IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 22 OF 1983

Between:

CARPENTERS FIJI LIMITED — PLAINTIFF

- and -

MERIT TIMBER PRODUCTS LIMITED — DEFENDANT

Mr. H. Lateef for the plaintiff
Mr. D.C. Maharaj for the defendant

J U D G M E N T

On the 27th April, 1981, the plaintiff company entered into an agreement with the defendant company whereby it was agreed that the plaintiff would lease to the defendant a reconditioned Caterpillar 955L track type Loader with logforks and fibreglass canopy for a period of 24 months from 1st May, 1981, at a monthly rental of $2,768.00.

It was also agreed between the parties that should the defendant pay all rentals payable under the agreement and not be in default thereunder it would have the option to purchase the machine on giving written notice of exercise of the option and on further payment of the sum of $5,500.

The said Agreement was in writing executed under seal by the defendant company.

The plaintiff's copy of the said Agreement was not executed by the plaintiff company although it purports to have an acceptance on it by "CARPTRAC" signed by "E.J. Handley Manager".

The machine was delivered to the defendant company either on the 1st or 5th May, 1981. The date is not certain.

On or about the 21st July, 1981, trouble was experienced with the machine and it was delivered to the plaintiff company for repairs.

There is no dispute as to the condition of the machine when it was returned for repairs. The engine had seized due to it being operated with no oil or insufficient oil. The cause of there being no or little oil circulating is not known. The repair account came to $9,909.67.

Clause 3(a) of the Agreement provides as follows :

"3. MAINTENANCE OF EQUIPMENT:

(a) Lessee will keep the equipment in good order and repair so that they shall at all times during the term of this Lease be in first class condition for equipment of their description and (without limiting the generalty of the foregoing) will pay all expenses of operating, servicing and maintaining the equipment and at all times as occasion requires will furnish (so far as the equipment is of a kind requiring the same) all fuel, oil, tyres, greasing, repairs, renewals, replacement parts, washing, cleaning, polishing and garaging."

Clause 4. provides as follows :

"4. DAMAGE TO EQUIPMENT:

Lessee will be liable to make good all damage caused to or suffered by the equipment during the term of the lease and Lessor reserves the right to carry out all repairs, maintenance, servicing and whatsoever to make good such damage at Lessee's expense."

Clauses 3 and 4 are stringent provisions and committed the defendant to keeping the machine in good order at all times during the term of the hiring and to making good all damage to the machine howsoever caused. Insurance covered accidental loss and damage but there is no provision for fair, wear and tear normally found in a lease.

The reason for this stringency would appear to be the nature of the transaction - a Hire/Purchase one. During the hire period of 24 months it is anticipated the option to purchase will be exercised at the end of the hire and the lessee is treated from the inception as ultimate owner of the machine. As such ultimate owner it is to be expected that he accepts all expenses and risks in connection with the machine.

This idea of ultimate ownership is borne out also by the written Used Equipment Warranty Statement which the plaintiff gave to the defendant at about the time of the defendant executing the Agreement.

The Warranty is expressed to extend over a period of 30 days from the 1st May, 1981. As the machine broke down about 21st July, 1981, the Warranty had expired more than a month previously.

Mr. W.L. Briggs the Manager of the defendant company said in evidence that when he read the Warranty he told Mr. Chute, an employee of the plaintiff company that the Warranty was a joke because it virtually said that if the machine broke down it was his (Mr. Brigg's problem). Mr. Chute was alleged to say "we would stand you right" leading Mr. Briggs to believe that the plaintiff company would take care of the machine for a longer period than stated in the guarantee.

Mr. Chute, the plaintiff company's sales Manager denied that he told Mr. Briggs not to worry and that Carptrac would make good any major defects.

The burden of establishing that the Warranty period was extended beyond the 30 days stated therein lies on the defendant and it has not discharged that burden.

There was in any event another hurdle that the defendant had to overcome and that was to establish that the seizure of the motor arose through a defect that would have been covered by the Warranty.

Mr. Briggs who has had considerable mechanical experience agreed that the damage caused to the machine was due to it being driven with low or no oil. He could not say why there was low oil or no oil. He mentioned several possible causes such as faulty rings or valve guides. He denied that the cause was negligence of the operator of the machine in not carrying out proper maintenance. He testified to seeing the operator topping up the engine of the machine on the day it broke down.

It is not possible to determine why there was little or no oil in the engine but there is no dispute that the damage to the machine was a direct result of it being driven with little or no oil in the engine.

Under the Agreement the defendant was obligated to keep the machine in good condition. The Warranty had expired but in any event the defendant did not establish that the damage was the result of faulty or defective parts.

The defendant is liable to meet the costs of the repairs necessitated by it being driven with no or little oil.

The repairs were not completed until 18th November, 1981, when the plaintiff wrote to the defendant requesting settlement of an account for $18,213.76 made up of $9,909.67 the costs of the repairs and $8,304.00 arrears of monthly lease rentals.

When this account was not paid the plaintiff company wrote again claiming cost of the repairs and the sum of $65,269.67 the total of the remaining lease rentals provided for in the hire/purchase agreement.

In this action the plaintiff company now claims the sum of $9,909.67 cost of the repair, the sum of $18.03 advertising costs and general damages for breach of agreement.

Before considering the plaintiff's claim further,or the defendant's defence and counterclaim, there is one alternative legal defence which should be considered.

The defendant alleges that the true nature of the transaction was that it was a loan or sale of a machine on time payments and that the agreement was in fact a Bill of Sale which was not registered under the provisions of the Bills of Sale Act and the agreement is therefore void and unenforceable.

Even if the transaction was a Bill of Sale, the provisions of the Bills of Sale Act would have no application and that is because the defendant is an incorporated company. Under section 3 of the Act the capital or property of an incorporated company is expressly excluded from the definition of "personal chattels".

Section 2 of the Act applies to every bill of sale whereby the holder or granter has power at any time to seize or take possession of any personal chattels comprised

in or made subject to such bill of sale.

The transaction in the instant case was clearly a hire/purchase one. The agreement expressly provides that the equipment remains the personal property of the lessor (the plaintiff company).

In England the hire/purchase transactions are different. The owner of the chattel sells it to a finance company which either re-sells it to the prior owner on hire/purchase terms or to a third person to whom the former owner had arranged to "sell" the chattel.

It is where the owner is in fact seeking finance and sells his chattel to a finance company and then enters into a hire/purchase agreement in respect of the same chattel that it has sometimes been held that the agreement is in reality a bill of sale.

Halsbury 4th Edition Volume 22 paragraph 211 states :

> "211. BILLS OF SALE DISTINGUISHED. A bona fide agreement in writing for the bailment or sale of goods which are not to become the property of the bailee or buyer unless and until the last instalment of the stipulated payments is made,and providing for the right of the owner or seller to retake possession in default of payment, is not a bill of sale, and does not require to be registered under the Bills of Sale Acts. This is because no property is conveyed by such an agreement to the hirer or buyer during the effective currency of the agreement, and, therefore, the hirer or buyer not being the owner of the goods, the licence to seize only empowers the owner or seller to retake possession of his own goods. The effect is the same if the owner of chattels sells them and by an independent contract becomes the hirer or buyer of the same goods under a hire purchase or conditional sale agreement made with the purchaser, even if the amount of the purchase price in such a contract is a sum equivalent to that obtained by the hirer or buyer on the original sale."

The agreement in the instant case is not a bill of sale.

The machine was at all material times the property of the plaintiff company and this finding disposes of the defendant company's counterclaim for damages for conversion and a declaration that it is the owner of the machine. There now remains only the defendant company's counterclaim for damages for alleged wrongful repossession.

Each party alleges that there has been a breach of the agreement by the other party. The defendant company paid only four of the monthly instalments up to the end of August 1981 and no payments thereafter. Two of those payments were made while the machine was in the plaintiff's possession for repairs.

The repairs to the tractor were not completed until November, 1981, by which time three monthly payments of rent would have been overdue if the agreement was still in force. It is not clear what the plaintiff did as regards the breach alleged by the defendant company. In its letter of the 1st December, 1981, it claimed the costs of repairs and the remaining lease rentals payable under the agreement totalling $65,269.67.

Under clause 16 of the Agreement headed MISCELLANEOUS it provides (inter alia) that :

> "In case of any default by Lessee hereunder all sums due and to become due hereunder shall, at the option of Lessor or any assignee of Lessor, become payable forthwith."

The Miscellaneous clause is a most unusual one and contains a great many provisions that are normally separate and distinct provisions in an agreement.

Clause 14 provides specifically for default but there are as many if not more provisions in clause 16 dealing

with default than there in the default clause.

The letter of 1st December, 1981, appears to indicate that the plaintiff company's original claim was made pursuant to the provisions of clause 16 a claim which it did not pursue in this action.

The plaintiff in its Statement of Claim did not quantify its claim for damages other than its claim for the repairs and advertising charges.

There is no basis for its claim for the advertising charges which were incurred when the plaintiff endeavoured to sell the machine. The defendant company never exercised its option to purchase and cannot be held responsible for those charges.

Although the plaintiff through its Credit Controller, Mr. Low, endeavoured in Court to quantify its claim for damages, I must treat the claim as one for general damages for breach of contract. The figures he furnished would assist if the basis for determining the measure of damage is the balance rentals payments due under the agreement less the value of the machine at the time of the alleged breach. The only comment I would make about the figures at this stage is that the value of the machine should be the market value and not book value which could reduce the claim by $6,000 or $7,000 or even more dependent on the percentage mark up of the machine for retail purposes.

The defendant alleges there was a breach by the plaintiff company in that it repossessed the machine without notice.

The claim by the defendant company for damages for wrongful possession arose as a result of an admission by Mr. Sadasiwan, an Assistant Accountant, employed by Carptrac when he was giving evidence for the plaintiff

company. He stated in evidence in chief that depreciation was calculated for 3 months to arrive at the written down value of $41,218 for the machine as at 31st July, 1981.

In answer to a question from the Court as to why a period of 3 months to the 31st July, 1981, was taken, he stated that 3 months depreciation was taken because that was "when machine was repossessed". He confirmed in answer to a further question from Mr. Lateef that his company's records indicated that the machine had been repossessed.

He later sought to qualify that statement by expressing doubts about whether the machine had in fact been repossessed.

Mr. Sadasiwan gave his evidence in a clear and straight forward manner. He worked for Carptrac where the machine was kept and repaired and as an Assistant Accountant would have been in a position to know whether the machine had been repossessed. He clearly admitted that Carptrac records showed the machine had been repossessed.

There was no repossession in the sense that it was taken out of the actual possession of the defendant company since it was already in Carptrac's possession to carry out repairs but there was a factual determination of the defendant's right to possession.

Repossession as at the 31st July, 1981, would not in the circumstances be unusual. The machine when brought in for repairs had suffered very extensive damage and it was the view of Mr. Petero Mausio the plaintiff's employee expressed in his letter of 4th August, 1981, that the damage was caused by the negligence of the defendant company "for not carrying out the fundamentals of operating the machine".

The probability is that the plaintiff then decided

to terminate the leasing and assume possession of the machine and instructions were then given to the Accounting Department to record the change preparatory to selling or leasing the machine again.

A complicating factor is that the defendant company paid rental for August, 1981. Monthly rentals were covered by promissory notes which the plaintiff presented to the defendant company's bank each month for payment.

It would appear that the plaintiff presented the note for the August payment which was met but later notes were dishonoured because the defendant cancelled its instructions to the bank to honour any further notes.

The plaintiff continued presenting the notes until in December 1981 they purported to treat non payment of rentals after August 1981 as a breach of the agreement.

I find as a fact that the plaintiff company repossessed the machine on or about the 31st July, 1981. On that date the defendant company was not in breach of any of the provisions of the agreement. Rental was paid to the 31st August, 1981.

The plaintiff company was not obliged to give notice of repossession. The agreement specifically provided that notice is not required.

At the time the machine was returned to Carptrac for repairs, there was a dispute as to liability for payment of the repair account. The defendant company then contended the damage was due to internal defects and intimated it could not meet the account.

Mr. Briggs in evidence mentioned surrendering the machine and that when he saw there was no early prospects of getting the machine back he instructed the bank not to

honour any more promissory notes.

Exhibit No. 4 is a letter written on behalf of the defendant company to Carptrac's Audit Controller. That letter referred to earlier advice that the defendant company could not keep the machine while it was not in running order and referred to an offer made by the plaintiff company to let the defendant have the machine with no repair charges and two months grace as regards payments.

There was no mention of Exhibit 5 by any of the witnesses nor was there any reply to it tendered.

Mr. Briggs wrote Exhibit 6 to Carptrac dated 8th February, 1982, to which he never received a reply. The letter appears not to have been finished because the second paragraph appears to be incomplete.

Exhibit 6 does however indicate that Mr. Briggs was still disputing liability for repairs and he refers to returning the machine in June 1981. That date appears to be an error because the machine was delivered for repairs in July 1981.

I mention this evidence because it appears that about July or August 1981 there was a dispute regarding liability for repairs. Both parties took action about that time which indicates the hiring was at an end.

On the plaintiff's part is the fact that it instructed its accounting department to record the repossession of the machine about the 31st July, 1981. There were subsequent instructions given to sell or lease the machine. Mr. Chute testified that he received instructions after repairs were done to sell or lease the machine. He could not say when he received the instructions.

On the defendant's part at about the same time the bank's instructions to honour the notes were cancelled and steps were taken to obtain another machine from America.

Rental was payable monthly in advance. Rent for August 1981 was due and presumably paid on or shortly before 1st August, 1981. That was the last payment made. The plaintiff company's action in treating the machine as having been repossessed or back in stock as at 31st July, 1981, appears to indicate that the plaintiff company accepted that situation at that time but later in December 1981 purported to claim that there were three monthly instalments overdue.

There is one liability that the defendant has not met and that is the repair account. It was not ascertainable in July or August 1981 because repairs had not then commenced. Under the agreement the defendant company is liable to pay the costs of the repairs.

In clause 16 are provisions purporting to provide that the lease is irrevocable. It provides as follows :

> "This lease is irrevocable for the full term hereof and for the aggregate rental herein reserved, and the rent shall not abate by reason of termination of the Lessee's right of possession and/or the taking of possession by Lessor or for any other reason, and delinquent instalments of rental shall bear interest at the highest lawful contract rate."

It is understandable that Mr. Lateef did not have much to say about clause 16 and only referred to it when asked by the Court where it was provided that the plaintiff company could claim all unpaid rentals.

In view of the decision I have come to it is not necessary to consider whether clause 16 is enforceable but I would add that if hire/purchase transactions of the nature that the plaintiff company is embarking on becomes a feature

in commercial circles in Fiji there may well be an urgent need for legislation to regulate such transactions.

Highly developed countries overseas have found such legislation necessary to protect purchasers who are very much more sophisticated and educated than most Fiji citizens.

I have some sympathy for the defendant company. Carptrac who specialise in Caterpillar equipment were apparently unable to complete repairs within a period of about four months. This may have been due to not having spare parts in stock in which case it would have been equitable in the circumstances to waive rental payments until the machine had been repaired. Unless a person can make use of a machine to earn money he is not likely to be able to meet payments. Companies that sell equipment should carry normal spares but in Fiji it is public knowledge that there are long delays while waiting for spares to arrive from overseas. Delay may also have been because the leasing was terminated about July 1981 and the plaintiff company had other machines in stock available for sale or leasing and did not have to hurry with the repairs.

The burden of establishing that the defendant company was in breach of its agreement falls on the plaintiff company. It has not satisfied me there was any breach which entitled it to general damages. It has however established that the defendant is liable for the costs of repairs.

On the other hand there is evidence that the plaintiff company terminated the leasing by repossessing the machine about 31st July, 1981, but that termination, if it was a breach of the agreement, did not result in any loss or damage to the defendant company. No such loss or damage has been established and accordingly the defendants counterclaim must fail and is dismissed with costs to the plaintiff company. I have not overlooked the payment of

the August rental. There has been no claim for refund of this rental. Nor did the defendant cancel the August promissory note. The defendant company obviously considered rental for August was payable at that time.

The defendant company could not have expected to have had the machine repaired and in operation before the end of August 1981 due to the extensive damage sustained by the machine.

If there was in fact a breach by the defendant company of any term of the agreement as at the 31st August, 1981, by which date the plaintiff company appears to have already determined the lease, since the defendant company had not repudiated the agreement the measure of damages to which the plaintiff company would be entitled would only be the arrears of instalments (if any).

In Brady and Another v. St. Margarets Trust Ltd. (1963) 2 All E.R. 275 it was held that the defendants were only entitled to arrears of instalments up to the date they determined the agreement since there had not been a repudiation of the agreement by the plaintiff but only a failure on their part to pay the instalments.

The terms of the agreement in Brady's case are nct known. Lord Denning M.R. referred to the agreement as being in the ordinary form the terms of which were very familiar.

If there had been a breach by the defendant company then I would have had to consider the legality or enforceability of clause 16 of the agreement in the instant case.

There is a further matter also if the defendant company had been in breach and that is that the plaintiff company had a number of other similar machines in stock which it later leased or sold. It had a duty to minimise its loss by disposing of the machine leased to the defendant

company before disposing of any other machine.

I am also in doubt as to whether the plaintiff company could refuse to deliver the machine which it still owned after it had been repaired until the repair account had been paid. The plaintiff company also took advantage of the occasion to do some work on the machine which had nothing to do with the damage. The defendant company was charged with $31.70 plus the company's profit thereon for what Mr. Ensor admitted was repairs due to wear and tear but was he said necessary.

If the repairs involving expenditure of $31.70 were necessary they would be covered by the agreement but in my view they should not have been carried out without prior reference to and instructions from the defendant company. This is yet another matter which satisfies me that the leasing was at an end before the repairs were done and the plaintiff company took the opportunity to get the machine into first class condition preparatory to selling it.

The defendant company's counterclaim is dismissed.

There will be judgment for the plaintiff company against the defendant company for the sum of $9,909.67 with costs of the claim and the counterclaim.

(R.G. KERMODE)
J U D G E

S U V A,

7TH SEPTEMBER, 1984.