'Ahoia & another v New Zealand Pacific Container Lines Ltd & others

Supreme Court, Neiafu
Dalgety J
Civil Case No.129/94

26, 27, 28 & 29 April 1994

Contract - shipping - undisclosed principal
Damages - proof of - duty to mitigate
Shipping - contracts - when loaded on board

The Plaintiffs arranged to ship their produce and crops, from Vava'u to American Samoa. They entered into a contract with the Second Defendant, as agents for an undisclosed principal to ship the produce and crops by a designated vessel, in a refrigerated container and on a specified date. The produce would then be sold in American Samoa. The designated ship arrived but no container was made available, as contracted. The produce did not leave. Damages were claimed.

Held:

1. The Second Defendant had materially breached the contract with the Plaintiffs.
2. The evidence did not establish that the First Defendant was the undisclosed principal and the action against it was dismissed.
3. The evidence did not establish a case against the Third Defendant and the action against it was dismissed.
4. Accordingly any proved loss suffered by the Plaintiffs would be recoverable from the Second Defendant only.
5. However no admissible evidence was called to prove any loss by the Plaintiffs arising from the breach of contract. In particular there was no evidence as to market prices in American Samoa at the relevant time nor of expenses and costs involved.
6. In addition although general damages were prayed for "inconveniences and hardship" (but not supported otherwise in the statement of claim) no evidence was given as to that and the claim for those damages was also rejected.
7. Further the Plaintiffs, on the evidence, had failed to minimise their losses, given an offer which was made for an alternative reasonable means of shipping, which they rejected.

8. The claims were dismissed (although an ex gratia offer for refund of freight prepaid was recommended).
9. (Obiter) The Carriage of Goods by Sea Act (Cap.141) did not apply to the contract, the goods not having been loaded on board let alone received by the carrier.

Cases referred to : Kum v Wah Tat Bank [1971] 1 Ll. Rep. 439
Glengarnock Iron v Cooper (1895) 22 R 672
Pyrene Co. Ltd v Scandia Navigation [1954] 2 All ER 158

Statutes referred to : Carriage of Goods by Sea Act, s.2

Counsel for Plaintiffs : Mr S Taufaeteau
Counsel for First Defendants : Miss Van Bebber
Counsel for Second & Third Defendants : Mr Appleby

Judgment

Viliami 'Ahoia the First Plaintiff is a sixty-four year old Vava'u farmer. He has been growing crops such as taro, yam, water melon, banana, copra and kape for over thirty-eight years. The main thrust of his activities was subsistence farming, although he occasionally sold surplus product on the local market to raise cash to meet the cost of his children's education and his financial obligations to the church. He had no other source of income. To enhance the value to him of his cash crops he sometimes sent produce to American Samoa to be sold there by his brother Litani 'Ahoia who is a director and the principal shareholder of a Samoan Company called Smile Samoa Incorporated. In the past he organised such shipments on his own. He must now rue the day in or about October 1992 when he was persuaded to enter into a joint venture with the Second Plaintiff.

The Second Plaintiff Poasi Ma'afu is a primary school teacher and part-time subsistence farmer who, as a sideline, has been growing crops commerically for about five years. He has experience of growing and marketing locally crops such as ufi, taro hopa, water melon, banana and a variety of vegetables. On one previous occasion in 1990 he shipped in boxes (not in a container) water melon, taro, manioke, kape and some other crops to relatives in New Zealand.

In or about October 1992 the two Plaintiffs agreed upon a Joint Venture. Neither from their own resources could afford to pay the freight on a refrigerated container (a "reefer") for a voyage from Neiafu to PagoPago. Both had planted their crops in about August 1992 but it was some two months thereafter that they came together with a view to exporting a container load of their produce to American Samoa. They believed they could obtain a better price for their produce there than in Tonga. Both Plaintiffs had known each other before 1992. The driving force behind the joint venture appears to me to have been the Second Plaintiff. The terms of that joint venture are simplicity itself. Both Plaintiffs were to contribute equally to the freight, and export costs (business licence, quarantine phytosanitary certificate, and customs export clearance); the shipper was to be the First Plaintiff; and the consignee was to be his brother in Samoa. That was the extent of their venture. Each was to stuff the container with his own produce and to keep the proceeds of sale of their own crops. The Second Plaintiff intended to ship only water-melons and some 618 thereof were approved for export. All other goods approved for export belonged to the First Plaintiff namely 150 water-melons; 28 bags of dehusked coconuts; 4 bags of taro; 110 bags of kape; and 14 hands of bananas (two varieties).

It was left to the Second Plaintiff to make the necessary arrangements to obtain a reefer and to book cargo space for it on a suitable vessel departing Neiafu about harvest time (mid November 1992 or thereby). The Second Plaintiff made general enquiries and then contacted Mr Sione Taumoefolau, the Vava'u Branch Manager of Burns Philp (Tonga) Limited. At this preliminary meeting in October 1992 the said Plaintiff asked Taumoefolau if he was the agent for the ship from Vava'u to PagoPago and he replied in the affirmative. From what the agent said the said Plaintiff learned that there was a vessel sailing Neiafu - PagoPago scheduled to depart Vava'u on or about 14th November 1992. The said Plantiff then stated that he wanted to export agricultural produce in a reefer and enquired about the availability of such a container. Said Agent stated that he could supply a reefer. That was the end of their preliminary meeting. They met again in the First week of November 1992 when an oral contract was entered into between the Second Plaintiff, on behalf of both Plaintiffs, and Sione Taumoefolau, qua Manager foresaid, whereby the

Second Defendants would supply to the Plaintiffs a reefer free of charge and thereafter transport the loaded container to American Samoa upon payment of the freight of 4,000 New Zealand dollars, the pa'anga equivalent of which would be calculated on the day the vessel arrived at Vava'u. The designated vessel was the M.V. "BALTIMAR MARS", voyage 12 of 1992, due to arrive Neiafu on 13th November 1992. As at that date the freight was calculated at 2,935-56 pa'anga. At a further meeting on or about 11th November 1992 the same parties also agreed that part payment should be made in advance, the balance upon the arrival of the ship : in other words it was intended that payment be made in full before the cargo was shipped. It was at that meeting that Taumoefolau again confirmed the availability of the reefer and advised the Plaintiffs that the time had come to harvest and prepare their crops for shipment.

Upon the basis of that contract both parties started harvesting and preparing their crops for shipment; obtained a business licence entitling them to export "one shipment only" of agricultural produce; had the export crops inspected by quarantine and obtained a phytosanitary certificate from them for the crops already described in paragraph 3 of the Judgment; and obtained the necessary customs clearance therefor. The First Plaintiff duly paid his one-half share of the freight, the sum of 1,467-78 pa'anga. The Second Plaintiff received a loan therefor from the Tonga Development Bank. They gave him a cheque for 1,500 pa'anga (cheque number 31677) drawn in favour of the Second Defendants. The Second Plaintiff took this cheque to Taumoefolau, handed it to him, asked for a refund of 800 pa'anga in cash to use for other purposes, and promised to pay the balance of his share of the freight at some unspecified date in the future. Until this point I had no hesitation accepting as truthful the evidence of the Second Plaintiff. However his deviousness in cheating the bank - for that is precisely what he did : he used loan funds for a purpose for which they were not intended - led me to review his whole evidence. I still believed him as to the terms of the Joint Venture and the shipping contract with the Second Defendants. However he had proved that he was not the upright educated man of affairs he professed to be. His conduct in the regard was not what his joint venturer expected of him. What is just as surprising is that Taumoefolau acceeded to the Second Plaintiff's request and repaid him 800 pa'anga in cash. The previously agreed condition about full payment in advance had thus been varied by mutual agreement. On about 13th November 1992 the Second Defendants issued to the Plaintiffs a pro forma Bill of Lading. This document was designed to enable the Plaintiffs (a) to obtain the necessary clearances to export their goods and (b) to have the reefer loaded on board the vessel. It was not a negotiable Bill of Lading. That document would be prepared later in Nuku'alofa and then couriered to PagoPago to enable the consignee to uplift the reefer once discharged from the vessel. This may seem an odd procedure but in reality it was a desirable check by the Second Defendants on the activities of their Vava'u Branch Manager. I do not know how good a store-keeper he was but as a shipping agent he was a considerable liability. He knew nothing about the standard conditions which formed part of the shipping contract. Presumably therefore he would not have known and would not have told shippers that liability was limited to a modest sum per unit unless the value was declared by endorsement on the face of the Bill. In this case I am satisfied with the Plaintiffs' evidence (and disbelieve that of Taumoefolau) that the Bill they received was a photocopy of the obverse of the pro forma Bill of Lading : the reverse had not been copied and this they did not receive.

The Plaintiffs agreement with the Second Defendants was to ship good in a reefer. The "BALTIMAR MARS" arrived at about 2100 hours on 13th November 1992 - Taumoefolau thought it was several hours earlier, but his recollection is flawed in this regard. This is not the sort of error one would have expected of a shipping agent! The vessel had an empty reefer on board but it was not readily accessible. Despite strenuous efforts no reefer was procured for the Plaintiffs and they were unable to ship their goods on this vessel. The Second Defendants had undertaken to provide a reefer and failed to do so. There was a material breach by them of their contract with the Plaintiffs.

There are three Defendants (FIRST) a New Zealand based shipping company, New Zealand Pacific Container Line Limited; (SECOND) the shipping agents at Vava'u, Burns Philp (Tonga) Limited; and (THIRD), a company incorporated in Tonga under the name Pacific Finance and Investments Limited. The Defendants lodged two contracts with their bundle of productions (D.1 and D.2) but they were never referred to at the Trial, have not been agreed or proved, and accordingly I shall ignore them. I must be guided by the evidence I heard in deciding upon the relationship of the parties inter se. Both Plaintiffs said in evidence that they were told by Taumoefolau that he was the representative of the Shipping Line. What they did not know and were not told, they say, was the identity of the Shipping Line Taumoefolau represented. In evidence Taumoefolau started by saying that he told the Plaintiffs that he was the agent for the First Defendants, but soon conceded that he probably did not tell them this. That latter admission is wholly consistent with the Plaintiffs' evidence. Accordingly I find in fact that Taumoefolau did not tell the Plaintiffs for whom he acted. It follows therefore that Burns Philp (Tonga) Limited in their dealings with the Plaintiffs were acting as agents for an undisclosed principal. The Plaintiffs have elected to sue them. They also sued the First Defendants naming them as principals but in their Defences these Defendants deny that they were the principal concerning the contract concluded between the Plaintiffs and Taumoefolau. It has not been established in evidence that they were the principal. The case against the First Defendants is therefore dismissed with costs which I assess at 7,650 pa'anga.

The reality is that by October/November 1992 the Second Defendants in Vava'u were acting only as sub-agents for the agents in Tonga who were, or so I was told, a company called Dateline Shipping: the evidence was that their ultimate holding company was then the Third Defendants. No case has been established against the Third Defendants and the Plaintiffs' action against them requires to be dismissed. During submissions their counsel, on their behalf, offered ex gratia to repay to the Plaintiffs the freight they had paid and I was invited to make an order for payment in these terms. The offer was a generous one and I shall make the Order requested. Interest thereon shall run from today until payment at the rate of 10 per centum per annum. I shall make no further Order against these Defendants.

If the Plaintiffs have suffered any loss arising from the breach of contract then it is to the Second Defendants that they must look to recover this loss. The Plaintiffs had no contract with anyone in Samoa to purchase their produce from them: if they had then their loss could have been calculated without undue difficulty. What they intended doing was allowing the First Plaintiff's brother to arrange for the produce to be sold in the market at Pagopago and thereafter remit the sale proceeds to Tonga. I was not told whether he was to remit the whole proceeds of sale or whether he would be sending the sale proceeds less expenses. Was he to be entitled to a handling fee for himself? Were the actual sellers

at the market to be entitled to a share of the price realised? Were there import dues, customs clearance fees, wharfage, ports and services tax, or sales tax payable in Samoa and, if so, what would this have amounted to? What costs would have been involved in transporting the produce in Samoa from the wharf to the market? None of this I was told. All are important matters of fact necessary before I can even begin to calculate loss. Even more fundamental is evidence of the market price for the produce at the time the vessel was due to arrive in PagoPago (mid December 1992) and in the ensuing days, say over one week so that an average price could be established. There was no such evidence. All the Plaintiffs could tell me was that they expected a better price than if they had sold the produce in Tonga. They led nobody with knowledge of the PagoPago market. Admittedly they produced a document (P.11) which specified market prizes in November 1992 at so much per item or per pound weight, however that letter dated 18th November 1992 was sought after the Plaintiffs had decided to litigate their claim for breach of contract. Market prices vary and there was no evidence at all as to market prices as at mid December 1992. The author of the letter was not called as a witness to speak to P.11. It has not been approved. Anyhow I do not know whether Litani 'Ahoia checked out these prices himself or whether they were given to him by someone else. Furthermore, all prices are quoted per pound weight whereas in the shipping documentation (P.4, P.5 and P.8) all produce (except water melons and kape) are described as bags, bunches and the like. The relationships between such indeterminate measurements and Avoirdupois Weight was never established. In the whole circumstances the Plaintiffs have failed to establish in evidence the extent of their loss caused by the Second Defendants' breach of contract. Nor, in my opinion, are they entitled to any general damages for the "inconveniences and hardship" suffered by them resulting from the breach of contract. Certainly they have a Plea-in-Law therefor (Prayer 6) but there are no pleadings in their Statement of Claim to support that Plea as there ought to have been. There should have been some specification of what the inconvenience and hardship amounted to. In any event the evidence does not justify an award of general damages. Both Plaintiffs gave clear and unambiguous evidence that they planted their produce in about August 1992; that the decision to ship goods to Samoa was an afterthought; and that if no container had been available they would have sold their goods locally. I am not persuaded that they suffered any significant inconvenience orr hardship solely due to the Second Defendants' failure to provide the required reefer. They were of course put to additional expense and lost the prospects of what they believed was an enhanced sale price at the PagoPago market but these were all matters of special damage which they failed to prove.

Separatim, and in any event, the Plaintiffs failed to minimise their loss. In the early hours of 14th November 1992 when it was clear that no reefer was available Mr Roger Cocker of Dateline Shipping offered to ship the Plaintiffs good to Nuku'alofa on the "BALTIMAR MARS" voyage 12 in a dry container and to trans-ship them there into an available reefer and thereafter to load that reefer back onto voyage 12. Had that happened the produce would have arrived in PagoPago in mid-December which was when the Plaintiffs had intended that it arrive there. Mr Cocker further offered to allow both Plaintiffs, or their nominees to travel at Dateline's expense to Nuku'alofa with the goods and there to supervise the transshipment. In addition he undertook to pay all costs concerned with the trans-shipment, including the cost of any produce which deteriorated en route to Nuku'alofa or was damaged while being re-packed there into a reefer. Had this

offer been accepted the Plaintiffs would have suffered no loss whatsoever. It was a most appropriate offer to make in the circumstances and Mr Cocker is to be commended for his responsible attempt to alleviate the Plaintiffs' difficulty caused by the failure to supply them with a reefer at Vava'u. The Plaintiffs rejected this offer out of hand. In this they were acting most unreasonably and without due regard to the obligation incumbent upon them to minimise their loss. The Second Plaintiff claimed in evidence that the offer was not a reasonable one as he feared that the goods would be re-inspected by quarantine at Nuku'alofa; that the quarantine standards there were very strict, the implication being that quarantine standards at Vava'u were not; and that he did not believe quarantine at Nuku'alofa would deal with him fairly because Mr Cocker had told him there was a "vendetta" between himself and quarantine at Nuku'alofa. Mr Cocker denied having said there was such a "vendetta". I believe him. Mr Konrad Engleberger the head of quarantine, based at Nuku'alofa, confirmed that there was no such "vendetta". I believed him as well. The Plaintiffs' evidence in this regard was a deliberate fabrication. Their belief that the goods would be re-inspected at Nuku'alofa was a figment of their imagination. I accepted Mr Engleberger's evidence that the issue of a quarantine certificate at Vava'u for the produce would have sufficed and that no further inspection would have taken place at Nuku'alofa. In the whole circumstances had this offer been accepted, the Plaintiffs would have suffered no loss. Their case against the Second Defendants must therefore fail.

There are two matters of law which were pled and argued by the Defendant's counsel. First, they submitted that the Plaintiffs' claim was subject to the terms and conditions of the Bill of Lading. I have already dealt with this as a matter of fact. These terms and conditions were not annexed to the pro forma Bill of Lading with which the Plaintiffs were supplied, hence they form no part of the contract. Secondly, they argued that this case required to be determined accordingly to the provision of the Carriage of Goods by Sea Act (cap. 141) and accordingly (1) the action was time barred and (2) their liability was limited to 200 pa'anga. Section 2 of the Act provides that the Rules set forth in Schedule 1 annexed to the Act are to have effect "in relation to and in connection with the carriage of goods by sea" in cargo carrying vessels from any port in the Kingdom of Tonga to any other port, be it a home or foreign port. The said Schedule details the "Rules relating to Bills of Lading". The term "carriage of goods" which appeared in Section 2 is defined by Article I(e) as covering -

> "the period from the time when the goods are loaded on to the time when they are discharged from the ship."

The goods in this case remained at all time in the care and under the control of the Plaintiffs. They were never received by the carrier into his charge for shipping. I so find as matters of fact. The pro forma Bill of Lading used in this case was intended solely to expediate export clearance. It was not intended to be the multi-part Bill of Lading properly so called, which Bill is a document of title, a receipt for goods laden on board the carrying vessel, and a negotiable document to a limited extent: the pro forma Bill was neither negotiable nor a receipt nor a document of title. [However, had the goods actually being passed into the custody of the shipper for carriage by sea, albeit not actually placed on board the vessel, then the pro forma document perhaps could have been regarded as a "received for shipment" bill of lading which for legal purposes is treated as a bill of lading, though like the mate's receipt it is not a document of title : see Kum v Wah Tat Bank

Ltd [1971] 1 Lloyd's Rep. 439 (Privy Council).] Accordingly I am not persuaded that the Act applies to this case. The Carriage of Goods by Sea Act gave effect to the Hague Visby Rules, to which Tonga was a contracting state. The terms of Article I(e) have frequently been the subject of judicial interpretation. The authorities make it perfectly clear that the terminus a quo for the operation of the Hague Visby Rules is the loading on board the vessel of the cargo, a term apt to include the actual loading operation even before the cargo crosses the ship's rail. What Article I(e) does is to name the first and last of a series of operations which include, between loading and discharging, the "handling, stowage, carriage, custody and care" of the goods : see Article II. The notion that the loading operation is artificially divided at the ship's rail has never been part of Scots Law - Glengarnock Iron & Steel Co. Ltd. -v- Cooper & Co. (1895) 22 R. 672 - nor, belatedly, is it good law in England either - Pyrene Co. Ltd -v- Scandia Navigation Co. Ltd. [1954] 2 All E.R. 158 where loading was said to include the process of lifting cargo on board ship by means of the ship's tackle even prior to the tackle passing the ship's rail. This is of course only sensible for the carrier is responsible for the whole of the loading - see Scrutton on "Charter-parties" and Temperley on the English "Carriage of Goods by Sea Act". Thus Devlin J. in the Pyrene Co. case (page 164) stated -

> "But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail (for the English) has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."

The Second and Third Defendants were jointly represented by counsel. They are entitled to their costs against the Plaintiffs. I shall assess these Costs at 5,700 pa'anga.

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

> IT IS ORDERED AND ADJUDGED THAT [1] this action insofar as directed against the Defendants be dismissed : [2] in as much as the Third Defendant ex gratia have offered to repay to each Plaintiff the freight paid by them in November 1992 at Vava'u, and now consents to judgment against them in respect thereof, therefore (a) the Third Defendants do pay the First Plaintiff the sum of 1,467-78 pa'anga together with interest thereon at the rate of 10 per centum per annum from today until payment to follow hereon; and (b) the Third Defendants do pay the Second Plaintiff the sum of 700 pa'anga together with interest thereon at the rate of 10 per centum per annum from today until payment to follow hereon: [3] the Plaintiff do pay Costs of 7,650 pa'anga to the First Defendants : and [4] the Plaintiff do pay Costs of 5,700 pa'anga to the Second and Third Defendants.