WR Carpenter (South Pacific) Ltd v Jewett Cameron (South Pacific) Ltd

Supreme Court, Nuku'alofa
Dalgety J
Civil Case No 425/93

16 November, 2, 3, 8 December 1993, 10 January, 1994.

Contracts - shipping contracts - insurance
Insurance - shipping contracts - responsibility
Shipping contracts - C & F contract - insurance responsibility.

The Defendant in Tonga ordered goods from the Plaintiff in Fiji paid for them and agreed to shipment by sea on a C&F contract. The Plaintiff lost the goods in a maritime accident. A partial replacement of goods was sent from the Plaintiff but the Defendant refused to pay for the replacements and sought a refund of its original payment:-

Held ordering payment and refusing refund:-

1. When cargo is shipped C&F, insurance is the responsibility of the consignees (here the Defendant) and a seller is not required to insure the goods for a buyer.
2. A Bill of Lading is, inter alia, a receipt for cargo received by a vessel and a shipment of cargo commences when goods are loaded on board a vessel preparatory to the voyage to the destination.
3. At common law there is a presumption against gift or donation, a presumption all the more difficult to rebut in commerical dealing between two trading companies.

Cases Considered : re Comptoir Commercial Anversois & Power [1920] 1 KB 868
Tsakiroglon & Co. v Noblee & Thorl [1961] 2 All ER 179
The "Pantanassa" [1970] 1 All ER 848
Tinsley v Milligan [1993] 3 All ER 65

Counsel for the Plaintiff : Miss Van Bebber
Counsel for the Defendant : Miss Tonga

Judgment

Four days have been spent at Trial in respect of what is essentially a very simple problem. The Defendants in Tonga ordered goods from the Plaintiffs in Fiji, paid for them, agreed to shipment on a C&F contract, and lost these goods in a maritime peril. They were sent partial replacement for the goods lost. Now they refuse to pay for that second shipment and seek refund of the payment made for the doomed first shipment. Insurance is not a necessity, but to engage in any form of maritime endeavour without adequate insurance is foolhardy in the extreme. Accidents do happen, ships do capsize, cargo can be lost. Thankfully these risks are not an ordinary part of everyday life but they do happen with sufficient regularity to merit any prudent man of affairs insuring such risks. Where cargo is shipped C&F, insurance is the responsibility of the consignees, in this case the Defendants. Had they effected proper goods in transit cover then they would have recovered under their insurance policy the value of the goods lost on the first shipment, and are unlikely to have quibbled about payment for the replacement goods. Unfortunately they did not and so was born this expensive litigation. Sympathetic though I am to the Defendants' position, they elected not to insure the cargo and the law must therefore take its course. I have no option in the matter.

The facts of this case were straightforward. The Defendants' Managing Director Mr. Tevita Havili visited the Plaintiffs in Suva, Fiji in the early part of September 1991. He had been doing business with the Plaintiffs since 1990, buying building materials from them. He was now in desparate need of further supplies to meet contractual obligations in Tonga. He met and talked with a Mr Madan Prasad, the Plaintiffs' then Marketing Manager and Mr. Jagdesh Singh, the Marketing Assistant. On his return to Tonga Mr. Havili placed various orders with the Plaintiffs (Production : P.4). These Orders numbered A.67 - 71/91 were all dated 13th September 1991. In all cases, goods were to be sent C&F. They were addressed to Madan Prasad who was asked to "confirm order prices and vessel" before the transfer of funds from Tonga to Fiji in payment for these Orders. Mr Madan Prasad responded to that order by facsimile transmission ("Fax") dated 14th September 1991 (P.5) wherein he confirmed the total value of the order and requested telegraphic transfer of that sum to ANZ Bank. In paragraph 4 of his Fax he stated -

> "All items can ship on FORUM SAMOA on 26/09/91 e.t.a
> Nuku'alofa 06/10/91 so (Telegraphic Transfer) ....
> reach (Plaintiffs) by 23/09/91 - confirm."

The Defendants acknowledged receipt of that fax on 16th September 1991 (D.9) and stated in their faxed reply to the Plaintiffs - "Please note our acceptance and confirmation." It was not until 25th September 1991 that Mr. Havili again contacted the Plaintiffs about this Order, this time about payment : by fax on that date (D.11) he advised that 22, 452 Fijian Dollars was that day being transferred from Tonga to Fiji and that the balance of 13,607.12 Fijian Dollars would be transferred by 30th September 1991. On 25th September 1991 the Treasury of the Kingdom of Tonga authorised the Defendants to remit to Fiji 22,452 Fiji dollars (D.1); similar permission for the said balance was given on 30th September 1991 (D.2). These funds in fact arrived in Fiji, at the ANZ Bank, and were credited to the Plaintiffs' account respectively on 27th September 1991 and 2nd October 1991 (P.36 and 37). These payments were made too late to enable shipment to

be made on the M.V. "FORUM SAMOA" departing Suva on 26th September 1991. In their discussions in Suva Mr. Madan Prasad had made it clear to Mr. Havili that payment was required before shipment. Mr Havili knew about this as it is clear from his request for confirmation before transferring funds (P.4). The Plaintiffs' position is reinforced by their acceptance of order (P.5) already referred to. The Plaintiffs were therefore under no legal obligation to ship on the M.V. "FORUM SAMOA" departing 25th September 1991. It would of course have been different if the full payment had reached the Plaintiffs in Suva by 23rd September 1991, but that never happened.

The Plaintiffs' Marketing Assistant, Mr. Jagdesh Singh, now entered the picture. Mr Havili had telephoned him on 30th September 1991 enquiring about the goods he had ordered and was informed they had not been shipped on 25th September 1991 as payment had not been received in time. Mr. Singh advised him that there were two options, a Forum Line vessel which sailed for Tonga by a roundabout route would be the first to leave Suva, or a Translink vessel which left one week thereafter but which sailed direct to Nuku'alofa and should be the first to arrive. Mr Havili wanted the first ship to arrive in Tonga as he was desparate for the goods he had ordered. Mr. Singh suggested using Translink's voyage 15, the M.V. "POLYNESIAN LINK" and Mr. Havili verbally accepted that suggestion. He followed that up with a fax to Mr. Singh on 1st October 1991 (D.13) wherein he stated -

> 'As per our telephone conversation 30/09/91 please note my acceptance of vessel nominated by you to be located in Suva on [09/10/91]"

The fax said 09/09/91 but it was self-evident, and admitted in evidence, that this was an error and the correct date was 09/10/91.

The Plaintiff were not now able to fulfil the whole of the Defendants' order but did manage to supply goods to the value of 30,986.70 Fijian Dollars. Wholesale Credit Sale slips for each part of the Order met were prepared, as also were Invoices which doubled as Certificates of Value and Origin for the whole amount specified in the said slips. Thus

Order No.	Value of Order (Fijian Dollars)	Relative Credit Sale Slip No.	Value of Goods Supplied (Fijian Dollars)
A 67/91	6,500	423693 423689	6,500
A 68/91	11,745	423688 423690	8,700
A 69/91	9,495	423694 423695 423691 423692	9,495

A.71/91	6,145	423691 423692	6,145
A.70/91	2,151-70	427004	146-70
	36,036-70		30,986-70

all these goods were supplied on a "C&F" basis and this was specified on each Invoice. The same notation appears in all the Credit Sale Slips. On the evidence, particularly that of Mr. Mohd Israar Ahmed, the Export Supervisor of the Plaintiffs, I am satisfied that goods to that value, conform to the Defendants' order (with one exception : see paragraph 8 hereof) were prepared for shipment in container number TPHU - 296578 - 0. Mr. Iain Campbell is the Managing Director of Campbell's Shipping Agency Limited, Suva and he gave clear and unambiguous evidence that particular container was loaded on board the M.V. "POLYNESIAN LINK" (Voyage 15) at Suva. In support of this he produced that load list for that vessel dated 9th October 1991 (P.40) which shows that container as destined for Nuku'alofa and (handwritten in ink) the bay where that container was stowed on board the vessel. That company's sign and stamp appears on the First Negotiable copy of the relative Bill of Lading [P.23, 38(ii) and 39(ii)]. This is only added, he said, after the cargo they receive has been stowed on the vessel. The stamp in this case show a date of 11th October 1991. In respect of work they did for Carpenters a practice had evolved in Suva that freight was not normally paid until about three days after the ship had sailed, when the original Bills of Lading would also be released. In this case the Plaintiffs did not pay the freight of 900 Fijian Dollars until December 1991 [P.38(i) and 38(ii)], being somewhat confused as to what they should do after the M.V. "POLYNESIAN LINK" (voyage 15) capsized in Suva Harbour on 11th October 1991, but after the said container had been loaded on board. I accept unhesitatingly the evidence given by Mr. Campbell and have no difficulty finding in fact that the Defendant's goods to the value of 30,986-70 Fijian Dollars were on board the said vessel when she capsized.

The cargo in this case was laden on board. The said vessel and a Bill of Lading issued. Carriage was on a C&F basis : it was thus up to the purchaser, in this case also the consignees, to effect any insurance which they required. The Bill of Lading is of course amongst other things a receipt for cargo received by the vessel : it evidences receipt of the cargo on board. All this is elementary shipping law. Shipment of cargo commences when the goods are loaded on board a vessel preparatory to the voyage to the contractual destination [see Re Comptoir Commerical Anversois and Power, Son & Co. [1920] 1. KB. 868 at page 892 per Bailhache J.], a statement which in the judgment of Viscount Simonds "has never been questioned, and I see no reason for questioning it" : Tsakiroglou & Co. Ltd -v- Noblee & Thorl G.m.b.H [1961] 2 All ER. 179 (House of Lords) at page 182. Under a C&F contract the seller is not required to insure the goods for the buyer : see Brandon J at page 855 in The "Pantanassa" 1970 1 All ER 848. In this case the Defendants knew (see Document D.13) that their cargo was likely to be loaded on 9th October 1991. They were therefore on notice as to the time from which any insurance policy they wished should run. This is ample notice for the purpose of Section 32(3) of the United Kingdom Sale of Goods Act 1979, esto the said provision applies to C&F contracts, et separatim

the said Act is to be considered a statute of general application. I have reservations on both counts but it is not necessary for me to determine these questions in this case and I shall resist the temptation to do so. Accordingly, the Defendant cannot recover the sum of 30,986-70 Fijian Dollars from the Plaintiffs.

The Defendants tried to argue that they could because they did not receive the original Documentation (Bills of Lading and Invoices) until January 1992. I see no merit in that argument. When cargo has been lost as a result of a marine peril such Documentation is required solely for the purpose of making an insurance claim. The Defendants in this case had no such insurance. They cannot claim therefore to have suffered loss as a result of the late tendering to them of this Documentation.

They also argued that they should not be penalised because the Plaintiffs advised them that they (the Plaintiffs) would be claiming the loss on their policy. The operative word is claim. After the ship sank there is no doubt that certain members of the Plaintiffs' staff were running around like headless chickens. In the matter of insurance they did not really know what they were doing. On 15th October 1991 (P.9) the Plaintiffs' General Manager wrote to Campbell's Shipping Agency giving notice that "we claim the sum of 30,840 Fijian Dollars ..... in payment for (the) loss" of the Plaintiffs' cargo. About one month later on 19th November 1991 the Plaintiffs lodged a claim with Campbells for cargo lost on the said vessel (P.21). That cargo comprised the Defendant's container and Mr. Singh had already prepared a memorandum to that effect dated 14th October 1991, only three days after the vessel capsized (P.22). He had also told Mr. Havili in a telephone conversation the day after the sinking that the Plaintiffs would claim on their insurance for the loss of the cargo. The Plaintiffs' export clerk (Peter Chand) had also written to insurers on 12th October 1991 claiming for this loss (P.9). Brokers brought it to the attention of the Plaintiffs by letter dated 7th November 1991 (P.12) that their underwriters were not responsible for claims for cargo shipped C&F. The Plaintiffs did not carry insurance to cover this loss. Their claim was therefore bound to be rejected. One really would have thought that management staff and others involved in export documentation would have known the basics of shipping goods C&F. Mr. Havili wrote to the Plaintiffs on 10th December 1991 to the effect that his company "and our Insurance Company do not accept that the claim should be in made in Tonga" (P.13) although at this stage it appears that Mr. Havili had not been in touch with his insurers! It was not until 7th January 1992 that the Plaintiffs' Accountant Mr. Rabendra Prasad informed the Defendants that they would have to claim on their own policy as shipment was C&F (P.14). Mr. Havili should have been advised of this after the ship capsized. In large measure the confusion can be traced back to Mr. Singh and Mr. Rabendra Prasad for they clearly believed at the time of the accident that the Plaintiffs "could claim through our insurers" and for that reason the Plaintiffs did not collect the Bills of Lading until much later. Mr. R. Prasad did this to avoid paying freight in the mistaken belief that (1) freight was not payable in such circumstances (vessel capsizing) and (2) payment of freight was not a condition precedent to a cargo claim. Mr. Havili was undoubtedly led astray by this confusion. However he knew or reasonably ought to have known that his marine open policy did not cover shipment of cargo from Fiji to Tonga; admitted in evidence that he knew the difference between CIF and C&F contracts; and did not attempt to deny that the goods lost were being shipped C&F. He has suffered no loss as a result of the Plaintiffs' ignorance of insurance law and practice.

Part of the goods ordered by the Defendants was a consignment of lavatories with a "S" bend. The Plaintiffs had in stock only sanitary with "P" bends. This was not what the Defendants ordered and Mr. Havili was understandably furious at receiving the wrong equipment. Nevertheless he chose to keep what he had been sent, and sold it all albeit at a reduced profit. He does not have a Counter-Claim for the loss of this profit and, accordingly, there is no legal basis in this case for him recovering that loss.

After he was informed of the loss of the vessel and his cargo by Mr. Singh, Mr. Havili emphasised that he needed these goods. Mr. Singh spoke to his General Manager and was authorised to send a replacement consignment as soon as possible and before receiving payment. In his conversation with Mr. Havili, Mr Singh says he " did not discuss payment" as Mr. Havili was "upset". Mr. Rabendra Prasad knew nothing about the arrangements for payment of this shipment. Mr. Havili admits he was upset, and understandably so as he had his own customers in Tonga to satisfy. He asked for the goods or his money back. The latter option he was not entitled to. He insisted on the Order which "he had paid for already". He recollects Mr. Singh telling him the Plaintiffs would make an insurance claim and "ship the goods" to the Defendants. I am satisfied that there never was any express discussion about payment. The Defendants' Mr. Havili assumed he would not have to pay for the replacement consignment. In effect he would have paid only once if shipment had been C.I.F., or being C&F if he had effected the necessary insurance policy. The Plaintiffs however shipped further goods to the Defendants. In the ordinary course of business they expected to be paid therefore and sent invoices for that replacement cargo to the Defendants. The Defendants see themselves as paying twice, and are not exactly thrilled at the prospect. But this comes about only because of their failure to insure the first shipment which was lost in Suva Harbour. The Plaintiffs are not a charitable institution, but a commerical organisation. They expect to be paid for goods they supply. The second shipment certainly was not intended as a gift. At common law there is a presumption against donation (gift), a presumption all the more difficult to rebut in commercial dealings between two trading companies : see Tinsley -v- Milligan, [1993] 3 All ER 65. There is no evidence to rebut the presumption in this case. The Defendants ordered and received goods: they should now pay therefor.

The replacement consignment was shipped C&F partly on the MV "FORUM SAMOA" (voyage 193), and partly on the MV "FUA KAVENGA" (voyage 149). There is no dubiety as to what was shipped and received, namely -

Credit Sale Slip No.	Goods	Value (Fijian Dollars)
427009	Nuts, Bolts and Washers	2,151-70
427049	Cisterns and Toilet Seats	408
427050	Lavatories with P bend	945
427044	Tiles	4,225
427042	Tiles	1,450
427043	Tiles	1,625
427048	Cisterns and Toilet Seats	657

429201	Sinks, Urinals and Sizylation Foil	8,217
429202	Vibrator and Poker	1,895
		21,573-70

The Defendants are due and liable to pay therefor.

Accordingly I shall dismiss the Defendants' Counter-Claim for repayment of 36,036-70 Fiji Dollars, being the money paid for the first shipment. The Plaintiffs are entitled to decree in their favour calculated as follows -

		Fijian Dollars
- Value of goods shipped on "POLYNESIAN LINK"	:	30,986-70
- Value of replacement goods shipped	:	21,573-70
		52,560-40
- Less, monies paid for 1st shipment	:	36,036-70
		16,523-70

In their Prayer the Plaintiffs only ask for 16,523 Fijian Dollars so that is all they will receive. At current rates of exchange that amounts to 15,057-87 pa'anga and I shall grant decree accordingly. Interest thereon would have run at the judicial rate of 10 per centum per annum from 14th June 1993, the date when this action was raised, if Counsel had expressly asked for interest to be back dated to then. In the event interest shall run from the date of judgment until payment to follow hereon. Costs will follow success.

The Defendants' pleadings in this case left a lot to be desired. Mr. Havili agreed that considerable portions thereof were factually inaccurate. Perhaps this is not at all surprising if, as he claims, he conversed with his lawyer for two hours only prior to Defences being raised, and never met with them again until the Trial! All factual matters pled by a Plaintiff which are correct must be admitted by a Defendant. If facts are pled which he does not know and could not reasonably be expected to know, the Defendant should respond that these averments are not known and not admitted. Quoad ultra he should deny the case pled against him adding by way of explanation whatever seems necessary and relevant. It is the responsibility of Counsel to ensure that henceforth pleadings comply with these simple and elementary rules.

Therefore, I shall pronounce an ORDER in the following terms -

> IT IS ORDERED AND ADJUDGED THAT [1] the Defendants' Counter-Claim be dismissed; [2] the Defendants do pay to the Plaintiffs the sum of 15,057-87 pa'anga together with interest thereon at the rate of 10 per centum per annum from 10th January 1994 until payment to follow hereon; and [3] the Defendants be found liable to the Plaintiffs in Costs, as same may be agreed which failing as taxed.