IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 248 OF 2014

BETWEEN : GENERAL MACHINERY HIRE LIMITED a limited liability company having its registered office at 63 Vitogo Parade, Lautoka.

Plaintiff

A N D : THE NEW INDIA ASSURANCE COMPANY LIMITED a foreign company duly incorporated under the laws of India and having its place of business in Fiji at Suva and carrying on business as an insurance underwriter.

Defendant

Before	:	A.M. Mohamed Mackie- J
Appearance	:	Ms. V. Lidise for the Plaintiff
		Mr. R. R. Gordon with Mr. W. Pillay for the Defendant
Dates of Hearing	:	On 14th to 17th November 2017
Site Inspection:	:	On 14th November 2017
Written Submissions:		On 17th July 2018 by the Defendant & 17th August 2018 by the Plaintiff
Judgment Delivered:		On 13th December 2018

JUDGMENT

A. INTRODUCTION

1. This is an action commenced by the plaintiff 'General Machinery Hire Limited' against the defendant 'The New India Assurance Company Limited' by way of Writ of Summons filed together with the Statement of Claim (SOC) dated 25th August 2014, praying for the following reliefs as per the prayers thereto.

1. *A declaration that the Defendant is liable to indemnify and insure the Plaintiff for all the losses and damages suffered by virtue of the provisions of the Public and Product Liability insurance policy.*

2. *A declaration that the Defendant is liable to indemnify and insure the Plaintiff for all the losses and damages suffered up to the sum of $200,000 by virtue of the provisions of the Goods in Transit insurance policy.*
3. *Judgment in a sum of $ 246,338.93 or for so much thereof as is found due by the Defendant.*
4. *Interest at 10% per annum on the judgment sum from 6th of August 2012 to the date of judgment pursuant to Insurance Law Reform Act 1996.*
5. *Cost on a solicitor client basis.*

B. BACKGROUND AS PER THE SOC:

2. During the time material, the plaintiff had entered into a Service Agreement (Tab No.6 in the ABOD) with the Mobil Oil Australia PTY Ltd (Mobil) for the cartage of Bulk and Packaged Lubricant Products on behalf of Mobil from its Suva and Vuda Terminals to Mobil's joint ventures and customers.

3. The said contract required, inter-alia, that the plaintiff maintains comprehensive insurance cover for general liability and automobile liability for the duration of the contract.

4. In terms of the said agreement, the plaintiff was liable to indemnify Mobil and its joint ventures for losses and damages to the properties of Mobil and its joint ventures as well as for consequential losses suffered arising from accidents and the plaintiff's negligence during the discharge of its services under the agreement.

5. The plaintiff obtained from the defendant an Insurance Policy, namely, **Public & Product Liability Policy** (hereinafter called and referred to as "P&PLP") bearing number 922622/ 4690/002644/200 valid for the period from 27th July 2011 to 27th July 2012, in terms of which the defendant agreed to insure and indemnify the plaintiff for legal liability to pay damages for death, injury or property damages and consequential losses arising from accidents caused by the Plaintiff. The limits of indemnity were $5,000,000 on General liability and $5000, 000 on Product liability under this P&PLP. The plaintiff had paid additional annual sum of $10,000 as required by the defendant on account of an extra cover. (Vide paragraph 7 of SOC). The plaintiff pleads the **first cause of action** on this policy.

6. The plaintiff, through a further contract of insurance with the defendant, obtained another Policy, namely, **Goods In Transit Policy** (hereinafter called and referred to as "GITP") bearing number 922622/ 2101/10831//00 valid for the period from 27th July 2011 to 27th July 2012, and in consideration of the premium paid, the defendant agreed to insure and indemnify the plaintiff against all risks causing loss or damages to the goods and merchandise belonging to the plaintiff or other parties from the time the goods have left a warehouse or relevant premises until delivered and unloaded at the final destination. (Vide paragraph 18 of the SOC).The sum insured by this policy is $200,000. The plaintiff had paid additional annual sum of $10,000 as required by the defendant owing to the contract the plaintiff had entered with Mobil. The plaintiff pleads the **second cause of action** on this policy.

7. The plaintiff claims that on 28th April 2012, when its employee driver, Mr. Abdul Ahad, (PW-2) was in the process of unloading approximately 26,300 litres of Bulk Lubricants from the plaintiff's fuel tanker bearing registration number EQ 363 into the fuel storage tanks at the Carpenters Motors Service Station in Samabula ("the Service Station") a **crossover accident** occurred , resulting the discharge of Auto Diesel Oil (ADO) into the Service Station's Unleaded Petrol (ULP) storage tank and the discharge of ULP into the Service Station's ADO storage tank.

8. The fuel tanker, which is consisted of five (5) compartments, was filled at the Suva Mobil's terminal with approximately 11,500 liters of ADO and 14,800 liters of ULP in the following manner.

   i. Compartment 1- 6600 liters of ADO
   ii. Compartment 2- 4,900 liters of ADO
   iii. Compartment 3- 4,950 liters of ULP
   iv. Compartment 4- 4,850 liters of ULP
   v. Compartment 5- 5,000 liters of ULP

9. Prior to the commencement of discharge, the underground ULP storage tank at the Service Station had 15,800 liters of ULP (which is referred as tank No. 1) and the underground ADO storage tank at the Service Station had 22,600 liters of ADO (which is referred as tank 2).

10. While unloading the fuel, the plaintiff's driver accidently discharged ADO from one of the compartments of the fuel tanker into the ULP storage tank of the Service Station, resulting in the contamination and mixing of the ULP in the storage tank with ADO and likewise discharged ULP from at least one of

the compartments in the fuel tanker into the ADO storage tank at the Service Station, resulting in the contamination and mixing of the ADO in the storage tank at the Service Station with ULP.

11. The plaintiff claims $239, 838.93 being the total sum paid to Mobil as damages for the contaminated ULP & ADO and consequential damages under several heads, together with a further sum of $6,500 paid to a different company being the charges for the disposal of the contaminated fuel and cleaning the storage tanks.

12. The defendant was duly advised of the losses and damages suffered when it lodged written claim on 18th July 2012.

13. The Defendant, having accepted that the driver of the plaintiff company was initially negligent in the discharge of fuel and despite making a payout offer of $50,000,00, has wrongly and in breach of the terms of the contract of insurance , denied their liability to indemnify the plaintiff for all the damages and losses suffered.

14. The defendant by its Statement of Defence (SOD) dated 24th September 2014, having denied the most of the averments in the SOC, took up the position that:

    A. *The losses alleged by the Plaintiff were not caused by the negligence or accident.*
    B. *The actions and omissions of the Plaintiff's employee driver, namely, Abdul Ahad, were willful and deliberate acts for which the Defendant is not liable to indemnify the Plaintiff.*
    C. *The actions and omissions of the Plaintiff's employee, Abdul Ahad, were criminal and mischievous acts for which the Defendant is not liable to indemnify the Plaintiff.*
    D. *The actions and omissions of the Mobil Service Station Manager contributed for and caused the alleged losses and damages for which the Defendant is not liable to indemnify the plaintiff or by implication pay to cover losses sustained by Mobil.*
    E. *The Plaintiff has a good cause of action against Mobil for the contributing and sole actions of the Mobil Service Station manager; however, due to the commercial relationship between the Mobil and the Plaintiff, the plaintiff is seeking to recoup these losses from the Defendant.*
    F. *Accordingly, the Defendant moved for the dismissal of the Plaintiff's claim with cost.*

C. AGREED FACTS:

15. According to the PTC minutes, following contents in sub paragraphs 1 to 5 below are agreed facts. Parties have also agreed on issues from 1 to 43 as arising out of the first cause of action and on issues from 44 to 52 as arising out of the second cause of action respectively, which the plaintiff claims to have found on the aforesaid two insurance policies.

Agreed Facts :

1. *The Defendant is and was at all material times a foreign company duly incorporated under the laws of India and registered in Fiji as a foreign company having its principal place of business in Fiji at Suva, carrying on business in Fiji as insurance underwriters.*

2. *Between 27th July 2011 to 27 July 2012, the Plaintiff held a valid contract of insurance with the Defendant being the Public and Products Liability policy number 922622/4690002644/2000 (hereinafter referred to as "the Public and Products Liability Policy.")*
3. *Between 27th July 2011 to 27th July 2012, the Plaintiff held a valid contract of insurance with the Defendant being the Goods in Transit policy number 922622/2101/10831/00 (hereinafter referred to as "the Goods in Transit Policy.")*
4. *On about 28 April 2012 at a Service Station in Samabula, a crossover incident occurred when the Plaintiff through its employee Abdul Ahad unloaded ADO from the Plaintiff's fuel tanker into the Service Station's ULP storage tank and ULP from the fuel tanker into the Service Station's ADO storage tank (hereinafter referred to as "the crossover incident").*
5. *The Plaintiff's employee Abdul Ahad was subsequently terminated from the Plaintiff's employment after the crossover incident.*

16. I do not propose to reproduce all the agreed issues, as most of them seem to have already found answers by agreed facts, direct or tacit admissions through the contents of various pre-litigation correspondences, written submissions and agreed documents.

17. I also find that several issues raised essentially involve Mobil, the Service Station Manager and/ or the person who received the fuel at the Service

Station and attended the discharging processes, who are not parties to the action.

18. Further, a preliminary decision, to be arrived at after careful scrutiny of the contents of both the insurance policies pleaded by the plaintiff, as to whether would both the Policies legally indemnify the plaintiff? , if not, which Policy could grant indemnity to the plaintiff? , will determine the extent of analysis needed here and the number of issues to be answered by this court. The policy that does not indemnify the plaintiff, the cause of action found on it and the issues touching it will not warrant serious consideration.

D. TRIAL& WITNESSES:

19. Though, the trial had been fixed for 5 days, to commence from 13th November 2017, on the application of the learned counsel for the plaintiff, it commenced only on 14th November 2017 and lasted till 17th November2017.

20. On behalf of the plaintiff, the driver of the fuel tanker, namely, Mr. Abdul Ahad (PW-1) and a Director of the plaintiff company, namely, Mr. Ajnil Singh (PW-2) gave evidence referring to the relevant documents in the ABOD, which is composed of 39 documents.

21. At the closure of the evidence of the above two witnesses for the plaintiff on 17th November 2017, though, an application was made by the plaintiff's learned counsel for an adjournment, in order to call two other witnesses , same being vehemently objected by the learned defence counsel, this court by an impromptu ruling disallowed the application for the adjournment. Written reasons for same were given on 7th December 2017. Vide- ***General Machinery Hire Ltd v New India Assurance Co Ltd [2017] FJHC 929; HBC248.2014 (7 December 2017)***.

22. Accordingly, with no alternative, the plaintiff's learned counsel closed the case for the plaintiff and the defence too closed its case by calling only one witness, namely, Mr. Jalallu Dean, (DW-1), who is also said to be a fuel tanker driver by profession.

E. SITE INSPECTION:

23. When the trial was in progress, on the request of the plaintiff's learned counsel, with the consent of the learned defence counsel, a site inspection was carried out, through which we were able see for our own eyes a model loading process of the both type of fuel at the loading terminal of Mobil in Vuda and a discharging process at the Mobil's Service Station in Lautoka, respectively, which in fact gave us tremendous insight about the whole processes involved in the loading and discharging of fuel.

F. DISCUSSION:

24. At the outset, let me put on record that as per the admitted facts Nos. 2 and 3, the existence of two valid insurance policies between the plaintiff and the defendant, as evidenced by tabs No. 7, 8 and 9, 10 respectively in the ABOD, covering the date and time material to the crossover incident, is not in dispute between the parties.

25. Further, according to what transpired through the oral and documentary evidence and various correspondences between the parties, the existence of a Service Agreement between the plaintiff and Mobil as per tab No.6 in the ABOD is also not in serious dispute.

26. In addition to the above, the procedures followed during the loading of the fuel, the quantity of the each type of fuel loaded into 5 compartments of the plaintiff's fuel tanker at the loading terminal, the quantity of the fuel that already existed in both the underground storage tanks at the Service Station prior to the discharge of new stock and the occurrence of the crossover incident on 28th April 2012 at the said Service Station, as elicited out of the pleadings and evidence , are not in dispute anymore. Thus, the issues raised in relation to the above matters need not be seriously considered and answered specifically.

27. The plaintiff, rely on the aforesaid **P&PLP**, on which the , purported, first cause of action is based as pleaded from paragraphs 7 to 16 of the SOC to claim that it is entitled to be indemnified as the crossover incident was "an accident". The plaintiff also relies on the aforesaid **GITP** on which the, purported, second cause of action is based as pleaded from paragraphs 17 to 28 of the

SOC to claim that it is entitled to be indemnified as its driver, namely, Abdul Ahad, was negligent during the discharging process.

28. It is to be borne in mind that, what the plaintiff is entitled to be indemnified in terms of the **P&PLP**, as per the sub heading therein titled "**interest insured**", is the damage for death, injury or property damage caused by **accidents**, together with indemnity for legal cost incurred with the insurance company's consent, up to the limit of $5,000,000 under the public liability and $5,000,000 under the product liability. (Vide page 1 tab 7)

29. Conversely, in terms of the **GITP**, what the plaintiff is entitled to be indemnified, as per the sub heading therein titled " **interest insured**" , is the loss or damage for all goods and/or merchandise and any other property either the insured's own or others property of every description including loss or damage to containers. However, this policy is subject to the condition that such losses or damages become payable only if the insured was **negligent**. (Vide pages 1 & 2 in tab 9 & tab 10).

G. PIVOTAL ISSUES:

30. The principal issues that beg adjudication can be condensed to stand as follows.

    a. Whether the crossover incident was the result of an **accident/negligence** on the part of the fuel tank driver PW-1?
    b. Whether the crossover incident was the result of deliberate and mischievous act with criminal intention on the part of the fuel tank driver PW-1?
    c. Whether the defendant is liable in terms of both contract of insurance to indemnify the plaintiff?, **if not**,
    d. Under which policy the plaintiff is entitled to be indemnified for the losses suffered? And
    e. If the liability is established, what is the amount the plaintiff is entitled to be indemnified?
    f. What is the amount of cost and interest recoverable, if the plaintiff is entitled thereto?

31. The issue (a) above involves both the policies. For the plaintiff to succeed under the first cause of action, which is based on the **P&PLP**, the court will have to arrive at a finding that the crossover was a result of an "accident". The defendant's liability to indemnify the plaintiff arises only when the occurrence of an accident is legally proved.

32. On the other hand, for the plaintiff to succeed under the 2nd cause of action , which is based on the GITP, the court will have to arrive at a finding that the crossover incident was caused due to the "Negligence" on the part of the plaintiff's driver PW-1 and not otherwise.

33. The significant difference to be observed between P&PLP and GITP, is that in case of former one, it has to be proved that the crossover incident was an "accident", while in case of the latter one, the proof of "negligence" of the plaintiff's driver, behind the incident complained of is a mandatory requirement for the insured plaintiff to be indemnified.

34. It is also to be observed that, while the **GITP** is meant for indemnifying the insured against the loss and damages only to the prescribed properties, the **P&PLP** indemnifies the insured against the death, injury, loss or damages caused to the properties owned by insured or others, if the incident is proved to be accident.

35. The learned counsel for the defendant, having taken up a stern position in the SD that the losses alleged by the Plaintiff were not caused by the accident or negligence, throughout the trial and in the written submissions argued that none of the policies will indemnify the plaintiff.

Public and Product Liability Policy. (P&PLP)

36. This is the Policy; on which the plaintiff bases its first cause of action. The validity of this policy has been admitted in the PTC minutes.

37. Since my primary task is to ascertain whether there was an accident behind the crossover incident, as alleged by the plaintiff in terms of the P&PLP. For the time being, I shall confine my discussion only in relation to this policy, on which the, purported, first cause of action is based.

38. I, find that the term "negligence" is the operational term in the GITP and same will be discussed when the Second cause of action is under consideration later in this judgment.

39. My attention is drawn to paragraphs 11 and 23 of the SOC, where the plaintiff describes the crossover incident as an "accident". However, in the agreed issue No.04 the plaintiff has agreed to recognize the crossover incident only as an "incident". Though, an incident can turn out to be an accident, all the incidents need not necessarily be so. The general meaning of the word "incident" is an instance of something happening; an event or occurrence.

40. For the crossover incident in this action to be considered as an **accident**, in terms of the **P&PLP**, there has to be evidence that it was caused, particularly, by the involvement of an external force/s, beyond the control and in the absence of any fault on the part of the plaintiff's driver.

41. What has been insured by the **P&PLP**, as I understand from the contents of it, is against the death, injury, loss and damages to the properties that resulted due to an accident. A typical example is a road accident which may cause it to tumble or to collide with persons or vehicles causing damage, death or injury, and loss/damages to the properties, which may extent to the spillage or leakage or sometimes lead to the pilferage of the fuel in the tanker, during the debacle, causing further loss and damage.

42. It appears that the plaintiff is in an attempt to paint a picture of an accident out of this crossover incident, in order to bring the claim under the Public and product Liability Policy.

43. A careful scrutiny of the contents of both the policies shows that, it is with the purpose of having a separate and specific cover for the losses and damages caused by an **incident** of this nature owing to the negligence of the insured, the GITP has been introduced by the defendant, wherein the proof of negligence, that allegedly caused the incident, is mandatory in order to be indemnified.

44. The fuel tanker was not involved in a road accident and the crossover incident occurred when the tanker was on complete halt and the fuel therein was being unloaded by the driver PW-1, with the participation the receiver at the Service

Station, whose duties, among others things, were said to be to take pre and post dip including the checking and breaking of the seals and formally accepting the delivery. There was no other external force/s involved in the process to turn the unloading process as an accident. The crucial part in the unloading process, as we observed during the site inspection, is the fixing of the hose/s into the customer's tank and to the compartments of the tanker before releasing the fuel.

45. The evidence led before the court did not prove the occurrence of an accident during the process of unloading on the day in question.

46. The ordinary meaning of the word "accident" is; *"an unfortunate incident that happens unexpectedly and unintentionally, typically resulting death, damage or injury; an event that happens by chance or without apparent or deliberate cause; something bad that happens which was not expected or intended"*.

47. In the light of the above observations, it is my inescapable conclusion that the crossover incident occurred on 28th of April 2012 at Samabula Service Station was not an "accident" in terms of the P&PLP as pleaded by the plaintiff.

48. Accordingly, the action of the plaintiff on the first cause of action, purported, to have found on the P&PLP, has to necessarily fail.

49. Most parts of the arguments advanced by the learned defence counsel seem to be appropriate for the consideration in relation to the 2nd cause of action, purportedly, found on the GITP and pleaded by the plaintiff.

Goods in Transit Policy

50. This is the policy, obtained to cover certain incidents that may cause loss and damages during the process of loading, transporting or unloading of the goods and merchandise. This can include the crossover incidents of fuel as well, which is commonly expected to occur during the loading cartage and delivery of fuel in large scale. The policy does not specifically say that the crossover incident is not covered by it. If it is not specifically ousted, it has to be construed as it is covered by it.

51. The defendant was fully aware of the nature of the activity carried out by the plaintiff and all the risks involved in it, when the contract of insurance was agreed upon with the plaintiff. The defendant cannot now be heard to say that that the crossover is not covered by it.

52. Perusal of the relevant policy reveals that it has been designed to insure all goods and/or merchandise and any other property either the insured's own or others property, of every description including loss or damage to the containers. However, the plaintiff under this policy is entitled to be indemnified only if it had acted **negligent**ly during the process of discharging the fuel.

53. **If** the plaintiff proves that, due to the incident complained of, it has suffered losses and damages in relation to goods owned by it or others, when they were in the plaintiff's custody and if court finds that the incident resulted solely/ partly due to the **negligence** on the part of the plaintiff, the plaintiff has the right to be indemnified, provided there existed a valid policy during the time material.

54. In the agreed facts, the parties have admitted the existence of a valid **GITP** on the date of incident. I need not delve into the question of the validity of this policy any further as it is an agreed fact.

55. Thus, what I have to primarily decide is whether the plaintiff's driver PW-1 was actually negligent during the discharging processes and the claim of the plaintiff under this policy could withstand the defenses advanced by the learned counsel for the defendant.

Was the Driver (PW-1) Negligent?

56. It his evidence PW-1, among other things, has admitted that as he was supposed to go for shopping with his family at 1:00 pm, after his work on the day of the incident, he hurried the unloading process. I am not convinced at all with the, purported, reason given by him for his rushing in delivery. It appears to me only as an after-thought advanced to justify his imprudent act. He may perhaps have had some other reason or had no reason at all for his rushing.

57. His evidence was that the despatcher, who, purportedly, informed on the previous evening about only one job (delivery) for the following day, in the morning of the day of the incident informed about three jobs and he got angry over it. If he was, in fact, supposed to do three deliveries on that day, hurrying the discharge on the 1st delivery would not have helped him to go for shopping at 1:00 Pm. Also there was no evidence to show that he actually did other two deliveries or that he was asked to do them after the 1st delivery was over and if not what was the reason for it.

58. However, rushing the unloading, due to certain reason has been clearly admitted by him. It is also in clear admission by PW-1 , that he used two hoses to unload the fuel , the first one for the ADO and the 2nd one for the ULP, though the accepted procedure and the instruction were to use a single hose for the unloading when the fuel is in two types. (vide pages 19 and 20 of the transcripts)

59. Under cross examination PW-1 has unreservedly confirmed that he used double hors for delivery for the unloading of both types of products despite he had got training and instructions to use single hors for delivery in case two types of fuel are to be unloaded. (Page 62, 66 in the transcript).

60. He also confirmed that halfway through the unloading, despite having discovered that a crossover had already occurred, continued to unload allowing further contamination, which is a willful and deliberate act.

61. The defendant in the statement of defence and at the trial took up a strong position, that the crossover was **not caused** by negligence and the actions of the driver were willful & deliberate with criminal indentation, malice and was mischievous. Therefore the defendant is **not** liable to indemnify the plaintiff.

62. I totally agree with the learned defence counsel that the driver PW-1, as he admitted in his evidence, had resolved from the inception to do the double hose delivery for the unloading. But, I beg to disagree with the learned counsel that the action of the driver was willful, deliberate, mischievous and with malice and criminal intention in rushing the delivery at the inception of the unloading process.

63. Having decided to do the double hose delivery, as he admitted, he firstly fixed the two fittings and two hose ends on the customer's tank and immediately proceeded to fix other ends of the hoses to the discharging point of the compartment 01 and 03, of the tanker which contained 6,750 Lt. of **ADO** and 4,950 Lt of **ULP** respectively. Notable point here is that he fixed them just one after another, with no interval in between, and after fixing both hoses, he proceeded to open the gate valves of both the compartments too just one after another.

64. This was the very moment where the procedure and the instructions for safe delivery were, admittedly, breached by the driver and the contamination started, which could have been avoided if not for his **negligence** or stopped halfway by not acting **willfully** and **deliberately**, as alleged by the defence. It is clear from the evidence that when the ULP in compartment 3 was fully drained , the drive, after shifting the hose from compartment No. 3 to 4, in order to continue with the process and when he was about to open the gate valve of compartment No.04, it suddenly struck him that contamination had already occurred.

65. Unfortunately, the driver instead of stopping the unloading immediately, willfully and deliberately continued with it, knowing very well that he is mixing the uncontaminated fuel with contaminated fuel in the underground tanks.

66. He in no uncertain terms admitted in his evidence that, having discovered the crossover halfway through, he after changing the hose ends at both the underground tanks, continued with it allowing more ULP from compartment 4 and 5 of the tanker into the underground ULP tank, which was already contaminated with ADO by his initial negligent act and added more ADO from compartment 1 (residue) and 2 into the underground ADO tank, which was already contaminated with ULP by his initial negligent act, on his own conclusion that it would blend and neutralize. This worsened the situation that was already bad.

Was the Driver initially Negligent?

67. It is an undeniable fact that the driver, as he admitted in his evidence, had at the very inception resolved to hurry the discharge by utilizing double hose

delivery, contravening the instructions and procedure generally adopted in discharging. However, this does not necessarily mean that through this act or omission he willfully and deliberately acted with malice and criminal intention to cause loss and damages.

68. I, observe that there has been an initial negligence on the part of the plaintiff's driver, which prevailed only until he had the entirety of ULP in compartment No.03 (4,950 litres) and a substantial amount of ADO in compartment No.1, of the tanker fully unloaded and decided to commence unloading of the ULP from the 4th compartment. It is from this point of time the process became willful, deliberate and mischievous, which existed till the unloading of the remaining ADO from compartment 01 , 4,900 litres of ADO from compartment No 02, and 4,850 litres plus 5,000 litres of ULP from compartment No. 04 and 05 respectively was fully completed. However, still I cannot agree with the learned counsel for the defendant that the driver had entertained criminal intention (*mens-rea*) to sabotage at the inception or during the entire process, reason for which I shall discuss later.

69. It is beyond doubt, that the propriety of the method adopted to discharge the fuel is blameworthy. But, this was condoned and not objected by the receiver and he even did not question the driver as to why he was doing in that manner. This shows that there has been a practice of double hose delivery despite the drivers had been instructed to follow the single hose delivery. There was no evidence to show that this rule is practiced to the very letter. Though, he adopted the wrong method for discharging, It is always prudent to make some allowance for any unintended human error.

70. Just because he did not follow the accepted unloading procedure, It is unfair to disentitle the plaintiff's driver of his plea of negligence, which seems to have been genuine and prevailed only during the initial stage of the unloading.

71. My attention was not drawn to any specific document containing rules and/or relevant procedures to be adopted in the discharging process. However, I do not think that the defendant can capitalize on a procedural non-compliance of this nature on the part of the driver, to oust the negligence, which seems to have initially existed, in order to evade the liability.

72. However, as I observed earlier, as and when the driver resumed discharging of fuel from the remaining compartments of the tanker allowing further contamination, his action became deliberate and willful and the element of negligence did not continue to prevail. Thus, from this point of time the plaintiff forfeited his right to be indemnified by the **GITP**. Hadn't he continued to discharge, he would have undoubtedly avoided further contamination and downsized the loss and damages to the plaintiff.

Was Criminal Intention Present

73. Another allegation leveled by the defence was that the actions and omissions on the part of the Plaintiff's employee driver, Abdul Ahad, were criminal and mischievous. Therefore, the learned defence counsel argued that the defendant is not liable to indemnify the Plaintiff.

74. With all due respect, I prefer to disagree with the learned counsel on this point for the main reason that the proof of criminal liability should be beyond reasonable doubt.

75. The defence was seen attempting to infuse serious criminal intention into the actions and omissions of the driver in the process of discharging the fuel. PW-1 driver in his evidence has clearly refuted this charge.

76. Following questions raise reasonable doubt, benefit of which should go to the PW-1 driver.

    a. Should the anger, purportedly, entertained by him after the dispatch officer's response in the morning, who is not his employer, have led him to intentionally contaminate the high valued product like this?

    b. Would he have dared to lose his job, which gives his family the bread and butter, just because of the unsubstantiated utterance by the dispatch officer?

    c. Had he done this unloading with such a serious criminal intention, would he have told the receiver about the contamination?

    d. Would he, immediately after the incident, have worried so much over it?

77. With 23 years of service experience as a heavy vehicle driver, while serving the plaintiff company for about five years as a fuel tanker driver, with the history of approximately 1,750 impeccable fuel deliveries, and with no evidence of any dispute with his employer-plaintiff company or Mobil, it is difficult even to imagine that he had criminal intention to cause such a damage and loss to his employer.

78. In view of the above, this unfounded allegation by the defence against the driver PW-1 deserves nothing but a summary dismissal.

Validity of the Driving License

79. Learned counsel for the defendant in his written submissions, for the first time, raised the issue about the validity of the driving license of the PW-1 driver, which had apparently expired on 8th September 2011.

80. Though the document clearly demonstrated the expiry date, it is an issue which could have been better addressed by the plaintiff's counsel and the witness, had it been raised prior to or at the trial. Now the learned defence counsel cannot raise an issue on a matter which is not purely on law and about which he was silent at the trial.

81. However, this is not an incident or accident occurred when the vehicle was being driven by PW-1. It was on complete halt when the discharging of fuel was in progress. The driver was performing another part of his assigned job for which, I don't think he needs to have a driving license. If he had sufficient experience and training for discharging of fuel, the expiry or absence of a tanker driving license need not have precluded him from engaging in fuel discharge. PW-1 had a long term experience in driving fuel tanker and discharging fuel, having done around 1,750 deliveries in 5 years' time. He had undergone relevant trainings and even now he is said to be engaged in a similar job in a different company for last 5 years. I find that his proficiency in the job cannot be easily impeached.

82. Even if he had a valid driving license at the time of the crossover incident, it would not have made any difference in the discharging process, if it was to occur due to his negligence. Therefore, I disregard this argument raised by the learned defence counsel.

A. **Were the goods still in Transit or Delivered?**
B. **Can the Plaintiff Claim damages for the Contaminated Fuel in the Underground tanks?**

83. The learned defence counsel in his written submissions has, for the 1st time, raised the above new issues basing on the following arguments.

a. The delivery of the fuel was completed with the discharging of it from the fuel tanker into the underground storage tanks at the Service station and it was no more in transit.
b. The stock of fuel that was in the underground tanks prior to the discharge was not insured and therefore cannot be covered by this policy.

84. In response to the above argument, for the time being, I would say that the delivery means, it should be due delivery to the place intended to. The ADO in the tanker should have got delivered into the ADO underground tank and the ULP in the tanker should have found its destination in the ULP underground tank and not vice versa.

85. However, since this court is of the opinion that the plaintiff would partly succeed in its 2nd cause of action on account of its driver's initial negligence and since the above issues involve the determination of the extent of losses and damages recoverable by the plaintiff, I reserve them to be addressed at the hearing for assessment of damages.

A. **Issues in Relation to Mobil & Others**
B. **Issues on, Purported , Settlement Offer**

86. I find few issues before me involve Mobil, the Service Station Manager and/or the Receiver at the service station, who are not parties before this court. Also there are some issues before me in relation to the settlement offer, admittedly, made by the defendant to the plaintiff. Since, the plaintiff has proved its case against the defendant on its own merits, those issues do not warrant consideration to deliver this Judgment.

H. ASSESSMENT OF DAMAGES

87. This court by its ruling dated 7th December 2017, has reserved the right of the

parties for a hearing on assessment of damages in the event the plaintiff succeeds in its claim. The plaintiff has succeeded partly on the 2nd cause of action on the initial negligence of the plaintiff's driver PW-1.

88. Thus, I decide that the parties should be heard before any assessment and however, must keep the parties informed, that 4,850 litres of ULP that was in the compartment No-4, 5,000 litres of ULP that was in compartment No-5, the residue of ADO in compartment No.1 (quantity to be agreed or assessed), and 4,900 litres of ADO that was in compartment No-2 should be left out from the assessment.

89. Since the Goods in Transit Policy covers only the goods and/or merchandise and does not make provisions for consequential losses and damages , the claims of the plaintiff under paragraph 23 (a) (iii) , (iv), (v) of the SOC are liable to be dismissed and such claims shall not be the subject of assessment. However, the charges for tank / line flushing and cleaning will also be subjected to the assessment.

I. INTEREST & COSTS

90. The plaintiff has prayed for 10% interest on the adjudged sum calculated from 6th August 2012. I consider fact that there was a without prejudice settlement offer by an even dated communication (vide tab 28). The action was filed on 26th August 2014. The defendant had valid defence to oppose and defeat the claim of the plaintiff on the 1st cause of action and in respect of the part of the claim under the 2nd cause of action. Therefore, considering the win-win outcome of the action, I decide the plaintiff shall be entitled only for 5% interest to be calculated from 1st of September 2016 on the sum to be assessed.

91. The amount of costs will also be assessed, if parties do not agree.

J. Conclusion:

92. The plaintiff has not proved that the crossover incident occurred at Samabula Service Station on 28th April 2012 was an "accident" in terms of the Public and Product Liability. Accordingly, the plaintiff's claim under 1st cause of action should fail.

93. I find that there was an initial negligence on the part of the plaintiff's driver, Abdul Ahad, which caused the crossover during the discharging of fuel on the day in question at Samabula Service station and the plaintiff's claim under Goods on Transit Policy, should succeed partly.

94. The plaintiff is entitled for damages, quantum of which and that of the costs to be assessed at a further hearing, if parties do not agree. The Plaintiff shall be entitled for interest at 5% on the amount to be assessed as damages payable. Interest to be calculated from 1st September 2014.

K. Final Orders:

a. The plaintiff's action fails on the first cause of action.

b. The plaintiff succeeds partly on the second cause of action.

c. There shall be a hearing for the assessment of damages payable by the defendant.

d. Plaintiff shall be entitled for interest at 5% on the sum to be assessed, as damages payable, calculated from 1st September 2014.

e. Costs payable shall also be decided after the assessment hearing, if not agreed.

HIGH COURT OF FIJI LAUTOKA

A. M. Mohammed Mackie
Judge

At Lautoka
13th December, 2018