

IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

PLAINT NO. 125/97

BETWEEN PELORUS MARITIME

LIMITED a duly
incorporated company
having its registered
office at Rarotonga

Plaintiff

AND

MINISTRY OF
ENERGY a Government
body established under
the Ministry of Energy
Act 1991

Defendant

Counsel: P Moodley for Plaintiff

P W Graham for Defendant

Date of Hearing: 29 August and 3 September 1997

Date of Judgment: 5 September 1997

JUDGMENT OF QUILLIAM CJ

For the purpose of maintaining the supply and generation of electricity to the Outer Islands of the Cook Islands the Defendant engaged the services of the Plaintiff for the carriage and delivery of diesel fuel. This was carried in the Plaintiff's ship Avatapu. Accounts were rendered to the Defendant for the fuel and freight charges, but some of these were disputed by

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the Defendant which was not prepared to pay the full amount claimed. The method of operation was that the Defendant would order certain quantities of fuel to be delivered, and the corresponding amount was delivered to the ship and was paid for by the Plaintiff. The fuel would then be delivered to the islands concerned and the Plaintiff would charge the Defendant for each delivery. The records of fuel received and delivered by the Plaintiff did not on occasions correspond with similar records kept by the Department. The difference between those two sets of records represents the deficiency in payment alleged by the Plaintiff.

It became apparent early in the hearing that the apparent discrepancies were explained by a lack of communication between the parties. Finally, after the hearing had begun, an attempt was made to reconcile the respective records and this has narrowed the gap. There now remain 11 deliveries still in dispute and I will deal with these separately.

First, however, it is necessary to say something about the way in which the system of deliveries operated.

The fuel delivered to the ship was measured on a flow meter and a bill of lading completed to record the amount. A copy of that bill of lading was kept by both parties and constitutes the starting point of the records of both. The difference between them occurs at the point of delivery from the ship. After discrepancies became apparent the captain of the Avatapu, Captain Griffith, had her flow meter tested, and it was found to be recording 1.16% more fuel than was actively delivered. A correction of that amount was therefore made to all subsequent recorded deliveries, and this was accepted to have been done for each of the deliveries made during the period with which this claim is concerned.

When the ship reached one of the islands it would discharge fuel in accordance with the orders it had received from the Defendant. Most of those orders were received before the ship left Rarotonga, but on occasions orders were sent to the ship by fax.

The method of delivery was into square tanks of 1600 litres capacity which were taken out to the ship and filled either on the deck of the ship, or in the small boat which carried them. The amount delivered to these tanks was recorded on the flow meter on the ship, and that formed the basis for the accounts rendered by the Plaintiff. The tanks were taken ashore and the amount of fuel was measured by the Defendant's officer by the use of a dipstick. The reading on the dipstick was then compared with a calibration chart and the result comprised the Defendant's record of the amount received. That record was then faxed to the Defendant's office in Rarotonga. The fuel in the square tanks was then taken and added to the Defendant's bulk supply. It may be that on occasions the measurement by the Defendant's officer was made in the bulk supply rather than in the smaller tanks, although this was not clearly established.

From the records kept by both parties a summary was eventually prepared showing for each delivery the amount of fuel claimed by the Plaintiff to have been delivered and the amount claimed by the Defendant to have been received. In most cases these figures correspond, but in 11 instances they do not, and those comprise the area of dispute. There are two categories into which these fall. The first comprises those cases in which the respective measurements differ. The second comprises those cases in which the plaintiff claims to have delivered fuel, but the Defendant has no record of any such delivery. I deal first with the first category.

1. On 20 February 1996 the bill of lading for Voyage 132 to Atiu shows 9600 litres delivered to the ship. The Plaintiff has recorded 11,140 litres delivered at Atiu, but the measurement made by the Defendant's officer is of only 9414 litres, a difference of 1540 litres. The question is which measurement is more probably the correct one, the onus of course resting on the Plaintiff. While I recognize the difficulties there may be for the Defendant to bring its officers from the Outer Islands to give evidence, it is nevertheless the case that the Defendant has been obliged to rely upon its office records. As against this I had the eyewitness evidence of Captain Griffith for the Plaintiff. I have to say at once that I was most impressed by the clear and forthright way in which she gave her evidence, and so far as her observations of what accrued at the time of delivery are

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concerned I can find no reason to doubt her evidence. Her record of the delivery was that of the meter, adjusted as previously referred to, and it is that which requires particular attention.

There are, however, a number of variables in the procedures that were followed. There was evidence that on occasions the Defendant's tanks after having been filled and brought ashore, were left unattended, and that people were seen to help themselves to fuel from the tanks.

The main difficulty, however, in being able to accept the Plaintiff's claim in reliance only on the accuracy of the meter readings, is that the result cannot be reconciled with the number of tanks filled. The evidence was that the square tanks have a capacity of 1600 litres. The way in which the Defendant's officer reported the delivery by fax to the Ministry was to show the quantity in each tank. On this basis he recorded a total of 9414 litres. The Plaintiff's claim is for 11,140 litres. It is clear that this quantity could not have been put into 6 tanks. There may be room for some variation but not to such a large extent. It is not possible to say with any certainty where the error lies, but I must, of course, give the benefit of the doubt to the Defendant.

I therefore conclude that for this delivery the Defendant's record of 9414 litres is to be preferred.

2. On the same voyage the Plaintiff claims to have delivered at Mauke 11,138 litres, but the faxed report of the Defendant's officer is that there was 9432 litres delivered into six tanks. This delivery is in the same situation as the previous one. The amount recorded for each tank is 1600 litres or less. It would not have been possible to contain 11,138 litres in six tanks. It is not without significance that the same situation has occurred with two different officers on different islands. I can only

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conclude that some doubt exists as to the accuracy of the flow meter on the ship. In this case also I think that the Defendant's figure, namely 9432 litres, must be preferred.

3. On the same voyage a third instance of the same kind occurred. The Plaintiff claims for a delivery of 5564 litres, but a different officer again, and on a different island, has recorded 4532 litres in 3 tanks. The tanks would not have held 5564 litres, and the same doubt exists as already referred to.
4. On voyage 134, the Plaintiff claims to have delivered at Atiu 13,928 litres. The defendant's record is of a total of 11,482 litres delivered into 8 tanks. A feature of further significance in this instance is that the content of 7 of the tanks is between 1458 and 1685 litres, but of the eighth tank only 750 litres. It is difficult to see how, if the total delivery exceeded the capacity of 8 tanks, there remained one tank less than half full. Here, too, it cannot be said that the Plaintiff's evidence overcomes the inference to be drawn.

I turn now to the second category, namely those cases in which the Plaintiff claims for fuel delivered, but of which the Defendant has no record at all. There are 7 instances of this in the summary referred to earlier. I can deal with them together.

In each case the Plaintiff has recorded deliveries to different islands and on different voyages without there being any corresponding record of receipt by the Defendant. There would seem to be only three possible explanations. One, as suggested on behalf of the Defendant, is that the fuel was delivered to someone other than the Defendant but charged against the Defendant. A second is that the fuel was not delivered to anyone but a fabricated charge was made by the Plaintiff against the Defendant. A third is that the Defendant's records are incomplete and the relevant documents are missing.

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I have to say at once that there was no evidence of any kind to support either of the first two possibilities. In each case there would need to have been deliberate dishonesty on the part of the Plaintiff and there is no suggestion in the evidence of any such thing.

That leaves the third possibility and I can only conclude, on the balance of probabilities, that the fuel was in fact delivered to the Defendant but has somehow not be recorded. I think the Plaintiff is entitled to payment for these deliveries.

Summary

As indicated to counsel, I propose to make a finding as to the quantity of fuel delivered for which the Plaintiff is entitled to payment, and it will be for the parties to make the necessary calculations to convert the quantities into money terms, and to add the corresponding freight charge.

I find the proved amount of deliveries in the disputed instances to be as follows:

Voyage 132 to Atiu	9414 litres	
Voyage 132 to Mauke	9232 litres	
Voyage 132 to Mitiaro	4532 litres	
Voyage 134 to Atiu	<u>11482 litres</u>	34,860 litres
Voyage 131 to Aitutaki	9517 litres	
Voyage 134 to Mitiaro	3351 litres	
Voyage 137 to Manihiki	1853 litres	
Voyage 137 to Mitiaro	1600 litres	
Voyage 141 to Pukapuka	1604 litres	
Voyage 141 to Palmerston	3209 litres	
Voyage 141 to Pukapuka	<u>3203 litres</u>	<u>24,337 litres</u>
		<u>59,197 litres</u>

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There will be judgment for the Plaintiff accordingly, with costs, disbursements and witnesses' expenses as fixed by the Registrar.

In case for any reason agreement cannot be reached as to the total sum represented by the findings as to quantity, leave will be reserved to apply further as to that.

A handwritten signature in black ink, appearing to read "William", written in a cursive style.

CHIEF JUSTICE