LIMITED**

Appellant (Defendant)

AND : **VISHAY KANT**

Respondent (Plaintiff)

Coram : **Almeida Guneratne AP**
Basnayake JA
Lecamwasam JA

Counsel : **Mr. Z. Lateef for the Appellant**
Mr. B. Patel with Mr. C. Young for the Respondent

Date of Hearing : **20 May 2021**

Date of Judgment : **3 June 2021**

JUDGMENT

Almeida Guneratne AP

[1] I agree with the reasons, conclusion and orders in His Lordship Justice Basnayake's Judgment.

Basnayake JA

[2] This judgment is written after careful consideration of the written submissions tendered by both parties. Although this case was fixed for 20 May 2021 for hearing, counsel for both parties invited court to deliver a judgment on the written submissions. Learned counsel intimated to court their inability to be present in court for a hearing.

[3] This is an appeal filed by the defendant/appellant (defendant) to have the judgment of the learned High Court Judge dated 26 January 2016 (pgs. 9-17 of the RHC) set aside with costs. There is also a Notice (pg. 6) filed by the plaintiff/respondent (plaintiff) for a variation of the judgment with regard to interest. The plaintiff is claiming interest on the award of $28,042.80 at 8% per annum calculated at daily rate from 25 April 2013 to the date of the judgment of the Court of Appeal.

[4] The High Court Judgment was in pursuance to an appeal filed against the judgment of the learned Magistrate of Suva dated 29 October 2014 (pgs. 468-477 Vol 2 of the Record of the High Court (RHC)). The jurisdiction to hear an appeal from a decision of the High Court in the exercise of its appellate jurisdiction is governed by Section 12 (1) (c) of the Court of Appeal Act. In terms of this section an appeal would lie to the Court of Appeal from the High Court on grounds involving a question of law only.

[5] **Section 12 (1) (c)**

> *12 (1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, to the Court of Appeal ... ... on any ground of appeal involving a* ***question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction*** *under any enactment which does not prohibit a further appeal to the Court of Appeal* (emphasis added).

Question of law

[6] A question of law is well explained in Prince Vyas Muni Lakshman v Estate Management Ltd. by the Court of Appeal (ABU 0014 of 2012 (27 February 2015)). The relevant portion of the judgment is reproduced.

"***A question of law only***

[36] What is a question of law? This has been explained by the Supreme Court of Fiji in ***Simeli Bili Naisua v The State*** *[CAV 0010 of 2013 (20 November 2013). Goundar JA with Gates P and Ekanayake JA agreeing stated that "the phrase 'a question of law alone' is one of pure law unaccompanied by any other ground of appeal". The learned Judge so stated after adopting Hallett J's interpretation in* ***Robinson*** *(1953) Cr App R 95 at pg. 99 that "an appellant has a right of appeal without leave only if he confines himself to a point of law".* (What is not relevant not included).

[37] The following questions as constituting questions of law have been determined by the Supreme Court of Sri Lanka by way of several examples in ***Collettes v Bank of Ceylon*** *(1982) (2) Sri Lanka Law reports 514 as follows:-*

(i) The proper legal effect of a proved fact is necessarily a question of law. A question of law is to be distinguished from a question of "fact". Questions of law and questions of facts are sometimes difficult to disentangle.

(ii) Inferences from the primary facts found are matters of law.

(iii) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law.

(iv) Whether the evidence is in the legal sense sufficient to support a determination of fact is a question of law.

(v) If in order to arrive at a conclusion on facts it is necessary to construe a document of title or correspondence then the question of construction of the document or correspondence becomes a question of law.

(vi) Every question of legal interpretation which arises after the primary facts have been established is a question of law.

(vii) Whether there is or is not evidence to support a finding, is a question of law.

(viii) *Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.*

(ix) *Whether the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law."*

[7] We must now examine the grounds of appeal tendered by the appellant to ascertain whether they formed only questions of law.

The Grounds of Appeal

1. *The Learned Judge erred in law and in fact in finding that the Bill of Lading did not apply when the Learned Magistrate after considering the evidence led in Court and based on the Plaintiff's admission in his pleadings made a finding of fact that the Bill of Lading applied and that the Appellant was merely acting as an agent of a disclosed principal and therefore cannot be held liable for the losses suffered by the Respondent.*

2. *The Learned Judge erred in law by relying on the decision in The Ardennes (Owner of Cargo) v The Ardennes (Owners) [1950] 2 KBD 517 as authority for the proposition that the Bill of Lading between the Respondent and the Carrier, Pacific Forum Line (NZ) Limited did not come into operation because the cargo had not been loaded on the ship, when a reading of that case shows that it is only authority for the proposition that a Bill of Lading is evidence of a contract between the parties and not the contract itself.*

3. *The Learned Judge erred in fact and in law in holding that the series of emails exchanged between the Appellant, its principal's (the Carrier's) subcontractors and the Respondent established that there was an independent contract between the Appellant and the Respondent, when the existence and terms of the alleged independent contract was neither proved nor established by the Respondent in the Magistrate's Court.*

4. *The Learned Judge erred in fact and in law by not upholding the Learned Magistrate's finding that the Appellant was at all material times acting as an agent of a disclosed principal and therefore any dealings between the Appellant and the Respondent were not personal but made by the Appellant for and on behalf of its principal.*

5. *The Learned Judge erred in fact and in law by holding that the Respondent's loss was directly due to the breach by the Appellant of its contractual obligation to keep the goods at the contractually stipulated temperature of 10 degree Celsius, when no evidence was adduced by the Respondent before the Learned Magistrate that it was the duty of the Appellant to pre-set, maintain and monitor the temperature of the container at 10 degrees Celsius.*

6. *The Learned Judge erred in fact and in law in holding that the loss suffered by the Appellant was the damage to the goods while they were with the Appellant or its agents and in failing to properly consider that the container was the Respondent's possession to pack the goods and therefore it was the Respondent's responsibility to ensure that the thermostatic controls had been adequately set and the container's temperature was maintained at the required temperature at all times.*

7. *The Learned Judge whilst correctly finding that the carrier's subcontractors who had provided the container and pre-set the temperature were not to be held liable however erred in holding the Appellant liable when the Appellant was merely acting as an agent of a disclosed principal and had merely facilitated the booking of the container and there was no proof by the respondent in the court below that it was the responsibility of the Appellant to pre-set, maintain and monitor the temperature of the container.*

8. *The Learned Judge erred in fact and in law in giving undue weight to the evidence to the Appellant's testimony that the Appellant's National Operations Manager, Mr. George King stated that it was his fault when the overall evidence clearly showed that this was not the fact.*

[8] There is no doubt that some of the above grounds of appeal constitute pure questions of law. The learned counsel for the plaintiff did not dispute the validity of this appeal on the ground that it was not based on any pure question of law. Grounds when taken cumulatively, I am of the view that we can proceed to hear this appeal. The questions are really based on two main areas, namely, whether a contract has been created outside the Bill of Lading (BOL) and whether the defendant acted in his individual capacity or as an agent of a disclosed principal. The validity of the BOL was never an issue in this case. There is also the question whether the plaintiff is entitled to compound interest.

[9] The plaintiff in an amended statement of claim (pgs. 463-465 Vol. 2) filed in the Magistrate's Court claimed judgment in the sum of $30,212.80 together with interest at the rate of 8% per annum from 25 April 2013 to date of judgment and at the rate of 4% per annum from the date of judgment to date of payment. As per the statement of claim, the plaintiff claims that in or about early April 2013 the defendant agreed to ship the plaintiff's cargo of fresh 'Dalo' to New Zealand (from Fiji) in a temperature controlled cooler container via ship Forum Fiji.

[10] The plaintiff claims that there was an express or an implied term that the defendant would provide to the plaintiff a cooler container for loading 'Dalo' with the temperature controlled at all times at 10 degrees Celsius and the container to be shipped to New Zealand from Suva on 7 May 2013. Pursuant to the contract the defendant delivered the container to the plaintiff on 25 April 2013. The plaintiff states that on 6 May 2013 the plaintiff discovered that the 'Dalo' in the container was completely frozen and informed the defendant about it. The plaintiff claimed that in breach of the contract the defendant set the container temperature at minus 21.5 degree Celsius thereby freezing the 'Dalo' and rendering it unfit for human consumption and which had to be destroyed.

[11] The plaintiff had relied on a large number of documents (Tabs A to S) which contained 9 emails (Tabs A to I) to support his case. The learned Magistrate at pages 475 to 477 having analysed the evidence dismissed the plaintiff's action with costs. The learned Magistrate found that there was a Bill of Lading between the plaintiff and the carrier. The plaintiff was aware that the defendant was the carrier's agent. On that basis the defendant is not liable for any loss. The defendant was not liable as the defendant was not a party to the Bill of Lading. The parties to the Bill of Lading were the plaintiff, the carrier and the consignee.

[12] The High Court in an appeal by the plaintiff allowed the appeal with costs. The learned Judge held as follows:

> *"The sole issue for me to decide is whether there was a contract existing before the bill of lading. The leading case on this issue is the decision of the English High Court in:* ***The Ardennes (Owner of Cargo) v The Ardennes (Owners)*** *[1950] 2 K.B.D. 517 (the Ardennes). It was held the bill of lading was not in itself the contract between the ship owner and the shipper, and, therefore evidence was admissible of the contract which was made before the bill of lading was signed and which contained a different term.*
>
> *Lord Goddard C.J in his judgment said: "It is I think, well settled that a bill of lading is not, in itself, the contract between the ship owner and the shipper of goods... The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board.*

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

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

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

The Appellant seeks to establish the fact of a contract from the e-mails which are part of AR1. 'A' is the e-mail from Satish Nandan (Nandan) of the Respondent for the booking of one reefer container on the subject vessel. The reply to this e-mail is 'B' from Alveen Ashish stating "We will book upon confirmation of temperature." The confirmation of temperature was provided by the Appellant in 'D', his e-mail to Nandan stating "Please make a booking for container for export to NZ on forum Fiji v20. Temperature will be 10.

*Therefore putting the e-mails together the existence of a binding contract between the Appellant and the Respondent becomes apparent with the salient terms quite patent I further note that 'F' the e-mail from Nandan at 9:53 am, 7 May 2013 states, "Hi All, as advised by Mere of container control please DO NOT load container PFLU6052315 because of temperature issues." This makes it crystal clear that the goods were never loaded on the ship and therefore applying Lord Goddard's words in "**The Ardenness**", the unsigned bill of lading here never came into operation.*

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

*With regard to the claim for compound interest the learned Judge held that, "The second is the issue of compound interest raised by Counsel for the Appellant. I am unpersuaded that he is entitled to this for 2 reasons. Firstly because the claim (ii) in the Amended Statement of Claim is for interest at the rate of 8% p.a from 25 April 2013 to judgment at the rate of 4% p.a. thereafter to date of payment. This clearly connotes simple interest. I agree with Lord Hope when he says at para [17] on page 666 of the report of the House of Lords decision in **Sempra Metals Ltd***

(formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another *[2007] 4 All ER 657, that* ***"the claimant must claim and prove his actual interest losses if he wishes to recover compound interest****...."* (emphasis is mine).

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

Submissions of the learned counsel for the defendant

[13] The learned counsel for the defendant made his submissions with regard to eight grounds as follows;

On ground one the issue is with regard to the application of the Bill of Lading. The learned Magistrate has said the Bill of Lading applies and there was no oral contract between the parties. The learned counsel submits that the plaintiff has acknowledged the existence of the Bill of Lading. Ground 2 is relating to the application of **The Ardennes (Owners of cargo) v The Ardennes (Owners)** 1950 2 KBD 517. The learned counsel submitted that The Ardennes case is an authority for the proposition that a Bill of Lading is evidence of a contract between the parties and not the contract itself. Ground 3 relates to the learned High Court Judge's finding that the emails established that there was a contract. The learned counsel submitted that The Ardennes case is not relevant for the reason that it was filed by the shipper against the ship owner and the present case was wrongly filed by the shipper against the agent of the ship owner. Further that in Ardennes an oral contract which was contradictory to the Bill Of Lading was entered into by the shipper and the ship owner before the Bill of Lading was signed. In the present case there is no contradiction found between the emails and the terms in the Bill of Lading. The learned counsel submitted that the agreed terms between the defendant Appellant and the plaintiff Respondent was the booking of a container set at the temperature of +10 degrees Celsius. As the agreed terms are not different the Ardennes has no application.

[14] Ground 4 is with regard to the High Court Judge not holding with the Magistrate that the dealings between the plaintiff and the defendant were not personal and made the defendant

liable on behalf of the principal. The learned counsel submitted that the defendant was not a contracting party to the Bill of Lading. The learned counsel cited the cases of **Montgomeric v UK Mutual SS Assn Ltd** [1891] QB 370 at 371, **Phonogram Ltd. V Lane** [1981] 3 All ER 182 at 187, **Teheran-Europe Co. Ltd. V St. Belton (Tractors) Ltd**. [1968] 2 QB 53 at 60 as authorities for the proposition that the agent only facilitates a privity between the shipper and the carrier. The learned counsel also cited, "Contract Law in South Pacific 2001 at page 95. The learned counsel submitted that the defendant was contracting with the plaintiff on behalf of Pacific Forum Line (Carrier).

[15] With regard to grounds 5, 6 and 7: Ground 5 is with regard to the breach by the defendant in not pre-setting the temperature at 10 degrees Celsius when no evidence was adduced. The learned counsel in paragraph 2.7 at page 3 of his submissions states that, "The agreed terms between the Appellant and the Respondent was the booking of a container set at a temperature at +10 degrees Celsius". This does not indicate that the responsibility of pre-setting the temperature was with the plaintiff. The learned counsel for the defendant however put the responsibility of checking the temperature on the plaintiff. The learned Magistrate too finds the responsibility of checking the temperature was with the plaintiff. The cargo got damaged while it was in the possession of the plaintiff. This is the reason for making the plaintiff responsible. It is evident from the emails that the container should be provided with a constant temperature of +10 Celsius. Irrespective of possession the defendant cannot simply let the plaintiff take over the responsibility. The defendant was paid for supplying a container with a temperature of +10 Celsius. Therefore it was the responsibility of the defendant to maintain it irrespective of its possession. The goods perished due to a wrong temperature in the container. If the responsibility of setting the temperature was with the defendant the liability falls on the defendant.

[16] Ground 7 is again with regard to the liability of Principal and Agent. The learned counsel in paragraph 4.11 at page 7 states that the setting of the temperature was for Container Services Fiji Limited. Who engaged the services of the Container Services Fiji Limited? It was the defendant. The plaintiff only had dealings with the defendant and no one else. In paragraph 4.13 the learned counsel has submitted that it was not the responsibility of the

Appellant to have the temperature controlled. In the same breath the learned counsel submitted that in the event the appellant is held to be responsible the Appellant was acting for the carrier and was only an agent. The learned counsel for the defendant appears to be blowing hot and cold at the same time.

[17] With regard to ground 8 the learned counsel again finds fault with the learned Judge for holding the defendant responsible for the loss on the strength of the admission of fault by the defendant's National Operations Manager Mr. George King. This ground looks illogical. The Appellant finds fault with the plaintiff for not cross-examining this witness on this admission. The learned counsel submitted that if the witness was cross-examined on this admission of guilt the witness could have either admitted or denied it or clarified it. Why should the plaintiff cross examine a witness of the opponent having got a valuable piece of evidence? Why didn't the Defendant get a clarification in re-examination? Was it due to fear that it will make the case worse? In order to circumvent the difficulty the learned counsel appears to have amended this ground in the written submissions. The learned counsel for the defendant has made a fruitless effort thereby to hide the truth. No submissions were made with regard to the Notice filed by the plaintiff on compound interest.

Submissions of the learned counsel for the plaintiff

[18] On grounds 1 and 2 the learned counsel for the plaintiff submitted that the normal practice is for the Bill of Lading (BOL) to be issued either on receipt of the goods by the carrier or on loading to the ship. A BOL is a receipt for the goods and is usually not signed until the goods are on board the vessel (**The Ardennes v Ardennes**) (supra). The learned counsel cited rules 3, 4 and 7 of article 3 of the Carriage of Goods … which states that a BOL shall be issued after receiving goods into the charge of the carrier and such bill shall be *prima facie* evidence of the carrier receiving the goods described in the BOL.

[19] The learned counsel also relied on CIF and FOB contracts (4th Ed.) by David Msassoon at page 89 paragraph 92, viz: the normal practice is for the BOL to be issued either on receipt

of the goods by the carrier or on loading to the ship. A BOL is a receipt for the goods and is usually not signed until the goods are on board the vessel. The learned counsel submitted that this is a "port to port" shipment where the carriage starts when the goods are received by the carrier at Suva wharf. It does not start from Shop 'N' save yard in Nasinu.

[20] The learned counsel submitted that the BOL did not apply because there was no evidence that the container was handed over to and was received by the carrier, PFL at the Suva wharf to make the BOL effective. The container containing 'dalo' was never handed over to the carrier, PFL. The learned counsel submitted that the BOL was issued after 10 a.m. on 6 May 2013 and the contract made on 24 April 2013 was breached; the resulting loss had occurred and the 'dalo' was not in an exportable condition. Hence the 'dalo' was not loaded onto the ship. The ship sailed on 7 May 2013. Therefore the learned High Court Judge was right to hold that the BOL did not apply.

[21] The learned counsel submitted that as in **The Ardennes** a shipper and the shipping agent are not precluded from entering into a contract separate from the BOL and before the BOL is issued. Even if the BOL is issued and the terms of contract in the BOL are different to the contract entered into prior to the entering in of the BOL the parties are not prevented from giving evidence that there was a contract which was made before the BOL was signed which contained additional terms. In this case a contract was found existing between the plaintiff and the defendant prior to the BOL. The learned Judge held that the BOL did not apply in this case.

[22] On grounds 3 and 4 the learned counsel submitted that the defendant invoiced the plaintiff for all the services. It was not done for PFL or as its agent. The learned counsel submitted that the learned High Court Judge was correct in holding that, "*Putting the emails together the existence of a binding contract between the appellant (plaintiff) and the respondent (defendant) becomes apparent.*" (Paragraph 20 at page 14 RHC). The learned counsel also submitted that the learned Judge was right to hold that the plaintiff had made the contract with the defendant and not with the defendant as agent for PFL. The learned Judge found that all the plaintiff's dealings were with the defendant and not with the PFL. It was the

defendant who arranged for the supply of an empty refrigerated container. The defendant arranged a technician to pre-set the temperature of the container. It was the defendant who arranged Cargo Brokers to transport the empty container with a pre-set temperature to the plaintiff's yard. It was the defendant who arranged Cargo brokers to uplift the container from the plaintiff's yard and to deliver it to Suva wharf after the defendant was informed by the plaintiff about the frozen 'dalo'. The BOL was sent to the wharf thereafter on 6 May 2013 after 10 a.m. All the emails were exchanged between the plaintiff and the defendant. None was with PFL or with the defendant as the agent of PFL.

[23] The learned counsel for the plaintiff submitted that the learned Magistrate who held that there was a contract, arrived at that decision based on the plaintiff's earlier transactions with the defendant. Otherwise there was no evidence of an agency between the parties. The learned counsel further submitted that there was also no evidence that in those previous occasions the plaintiff dealt with the defendant as agent for PFL. It may be that the plaintiff had knowledge that the defendant is an agent of PFL and nothing more. The learned counsel relied on Chitty on Contracts [31st Ed. 2012] Vol. 2 para 31-085, '*The fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his increasing personal liability*'. In **Pacific Travel Service v Ali** [1974] FJCA 2, the respondent had previously booked with the appellant's travel agent, and the respondent knew that the appellant was an agent of the airline but, the Court of Appeal held the contract was made with the appellant and not with the airline. The knowledge of the respondent that the appellant was the agent of the airline was not sufficient.

[24] The learned counsel submitted that the defendant had the onus to prove that it had informed the plaintiff at the time of the contract that the defendant was the agent of PFL and that he was contracting on behalf of PFL. The defendant did not discharge that onus. In **Yeung Kai Yung v Hong Kong & Shanghai Banking Corp** [1980] 2 All ER 599 (PC) at 604, Lord Scarman said, "*The true principle of the law is that a person is liable for engagements even though he is acting for another unless he can show by the law of agency that he is to be held to have expressly or impliedly negative his personal liability*". In **Austrac Rail P/L v Hunter Premium Funding Limited** [2001] NSWSC 654 Santow J said, "Where an

agent in making a contract discloses both the existence and the name of a principal on whose behalf the agent purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party". The learned counsel submitted that all the plaintiff's dealings were with the defendant and not with PFL. Further there is no evidence that the defendant informed the plaintiff at any time that he was making the contract on behalf of PFL.

[25] Grounds 5, 6 & 7 were addressed together. On ground 5, the learned counsel said that by letter dated 7 May 2013 marked Ex J (Vol. 1 pg. 104) the plaintiff in a demand notice informed the defendant how the plaintiff found the cargo (dalo) damaged as they were frozen and the plaintiff was informed by the defendant's employee Mr Satish that the temperature was set at minus 21.5 C by the technicians of the defendant and it was delivered to the yard with the same temperature when the correct temperature should have been +10 Celsius. The breach caused loss of $28,042.80. The learned counsel submitted that there is no appeal against the quantum of loss, interest and costs awarded by the High Court.

[26] The learned counsel further submitted that the defendant did not plead that it was the duty of the plaintiff to maintain the temperature and monitor the pre-set temperature while the container was in his (plaintiff's) possession. It is only a wild speculation to maintain that the plaintiff should have monitored the temperature as the container was in his possession. The submission on behalf of the defendant that the temperature gauge could have been adjusted by anyone is not supported by evidence. The learned counsel submitted that the evidence of the plaintiff was that a technician from Container Services Fiji Ltd. was hired to pre-set the temperature at +10 C and to check the temperature. These services were hired by the defendant and invoiced the plaintiff. Therefore the liability had been on the defendant.

[27] Addressing on ground 8 the learned counsel for the plaintiff submitted that the defendant found fault with the learned High Court Judge in giving undue weight to the testimony of the defendant's witness Mr George King, National Operations Manager of the defendant.

Mr. King admitted in court that the damage was due to his fault. Having admitted the liability, Mr King had asked the plaintiff to pay all the incurred charges including wharf charges and to remove the container to wharf and to make a claim (Pg. 486 Vol. 2). The plaintiff had acted on the advice and removed the container, paid the charges and got his solicitors to make a claim by letter dated 12 June 2013 (Ex. O, Pg. 115). The learned counsel submitted that the plaintiff was not challenged in cross-examination about the admission of liability by Mr King. Mr King himself did not rebut it when he gave evidence. The learned counsel submitted that the learned High Court did not rely solely on George King's admission to find the defendant liable. There was ample evidence to support King's admission as well as the learned Judge's findings.

[28] With regard to the plaintiff's notice on compound interest the learned counsel submitted that the learned High Court Judge allowed simple interest. The learned counsel submitted that the plaintiff produced letters from ANZ Bank (Ex. S, Pg. 124) in proof of the interest the plaintiff was charged by the Bank. It was further submitted that it is a known fact that Banks charge interest daily and compound it monthly. The plaintiff was charged compound interest and his actual interest loss is the difference between what he was charged and simple interest. The learned counsel relied on Lord Nicholls of Birkenhead in **Sempra Metal Ltd. v Inland Revenue Commissioner** [2007] 4 All ER 657 wherein it states, "*We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms...if the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality*". The learned counsel submitted that the compound interest is not limited to restitutionary claims as the learned Judge said. It can and should be awarded in all cases where justice requires it. The learned counsel relied on the case of **Mukta Ben v Suva City Council** [2008] FJSC 17.

[29] There is no dispute about the plaintiff and the defendant exchanging emails. There is no dispute that the plaintiff wanted the cargo to be shipped to New Zealand. The type of cargo and the manner of transport and other logistics were all discussed by the plaintiff and the defendant. They have been having transactions before and were used to each other. There

is evidence of the clear instructions given by the plaintiff to the defendant with regard to the temperature that should be maintained. That is +10 Celsius at all times. That was not complied with. Due to this mistake the plaintiff had to suffer a loss. The 'Dalo' set to be exported perished before it was shipped. Hence it was not shipped. In the meantime however the plaintiff states on the advice of the National Operations Manager of the defendant the plaintiff delivered goods to the wharf and the payments were made. That is to facilitate the defendant to entertain a claim from the plaintiff. That was the advice of the Operations Manager. This evidence was not disputed. The BOL if at all was opened at the instance of the defendant.

[30] Knowing that the cargo cannot be shipped why should the plaintiff open a BOL? It is not disputed that the goods were not loaded into the ship. It was taken to the wharf at the instance of the defendant. Now the defendant states that there is a BOL and the defendant is not a party to that and that there is no contract between the plaintiff and the defendant. The learned Judge found that there is a contract between the plaintiff and the defendant entered into prior to the BOL and the plaintiff is entitled to rely on that contract. The learned Judge has correctly followed the decision in **Ardennes** (*supra*). Thus the plaintiff was allowed to rely on his contract with the defendant. The defendant does not challenge the emails which formed into a contract. The only argument is that the plaintiff is not entitled to rely on a contract outside the BOL. In law the plaintiff is entitled to relying on a contract outside the BOL. The BOL does not prevent the plaintiff from relying on a contract which is outside the BOL. That is the rationale of Ardennes. According to the decision of **Ardennes**, even if there is a BOL, the court is not prevented from ascertaining whether there was a contract outside the BOL. In **Ardennes** there was a BOL. The shipper who was the plaintiff in that case averred that there were other terms not found in the BOL. Some of those terms were contrary to the terms contained in the BOL. The court permitted the plaintiff to produce evidence to prove a contract outside the BOL. Therefore the existence of a BOL is immaterial. The court can still find out whether there was another contract between the parties.

[31] There was no evidence adduced by the defendant to prove an agency. Throughout, the plaintiff's case was that he had dealt with the defendant and not as agent of the shipping line. In the event of a breach on the part of the plaintiff who would have sued the plaintiff? Could the defendant sue the plaintiff as an agent for the Shipping line (PFL)? In that case the plaintiff would be the shipping line. It was the defendant who did everything up to the time of delivery of cargo to the wharf. There were many other sub-contractors engaged by the defendant. The plaintiff paid for all the services to the defendant and no one else. The defendant was paid not as an agent of the shipping line. The defendant states that in the event the court holds that there is a contract between the plaintiff and the defendant the defendant states that he acted as an agent and is not liable. The learned counsel for the plaintiff made useful submissions on law relating to agency. I do not have to repeat them. I am of the view that there is ample evidence in this case with regard to a contract between the plaintiff and the defendant. The terms of the contract are found in emails and the learned High Court Judge has rightly examined the emails to find the contract. The claim of the plaintiff is based on this contract. There is no dispute with regard to the quantum. Hence I am of the view that the defendant appellant has failed. Hence the appeal of the defendant appellant is dismissed. The grounds of appeal are answered in the negative.

[32] The plaintiff respondent claims compound interest in his notice. In the amended statement of claim the plaintiff prayed for judgment and interest on the judgment sum at the rate of 8% per annum from 25 April 2013 to date of judgment and at the rate of 4% per annum from date of judgment to date of payment (pg. 465 Vol. 2). The learned counsel has drawn the attention of the learned High Court Judge with regard to the compound interest. As per the judgment in **Sempra Metals Ltd (formally Metallgesellschaft Ltd) v Inland Revenue Commisioners and Another** [2007] 4 All ER 657 "the claimant must claim and prove his actual interest losses if he wishes to recover compound interest'. In this case the

learned counsel for the plaintiff did not meet this requirement. Hence I am of the view that the learned Judge was right in awarding simple interest. The notice of the plaintiff respondent is therefore dismissed. The plaintiff is entitled to costs in a sum of $5000.00.

LecamwasamJA

[33] I agree with the reasons given and the conclusion arrived at by Basnayake JA.

Orders of Court are:

1. *Appeal dismissed.*
2. *Plaintiff respondent is entitled to costs in a sum of $5000.00 payable by the defendant appellant.*
3. *The plaintiff respondent's notice seeking compound interest is also dismissed without costs.*

.....

Hon. Justice Almeida Guneratne
ACTING PRESIDENT, COURT OF APPEAL

.....

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

.....

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL