

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. 36 of 2009

**BETWEEN** : **MOHAMMED FARUD** also known as  
**MOHAMMED FAROOD** trading as **FAROOD'S**  
**ALARMS & AUTOPARTS.**

**Plaintiff**

**AND** : **WILLIAMS & GOSLING LTD**

**Defendant**

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**Before** : **Master Anare Tuilevuka**  
**Solicitors** : **M.C Lawyers for the plaintiff**  
: **Mitchell Keil & Associates for the Defendant**  
**Date of Ruling** : **21 June 2011**

R U L I N G

BACKGROUND

- [1]. The plaintiff ("**Farud**") had exported some spare parts to Kiribati. The consignee in Kiribati is Gaming Trading. Farud's export broker in Fiji was Cargocare Fiji ("**Cargocare**"). On 4 June 2008, Cargocare had gone to Williams & Goslings to make arrangements for the shipment of Farud's spare parts to Gaming Trading in Kiribati.
- [2]. Later that same month, on 27 June 2008, Cargocare prepared four bills of lading for Farud's shipment. These bills are numbered SVTRW 102, 103, 104 and 105 all dated 27 June 2008. On the same day, Cargocare handed over to Farud the original bill of lading. This was done for Farud to clear his goods to the consignee in Kiribati.
- [3]. The bills identify Kiribati Shipping Services Limited ("**KSSL**") as the carrier. The bills were also signed by Williams & Gosling as agent of KSSL. Farud is identified as the shipper and Gaming Trading as the consignee.

- [4]. Farud does not deny having received the original bill of sale from Cargocare on the above date for the above purpose.

**THE STATEMENT OF CLAIM**

- [5]. I observe that Farud's claim does not raise any issue about the handling or the packing of the goods in Fiji. Nor does he raise any allegation about the parts being damaged on shipment *en route* from Fiji to Kiribati.
- [6]. Rather, Farud alleges that Williams & Gosling or its agent in Kiribati, in breach of the terms of the bill of lading, released the goods to Gaming Trading in Kiribati without any authority from Farud.
- [7]. Farud says he clearly instructed Williams & Gosling in Fiji not to release the goods to KSSL in Kiribati until he directs so. The standard shipping procedure is that goods are withheld by the carrier at the point of shipment and are only released when evidence of payment is produced by the consignee and upon verification by the shipper (Farud). This evidence may be in the form of the presentation by the consignee of the original bill of lading. Otherwise, if there is an arrangement for payment between the shipper and the consignee, clearance for the release of the consignment may be in the form of the presentation of an endorsement on the document directing the release.
- [8]. As a result of the above breach, Farud claims that he has suffered a direct loss in not being paid the purchase price for the consignment which amounts to FJD\$235,893.17.

**APPLICATION**

- [9]. Williams & Gosling wishes to obtain an order to strike out Farud's statement. The application is made pursuant to **Orders 18, 32 and 59** of the **High Court Rules 1988** and is based on two principal grounds.
- [10]. The first ground is that Williams & Gosling cannot be sued as it signed the bills of lading as **agent** of the carrier, KSSL. This fact was quite well known to Farud. Therefore, the action is frivolous and vexatious and an abuse of the process of the court.
- [11]. The second ground is the argument that, under the **Sea Carriage of Goods Act (Cap. 231)** and based on the **doctrine of forum conveniens** (i) the law of Kiribati is to be applied in the determination of the issues raised by Farud, and (ii) that Kiribati is in any event, the more appropriate forum of the two countries where this action should be tried.

**ANALYSIS**

- [12]. Mr. Prasad's well researched submissions relying on the principle of disclosed principal and indemnity under the bill of lading are commendable.
- [13]. Under the former, the gist is that in law, whether or not an agent is to be held liable for obligations purportedly incurred for and on behalf of his principle will depend on whether or not the agent sufficiently discloses the nature of his agency (i.e. the fact that he acts for and on behalf of another). If the agent does not disclose the nature of his agency and thus does not disclose the name of his principal, the agent may be held personally liable for his actions. If, however, the agent disclosed his agency and the name of the principal (disclosed principal), he will normally not be held liable for commitments undertaken within his

authorized agency (see **Austrac Rail P/L v. Hunter Premium Funding Limited** [2001] NSWSC 654; **Bowstead & Reynolds on Agency** (Sweet & Maxwell, 1996) 6<sup>th</sup> ed. At 548 and **Montgomerie v. United Kingdom Mutual Steamship Association** [1891] 1 QB 370 at p.371 as per Wright J).

- [14]. Under the latter, Mr. Prasad highlights clauses 1 and 3 of the bill of lading in question which purportedly grants immunity from suit to Williams & Gosling. He also cites various cases in support of his submissions (see **New Zealand Shipping Company Limited v. A. M. Satterthwaite & Company Limited** ("The Eurymedon") [1975] AC 154, the Privy Council).
- [15]. The arguments are strong however I have some misgivings as to the appropriateness of summarily terminating the current proceedings on the above grounds. In my view, the applicability or otherwise of an exemption or immunity may sometimes be a triable matter. I think it does in this case.
- [16]. As to Mr. Prasad's third submission, he argues that Kiribati and not Fiji is the natural forum for the litigation of this dispute. He relies on paragraph 5 of Yuen's second affidavit which deposes as follows:-

The goods were delivered to Kiribati. The Consignee who has possession of the goods is based Kiribati. The circumstances which led to the goods being released in Kiribati is best known to the wharf employees, Consignee's employees and the employees of the principal, Kiribati Shipping Services Limited. In the circumstances, Kiribati is a more convenient place for determination of this dispute.

- [17]. The onus is on Williams & Goslings to persuade the court that Fiji is not the natural forum (as per Inoke J in **GoodWay Inc v. Wassa International Co. Ltd and Anor** HC AK CIV 2007-404-000634 [2008] NZHC 463 (8 April 2008)).
- [18]. I am bound by the provisions of the **Sea Carriage of Goods Act (Cap. 231)**. **Section 2** of the Act provides as follows:

Subject to the provisions of this Act, the rules contained in the Schedule (in this Act referred to as "the rules") shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in Fiji to any other port whether in or outside Fiji.

[19]. **Section 7(1)** of the Act states:-

All parties to any bill of lading or document relating to the carriage of goods from any place in Fiji to any place outside Fiji shall be deemed to have intended to contract according to the laws in force at the place of shipment and any stipulation or agreement to the contrary or purporting to oust or lessen the jurisdiction of the courts of the bill of lading or document shall be illegal, null and void and of no effect.

[20]. Mr. Prasad submits that the laws of Kiribati, being the place of shipment, are clearly the law applicable. Furthermore, Kiribati is the forum conveniens for the following reasons:

(i) of the two courts, Kiribati is the natural forum for the resolution of the dispute. He reiterates paragraph 5 of Yuen's second affidavit (see paragraph 24 above).

(ii) the real dispute is not in relation to packing/delivery or damaged in connection with the goods. The dispute revolves around what happened to the goods after they were offloaded arrived safely in Kiribati. In particular, the questions: why were the goods released? How were the goods released? On whose authority were the goods released? Who released the goods? Where were the goods taken after delivery was effected?.

(iii) these are all questions that can be best answered by witnesses based in Kiribati.

(iv) KSSL - is a registered company in Kiribati. All alleged breaches of contract by KSSL occurred in Kiribati. KSSL staff, the consignee and wharf officials will be material witnesses in this matter. They are all based in Kiribati.

[21]. The above is further supported by the bill of lading which states as follows in its relevant part:

*Law and Jurisdiction* - Any suit to recover on any claim for loss or damage to the Goods carried hereunder shall be brought only in the country where the Goods are received for carriage or in the country where this contract calls for delivery, provided that nothing in this bill of lading shall operate to deprive the carrier of

any statutory protection or any defence, immunity, exemption, limitation of or exoneration from liability contained in the laws of New Zealand or any other country whose laws may be compulsorily applicable, alternatively, if all the parties agree, the claim may be referred to arbitration at a place to be agreed by the parties.

#### **CONCLUSION**

[22]. I am persuaded by Mr. Prasad's submissions based on **section 7(1) of the Sea Carriage of Goods Act (Cap. 231)** which finds support in the provisions on "Law and Jurisdiction" in the bill of lading. I find that:

- (i) Kiribati being the place of shipment, the parties would have been deemed to have contracted in terms of the laws of that nation – if such an issue had arisen as to whether the laws of Fiji or Kiribati should apply.
- (ii) But such an issue does not even arise as the parties, by virtue of the bill of lading (see paragraph [21] above) had clearly contracted to have the laws of Kiribati applied.
- (iii) Having said that, the factors set out above in paragraph [20], in addition to the above, are cogent reasons why Kiribati is the natural forum for the determination of this action.

[23]. For the above reasons, I order that the current proceedings be permanently stayed. I award costs in favour of the defendant which I summarily assess at \$500-00 (five hundred dollars). Farud is urged to institute proceedings in Kiribati.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka", written over a horizontal dotted line.

**Anare Tuilevuka**  
**Master**

**At Lautoka**  
**21 June 2011**