IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 339/93

BETWEEN: PACIFIC FORUM LINE a duly incorporated company having its registered office at Matautu-tai

Plaintiff

A N D: BIG SAVE TIMBER LTD a duly incorporated company having its registered office at Vailoa

Defendant

Counsel: R. Drake for Plaintiff
P.A. Fepuleai for Defendant

Hearing: 6 April 1994

Judgment: 8 April 1994

JUDGMENT OF SAPOLU, CJ

In this case the plaintiff company which operates a number of shipping vessels is claiming from the defendant company which is a supplier of building materials the sum of $18,275.99 for unpaid freight and customs service charges together with interest at 12% per annum from 6 August 1993 to date of judgment.

The defendant shipped to Apia in January 1993 timber consignments on voyage 163 of the "Fua Kavenga" a vessel operated by the plaintiff. An invoice dated 27 July 1993 was then sent by the plaintiff to the

defendant for the sum of $18,275.99 for freight and customs service charges for the timber consignments. The defendant paid for that amount by a cheque made out to the plaintiff. On 6 August 1993 the defendant stopped payment of that cheque at the bank. So the freight and customs service charges were not paid. At the hearing, both counsel for the plaintiff and the defendant agree that that was what happened up to that point of time.

Now the defendant has given two reasons for that action it took on 6 August 1993 in stopping payment of its cheque for $18,275.99. Essentially, the first reason is that the plaintiff had failed to credit in its records that the defendant had paid the full freight for its whole timber consignment previously shipped in December 1992 on voyage 162 by the same vessel of the plaintiff. The defendant had in fact paid the full freight for voyage 162 on 21 December 1992 as evidenced by a receipt produced to that effect. However in a letter dated 17 June 1992 from the plaintiff to the defendant, the plaintiff expressed concern about the defendant not having paid $3,612.00 freight for part of its timber consignment on voyage 162. That resulted in discussions and differences between the plaintiff and the defendant. For some reason not clear from the evidence, those differences remained unresolved up to the time the plaintiff brought its claim in Court in August 1993. In its statement of defence filed on 17 September 1993 the defendant refers to voyage 162 and the disputed payment not credited to its account by the plaintiff and says this is one of the reasons why it stopped payment on 6 August 1993 of its cheque of $18,275.99. So it is clear that up to 17 September 1993 the question of whether the defendant had

paid the full freight for its timber consignment on voyage 162 was still unresolved notwithstanding specific reference in the statement of defence to the receipt which confirms that payment had been made. It appears from the evidence for the plaintiff on this point that there was some misunderstanding by the plaintiff as to its records on this particular payment by the defendant. It was not until the hearing of this case that the plaintiff conceded that the defendant had paid all the freight for its timber consignment on voyage 162. It also came out in the plaintiff's evidence that the plaintiff was not aware of the allegations in the statement of defence relating to voyage 162 until the day before the hearing of the case started even though the statement of defence had been served well before this hearing. I have gone into some detail on this aspect of the case because of the claim for interest by the plaintiff which I shall deal with later.

The second reason given by the defendant for stopping payment of its cheque of $18,275.99 is essentially that it had already paid $7,000 by cheque to an employee of the plaintiff for the freight and customs service charges for its timber consignments on voyage 163. The defendant had also requested the plaintiff to deduct that amount from the total costs of freight and customs service charges but the plaintiff refused. This second reason for the defendant stopping payment of its cheque on 6 August 1993 is the main issue in this case. I will now set out the relevant facts as found by the Court.

The defendant was a client of the plaintiff. It regularly shipped timber consignments from overseas to Apia on the plaintiff's vessels.

The plaintiff's policy is that freight on goods shipped by its vessels are prepaid before arrival of the goods in Apia. However, that policy was relaxed in respect of certain clients of the plaintiff including the defendant. This policy relaxation meant that the clients concerned were only required to pay the freight and customs service charges when the goods actually arrive in Apia but before uplifting the goods from the plaintiff's premises. So the practice arose that the clients concerned could only uplift their goods on arrival in Apia from the plaintiff's premises after payment of freight and customs service charges. The defendant's evidence confirms that practice. In respect of voyage 163, the plaintiff's employee, designated as its container controller, released the defendant's timber consignment shipped on voyage 163 without freight and customs service being first paid. Then on 7 April 1993 the plaintiff's container controller went with the plaintiff's accountant in a car to the defendant's premises at Vailoa. The accountant remained in the car while the container controller went in to the defendant manager's office and handed him a writing pad piece of paper without the letter-head of the plaintiff. According to the evidence by the defendant's manager, he was told by the plaintiff's container controller that that piece of paper was the defendant's outstanding account with the plaintiff and he was there to collect the amount of $10,918.70 shown on the piece of paper as the total amount of the account. The defendant's manager responded that he could only afford $7,000 at that time. He then made out a cheque for $7,000 but the plaintiff's container controller asked him to make it out as "pay cash" and the defendant's manager did exactly that. When the defendant's manager asked for a receipt, the plaintiff's container controller replied to send someone to obtain a receipt from

him at the plaintiff's office. An employee of the defendant was subsequently sent to obtain a receipt but the plaintiff's container controller was never found in the office. This container controller was removed by resignation from the plaintiff's employment in May 1993 without a receipt being issued for the $7,000 cheque he received from the defendant's manager. The defendant now claims that the amount of $7,000 should be set off against the sum of $18,275.99 claimed by the plaintiff as the $7,000 was paid to the container controller, an employee of the plaintiff.

In order to decide this issue properly additional facts must be mentioned. The evidence for the plaintiff is that the container controller was never authorised to collect payments from clients of the plaintiff and it was not part of his job description to receive money from clients. In fact the plaintiff's policy is that none of its employees is permitted to collect any payment for an account from clients of the plaintiff. Its employees are only sent out, where necessary, to serve demand notices on clients but all payments for accounts are to be made to the cashier at the plaintiff's office. The evidence for the defendant confirms that payments of its accounts with the plaintiff were made to the cashier at the plaintiff's office except on this one occasion when the plaintiff's container controller came with a piece of paper alleged to be the defendant's account with the plaintiff and was given a cash cheque of $7,000. The defendant's manager also says that he believed the amount owed by the defendant to the plaintiff was greater than the total amount shown on the piece of paper given to him by the container controller but he made out the cheque because he trusted

the plaintiff's employees. The defendant's manager has been a busiessman in Apia for 7 to 8 years. Before he started business in Apia, he had been a businessman in New Zealand.

The question now is whether the $7,000 paid by the defendant's manager to the plaintiff's container controller should be set off against the sum of $18,275.99 claimed by the plaintiff. In my view the answer must be no. The container controller can hardly be described as acting as an agent for the plaintiff when he obtained the cheque of $7,000 from the defendant's manager. But even if he can be called an 'agent', he had no authority, be it express, apparent or otherwise, to collect payment on behalf of the plaintiff from the defendant. The plaintiff's evidence is to the effect that its container controller did not have any actual or express authority to collect account payments from any of the plaintiff's clients including the defendant. It is also clear from the course of dealings between the plaintiff and the defendant that the practice is always for payment to be made to the cashier at the plaintiff's office and there is no practice for payments to be collected from the defendant's premises by any of the plaintiff's employees. The defendant's manager should have known from previous payments made by the defendant to the plaintiff's office that those payments were always made to the plaintiff's cashier and not to the container controller. In these circumstances the container controller cannot be said to have had any apparent authority. For the defendant's manager to accept a piece of writing pad paper without the plaintiff's letter-head which shows an amount less than what he believed was owing to the plaintiff, and then gave out a cash cheque for $7,000 without a receipt to the container controller who had previously released the defendant's timber

consignments contrary to normal procedure, when he knew or ought to have known that payment were always made direct to the cashier at the plaintiff's office, is most negligent for a businessman of his many years standing. If the defendant's manager had also checked the piece of paper given to him by the container controller, he would have noticed that it is an incorrect account because it contains amounts the defendant had already paid for freight in respect of voyage 162. All these matters should have put the defendant's manager on the alert.

As to the plaintiff's claim for interest at 12% per annum from 6 August 1993 to date of judgment, the evidence for the plaintiff is that it operates on a bank overdraft facility. Because the defendant withheld payment of $18,275.99 for freight and customs service charges in respect of voyage 163, extra interest accrued on that overdraft facility. Presumably the amount of $18,275.99 paid by cheque would have been utilised to reduce the plaintiff's bank overdraft facility. The interest rate on a bank overdraft facility is 12% per annum.

It is clear that one of the reasons why the defendant withheld payment arose out of the plaintiff's failure to credit the defendant with payment of the full freight for its timber consignment shipped on voyage 162. I have already dealt with the facts relating to this aspect of the case. Suffice to add that the plaintiff mistakenly believed that the defendant still owed $3,612 for freight in respect of voyage 162 due to an error in the plaintiff's records. So the defendant refused to pay the total amount of $18,275.99 for freight and customs service charges in respect of voyage 163. Given such a situation, I can understand the defendant refusing to pay $3,612 as part of the total amount of

$18,275.99 claimed. But I do not agree that in the present circumstances the defendant should have withheld payment of the total amount claimed when it is only a lesser amount that he was disputing. The defendant could have withheld only such amount equivalent to the sum of money in dispute until matters have been sorted out but pay the balance over to the plaintiff. What is said here does not apply to the sum of $7,000 paid by the defendant's manager to the plaintiff's container controller.

In these circumstances, I think the reasonable thing to do is to deduct the sum of $3,612 from the amount claimed of $18,275.99 and award interest at 12% per annum to the plaintiff on the balance of $14,663.99 as from 6 August 1993 to date of judgment. To allow interest on the full amount claimed without making any allowance for the error by the plaintiff will not be reasonable.

In all then, judgment is given for the plaintiff in the sum of $18,275.99 as claimed plus interest at 12% per annum on the sum of $14,663.99 as from 6 August 1993 to date of judgment. Counsel to file written submissions on the question of costs within seven days.

T F M Sir Isaac

CHIEF JUSTICE