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

CIVIL APPEAL NO. HBA 04 OF 2019

BETWEEN : **OCEANS 11 LIMITED** c/o Aliz Pacific, Level 3, Aliz Centre, Martintar.

APPELLANT/ORIGINAL DEFENDANT

A N D : **GENERAL MACHINERY CUSTOMS & FORWARDING LIMITED** a limited liability company having its registered office in Lautoka.

RESPONDENT/ORIGINAL PLAINTIFF

Appearances : Mr K. Siwan for defendant/appellant
Ms Priyanka for the plaintiff/respondent
Date of Hearing : 05 August 2019
Date of Judgment : 18 October 2019

JUDGMENT

Introduction

[01] This is an appeal from the Magistrates Court of Lautoka.

[02] By his decision dated 5 December 2018, the Learned Magistrate ("*the Magistrate*") entered judgment in favour of the plaintiff/respondent, and dismissed the defendant/appellant's counterclaim. The components of the judgment include:

a) *Judgment in the sum of $13,026.64 entered in favour of plaintiff.*
b) *Damages for breach of the agreement in the sum of $1,000.00*
c) *Counterclaim of the defendant is dismissed.*
d) *Plaintiff entitled for post judgment interest at the rate of 5% per annum on the judgment sum subject to the jurisdiction of this court.*
e) *Defendant to pay costs of this action to the plaintiff, as summarily assessed by court, in the sum of $200.00.*
f) *30 days for appeal.*

[03] At the hearing, both counsel agreed that they will file their respective submissions without oral argument. Accordingly, both parties filed their submissions and the appellant has filed an answering submission as well.

The facts

[04] General Machinery Customs & Forwarding Ltd the plaintiff/respondent (hereinafter *"the respondent"*) is a company which carries on a business of freighting goods within and outside of Fiji.

[05] Oceans 11 Ltd, the defendant/appellant (hereinafter *"the appellant"*) engaged the services of the respondent to freight goods from Australia to Fiji. The charges for the service were $25,108.62.

[06] The appellant paid $25,108.62 through a cheque and the respondent delivered the goods to the appellant at Korolevu, Sigatoka.

[07] The appellant stopped the payment and the cheque was dishonoured. Thereafter, the appellant issued a cheque for $12,077.98 and refused to pay the balance sum of $13,026.64.

[08] The respondent brought a claim in the Magistrates Court against the appellant and claimed payment of $13,026.64, the balance sum, damages for breach of agreement, interest and costs.

[09] The appellant filed a statement of defence and pleaded that the appellant stopped the payment of the cheque upon discovering damages to the goods delivered by the respondent. The appellant particularized the damages. The appellant alleged breach of agreement and/or negligence on the part of the respondent and counterclaimed for a declaration that the appellant is entitled to deduct the sum of $13,114.00 from the respondent's invoice dated 9 May 2017 and damages and costs.

[10] After trial, the Magistrate held with the respondent and dismissed the appellant's counterclaim. The appellant appeals to this court.

Decision below

[11] Upon analyzing the evidence adduced by both parties, the Magistrate found that [at paras 25-36 of his judgment]:

> 25. *Plaintiff and defendant has[sic] entered in to a contract to freight the goods from Australia to Fiji and to the premises of defendant.*
>
> 26. *Plaintiff has delivered the goods or has arranged to deliver them and submitted the commercial invoices to the plaintiff's counterparty in Australia.*
>
> 27. *Defendant has informed of the fragile items and all declared items has been delivered with due diligence and without any damage to the defendant's destination by plaintiff.*
>
> 28. *Defendant has handed over already palatized [sic] items to plaintiff but has not declared whether they contain any fragile items in "Shippers letter of instruction".*
>
> 29. *Defendant has shipped items that has not been declared and disclosed to the plaintiff.*
>
> 30. *Even after the plaintiff has performed his part of contract defendant has breached by not paying the due amount to the plaintiff. Thus, plaintiff is entitled to the amount they claim for.*
>
> 31. *Defendant has not proved that damaged items had been declared to the plaintiff in order for them to take proper case in handling.*
>
> 32. *Defendant has not proved that damaged items have been replaced or repaired so they have actually borne the cost for replacement.*
>
> 33. *The plaintiff has not submitted any incorrect information to FRCA as they have relied on the documents that defendant has given to their counterparty.*
> 34. *Defendant failed to prove that they have given the invoice they rely on to the plaintiff's counterparty.*
>
> 35. *Had the invoice defendant rely on submitted FRCA, they still have items taxable undeclared in any mater whatsoever.*

36. *Accordingly, court finds that plaintiff has proved their case in balance of probability and entitle for a judgment against the defendant and defendant has failed to prove their counter claim in balance of probability.*

[12] Based on his findings, the Magistrate ordered:

37. *Judgment in sum of $13,026.64 entered in favour of plaintiff.*
38. *Damages for breach of the agreement in sum of $1,000.00.*
39. *Counter Claim of the defendant is dismissed.*
40. *Plaintiff entitled for post judgment interest at the rate of 5% per annum on the judgment sum subject to the jurisdiction of this court.*
41. *Defendant to pay cost of this action to the plaintiff, as summarily assessed by court, in the sum of $200.00*
42. *30 days for appeal.*

Grounds of Appeal

[13] The appeal is preferred on the following grounds:

1. *The Learned Trial Magistrate erred in law and in fact in granting the following orders:*

    i. *Judgment in the sum of $13,026.64 in favour of the plaintiff.*
    ii. *Damages for breach of agreement in the sum of $1000.00.*
    iii. *Counter claim of the defendant is dismissed.*
    iv. *Plaintiff entitled for post judgment interest at the rate of 5% per annum on the judgment sum subject to the jurisdiction of this court.*
    v. *Defendant to pay costs of this action to the plaintiff, as summarily assessed by court, in the sun of $200.00.*
    vi. *30 days for appeal.*

2. *The Learned Trial Magistrate erred in fact in failing to consider the defendants documents whilst analyzing the matter.*

3. *The Learned Trial Magistrate erred in law and in fact in considering in paragraph 28 that "The defendant has handed over already palatized items to Plaintiff but has not declared whether they contain any fragile items in "Shippers*

letter of instruction" whilst failing to consider email dated 24th November, 2016 from Dean Robertson to Sanjana Prakash.

4. *The Learned Trial Magistrate erred in law and in fact in considering in paragraph 29 the "Defendant has shipped items that has not been declared and disclosed to the plaintiff'", whilst failing to consider email dated 24th November, 2016 from Dean Robertson to Sanjana Prakash.*

5. *The Learned Trial Magistrate erred in fact in failing to consider the exhibits of the defendant showing the damages being done to the goods.*

6. *The Learned Trial Magistrate erred in fact and in law in granting Orders in favour of the plaintiff whilst accepting at paragraph 16 of the Judgment that by email dated 24th November, 2016 the defendant had informed that his cargo may contain fragile items whilst failing to consider the same and stating at paragraph 28 that the defendant did not declare whether the palatized items contained any fragile in it.*

The issue

[14] The only issue that was raised on the appeal is whether the Magistrate erred in law when not considering the email correspondences between the respondent and the appellant which informed the respondent that the goods would include fragile items.

The submissions

Appellant

[15] Counsel for the appellant submits: the Learned Magistrate erred in fact in holding that there is a breach of agreement when the document submitted in Court do not show that there is an agreement between the parties. The Magistrate erred in fact and in law in failing to consider the appellant's documents on damages to the bicycle and the credibility of the appellant's witnesses and in failing to consider the email correspondences between the parties. He also submits that the Magistrate failed to consider the crucial evidence while granting orders for the respondent against the appellant, that the

respondent had a duty of care in holding the items to be delivered to the appellant.

Respondent

[16] It was on the other hand, submitted on behalf of the respondent that: the Magistrate had confirmed that there was an agreement and that at no time were the 2 witnesses cross examined on whether there was agreement or not. In the absence of any written agreement the actions of both parties suffices as an implied agreement and documentation adduced in Court as evidence of the agreement being acted upon by both parties does indeed prove that there was an agreement and both parties had acted upon this agreement. The Magistrate had taken into account the issue of fragility and damages goods.

Discussion

[17] The respondent's claim arose out of a freight agreement. The claim against the appellant was that he failed to pay the balance freight charges of $13,026.64.

[18] It was agreed between the parties that respondent shall freight goods for the appellant from Australia to Fiji for the total freight of $25,108.62.

[19] The appellant issued a cheque of $25,108.62. The goods were delivered to the appellant at Korolevu, Sigatoka. The appellant found damages to the goods delivered especially to the bicycle. Therefore, he stopped payment of the cheque for $25,108.62. Instead, he issued a cheque for $12,077.98. It appears that the appellant had deducted $13,026.64 for the damages.

[20] The respondent brought an action in the Magistrates Court for the balance freight of $13,026.64. The Magistrate held with the respondent and dismissed the appellant's counterclaim.

[21] The only issue on appeal was whether the Magistrate erred in law in failing to consider the chain of email correspondences between the parties which led to the formation of a freight agreement.

[22] In order to answer the issue, I would consider the grounds of appeal collectively.

Whether there was an agreement

[23] The Magistrate held that the parties had entered into a contract to freight the foods from Australia to Fiji and to the premises of the appellant.

[24] The existence of agreement is determined objectively on the basis of the impression by the parties' words and actions.

[25] Traditionally, the objective evidence of agreement is the existence of an offer and corresponding acceptance. On occasions, the courts have found agreement in the absence of these criteria, particularly where there has been performance.

[26] We must first identify the existence of a binding agreement between the parties to determine whether there is a binding contract giving rise to enforceable obligations.

[27] Lord Denning stated in *Storer v Manchester City Council* [1974] 1 WLR 1403 at p. 1408:

> *"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract,' if by his words he has done so."*

[28] On the facts of the cause, the parties had clearly intended a binding freight contract giving rise to enforceable obligations. It is more so by what they said (via email correspondences) and did (by performance). The agreement has been performed by the parties. As agreed, the respondent did freight service and

delivered the goods at the appellant's place in Sigatoka and the appellant paid the freight although deducted for the damages.

[29] In these circumstances of the case, the Magistrate was correct in finding that there was a valid contract between the parties. Therefore, I reject the appellant's submission that the documents submitted do not show that there was an agreement between the parties.

Failure to consider email correspondences

[30] The main issue on appeal was whether the Magistrate erred in law in not considering the e-mail correspondences exchanged between the parties.

[31] Grounds 3, 4 & 6 complain that the Magistrate erred in law and in fact when failing to consider email correspondences between the respondent (Sanjana Prakash) and the appellant.

[32] The Magistrate held that: *"the defendant has handed over already palletized items to the plaintiff but has not declared whether they contain any fragile items in "Shippers letter of instruction." "*

[33] On the facts, it was the case that by the use of email communications during the negotiation stage, the parties had intended that there was to be a binding contract reached by the exchange of emails. Therefore, the e-mail correspondences became relevant to interpret the terms of the contract.

[34] The email of 24 November 2016 sent to the respondent (Sanjana Prakash) by the appellant (Dean Robertson) is extremely important. That email reads:

> *"**Subject**: Re: Enquiring on Shipping Services Sydney to Lautoka 40ft or 20 ft container) - Feb 2017*
>
> *Bula Sanjana,*
>
> *Most of the goods are palletised – Tiles (3.5 tonne)*
> *Rest are loose ctns for other supplied items e.g. outdoor furniture.*

Household items e.g. tiles, furniture, beds, cocktail bar glasses (fragile) and general kitchen items.
Cargo delivered as whole container as not wanting to merge.
Fragile:
Wouldn't want to crack the tiles and could contain glasses which are packed in cartons.
Special requirements:
Are considering shipping in a vehicle into the container – assuming this fits – how does this complicate the shipping options?

Final question have a tiler doing some work on our house & wants to ship goods back to Aus [Sydney].
What options do we have for merging goods into another container going from Lautoka to Sydney.

Kind regards.
Dean & Barbs
+61416519390"

[35] The above email is the starting point. That email clearly states the goods and nature of the goods and its fragility.

[36] The Magistrate had not considered the email that explained the nature of the goods to the shipped and the need for special requirements. This should be considered the terms of the contract.

[37] The obligations of the parties under contract needed to be determined in light of the email communications the parties had during negotiation stage. Unfortunately, the Magistrate had failed to do so.

Counterclaim

[38] The appellant counterclaimed against the respondent in the sum of $13,114.00 for the damages caused to the goods due to improper handling and for the cost of replacing them.

[39] The Magistrate had dismissed the counterclaim on the basis that:

"28. Defendant has handed over already palatized [sic] items the Plaintiff but has not declared whether they contained any fragile items in Shippers letter of instructions".

29. Defendant has shipped items that has not been declared and disclosed to the plaintiff.

32. Defendant has not proved that damaged items have been replaced or repaired so they have actually borne the costs for replacement."

[40] The goods to be shipped contained fragile and palletized goods. The email the appellant sent to the respondent disclosed this. Therefore, the respondent knew or had reason to believe that they are to ship goods that we fragile and palletized. On the facts the respondent was under obligation that they must handle the shipment (goods) with reasonable care.

[41] Since the shipment contained palletized goods, the Magistrate should have considered whether it was handled by means of pallets. He has failed to consider this aspect.

[42] The appellant gave evidence and produced photographs regarding damages caused to the items delivered. The Magistrate should have considered this evidence and he should have assessed the damages in light of the evidence placed before hm. Instead, he dismissed the counter claim saying that the appellant has not proved that damaged items have been replaced or repaired.

Conclusion

[43] For all these reasons, I conclude that the Magistrate would have come to a different conclusion if he had considered the email communications of the parties during the negotiation stage, especially the email dated 24 November 2016 sent to the respondent by the appellant. By use of email communications during the negotiation stage the parties had intended that there was to be a binding contract reached by the use of exchange of e-mails.

[44] I hold that the ground of appeal that the Magistrate erred in law and in fact in failing to consider the email dated 24 November 2016 from Dean Robertson to Sanjana Prakash, has merit.

[45] I would accordingly, set aside the Magistrate's judgment dated 5 December 2018, and remit the case to the Magistrates Court, Lautoka to be reheard before another Magistrate.

[46] As a successful party, the appellant is entitled to costs of this appeal which I assess at $1,000.00.

The result

1. Appeal allowed.
2. Magistrate's judgment dated 5 December 2018 be set aside.
3. The case remitted to the Magistrates Court, Lautoka to be reheard before another Magistrate.
4. The appellant is entitled to costs of $1,000.00.

Hafiz Ajmeer 18/10/19

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M.H. Mohamed Ajmeer
JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka
18 October 2019

Solicitors:
For appellant: Rams Law, Barristers & Solicitors
For respondent: Vijay Naidu & Associates, Barristers & Solicitors