IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 22/93

BETWEEN: BETHAM BROTHERS ENTERPRISES LTD a duly incorporated company having its registered office at MacDonald Building, Apia

First Plaintiff

A N D: NEW ZEALAND PACIFIC CONTAINER LINES LTD a company based in New Zealand

Second Plaintiff

A N D: BIG SAVE TIMBERS LTD a duly incorporated company having its registered office at Vailoa near Apia in Western Samoa

Defendant

Counsel: R. Drake for Plaintiffs
P. Fepuleai for Defendant

Hearing: 1st & 3rd November 1993

Judgment: 16th May 1994

JUDGMENT OF SAPOLU, CJ

This was originally a claim by the plaintiff Betham Brothers Enterprises Ltd hereinafter called "the first plaintiff" as handling agent in Western Samoa for Reef Shipping Ltd, an Auckland shipping company in New Zealand. The claim was for unpaid freight and handling charges against the defendant. The defendant counterclaims against the first plaintiff for damages to its consignment of taros and taamu while shipped in October 1992 on the vessel Baltima Marsh to New Zealand alleging negligence. I reserved my judgment.

When considering my judgment, certain difficulties became clear with regards to the capacity of the parties in relation to the claim and counter-claim. The first difficulty is that the first plaintiff is only a handling agent and there was no evidence placed before the Court to show whether it has authority to sue for freight on behalf of the owner or charterer of the ships for which it was claiming freight. The second difficulty relates to the defendant's counterclaim. It appears from the bill of lading for the defendant's consignment of taros and taamu for which it is claiming damages that the bill of lading was executed between the defendant as shipper and a New Zealand shipping line called New Zealand Pacific Container Line as owner or charterer of the vessel Baltima Marsh. The bill of lading also shows that the carrier of the defendant's damaged consignment was New Zealand Pacific Container Lines and not the first plaintiff. There is also no evidence to show that the first plaintiff was the carrier to New Zealand of the defendant's consignment that is alleged to have gone bad. The evidence only shows that the first plaintiff is a shipping handling agent.

On 18 April 1994 I called counsel for both the first plaintiff and the defendant and explained to them the foregoing difficulties. I also asked counsel that the case will be adjourned to 29 April for any further evidence they wish to call on the issues raised. On 29 April, only the first plaintiff called evidence while the defendant chose not to call further evidence. The further evidence called by the first plaintiff shows that New Zealand Pacific Container Lines is charterer of the two vessels Baltima Marsh and Socofl Stream in respect of which freight is being claimed. This same vessel Baltima Marsh was the carrier of the defendant's consignment to which the counterclaim relates. The company

Reefer Shipping Ltd is a subsidiary of New Zealand Pacific Container Lines and it is the management company for the vessels chartered by New Zealand Pacific Container Lines. On 25 June 1993 an agency agreement was executed between the first plaintiff and New Zealand Pacific Container Lines whereby the first plaintiff was authorised to enter into contracts of affreightment and to issue bills of lading and to represent New Zealand Pacific Container Lines in Western Samoa. Although not argued by counsel for the first plaintiff, it is at least arguable whether the agency agreement of June 1993 authorises the first plaintiff to sue for freight incurred in 1992 by New Zealand Pacific Container Lines. The new evidence also shows that the first plaintiff operates on a commission basis. I need not decide in view of this further evidence whether the first plaintiff has standing to sue for freight for the reason now to be stated.

Both counsel consented to the inclusion at this stage of New Zealand Pacific Container Lines as a plaintiff. Counsel for the defendant further added that the defendant does not strongly oppose the inclusion of New Zealand Pacific Container Lines as a plaintiff. In my view, the defendant cannot maintain its counterclaim against the first plaintiff for any alleged damage caused to its consignment of taros and taamus while in transit to New Zealand on a vessel chartered by New Zealand Pacific Container Lines which would be the carrier. The first plaintiff was neither the owner nor the charterer of the vessel Baltima Marsh which is alleged to have shipped the defendant's consignment to New Zealand. It was therefore not the carrier of that consignment. It is only a handling agent. Furthermore, on the further evidence adduced by the first plaintiff I am inclined, without deciding, that the first plaintiff may still have standing to sue for unpaid freight as claimed. However, by consent of

both counsel New Zealand Pacific Container Lines is now added as a plaintiff. It will hereinafter be called "the second plaintiff".

This brings me to the claim and counterclaim. The claim is for $997.66 for handling charges by the first plaintiff and $14,000 for unpaid freight for the defendant's consignments shipped to Samoa in 1992 on the vessels Baltima Marsh and Stoofl Stream chartered by the second plaintiff. These handling charges and freight were paid by the defendant by three separate cheques dated 30 November 1992, 1 December 1992 and 3 December 1992. It appears that after the cheques were paid and the first plaintiff released the consignments to the defendant, the latter then called the bank to stop payment of all three cheques. The defendant does not dispute he owes the amount claimed for handling charges and unpaid freight. What he says is that he stopped payment of the three cheques so that he can use the money to cover the costs of his taro consignment that went rotten when shipped on the vessel Baltima Marsh from Apia to Auckland on 19 October 1992. The defendant alleges that its consignment went rotten due to either the faulty refrigerated container which carried its consignment or the failure of the carrier to properly regulate the temperature of the container in transit. It is therefore counterclaiming for the value of its consignment and loss of profit which amount to NZ$18,000 in total. The case really focused on the defendant's counterclaim.

As the defendant does not dispute the claim for freight and handling charges, it should pay over the sum of $997.67 claimed by the first plaintiff as handling charges. The reason is that, apart from not disputing that part of the claim, the defendant cannot counterclaim against the first plaintiff for the carriage of its consignment of taros and taamus to New Zealand for the first plaintiff was not the carrier of that consignment.

Likewise, the first plaintiff was not the owner or charterer of the vessel that shipped the defendant's consignment to New Zealand. I therefore dismiss the counterclaim against the first plaintiff and hold the defendant liable to the first plaintiff in the sum of $997.66 for unpaid handling charges.

I turn now to the counterclaim against the second plaintiff. Essentially what the defendant says is that its taros and taamus which it purchased from planters were packed in non-aerated plastic bags after a portion of the consignment was inspected by an inspector of the produce guarantine division of the Agriculture Department. This produce guarantine inspector gave evidence and he says that he has been in his present occupation for five years. He usually inspected the defendant's taro consignments before they are shipped for export and the defendant's taros have always been exported in non-aerated plastic bags. He also says that there are no regulations for the kind of bag to be used for the export of taro, the only regulation is not to export rotten taro. He says though that aerated bags are better.

In respect of the taro consignment in question, the produce guarantine inspector went up to the defendant's premises at Vailoa on the afternoon of 19 October 1992. Twenty five bags of taro were emptied for his inspection. He also inspected another 210 bags of taro which appears not to have been emptied by merely looking at them. This seems to be normal practice, only part of a taro consignment is emptied for inspection and when the inspector is satisfied of that part of a consignment a certificate is then signed by him for the consignment to be exported. In this case the inspector says he was satisfied from his inspection that the

defendant's taro was in a condition suitable for export and he signed the appropriate certificate. The bags of taro were then placed in the refrigerated container supplied by the first plaintiff. There is no expressed evidence as to who owns this container but I infer from the evidence that the container belongs to the second plaintiff which is a container shipping line and used for shipment of goods on board the second plaintiff's container ships. The refrigerated container containing the defendant's taros and taamus was then taken down to the wharf on the evening of 19 October 1992 and loaded on the vessel Baltima Marsh which sailed from Apia on 20 October for Auckland. The ship arrived in Auckland on 30 October and according to the defendant's managing director the taro was rotten when the container was opened in Auckland.

The evidence by the defendant's managing director is that the defendant's taro for a number of years has been shipped in non-aerated bags to New Zealand in refrigerated containers and this was the first time any taro cosignment had gone bad on arrival in New Zealand. These taros were purchased from planters around the country. Other taro exporters also export their taros in non-aerated bags. None of these other taro exporters was called to given evidence to confirm the evidence by the defendant's managing director. In respect of this particular consignment, the taro was cleaned before packing. When the produce guarantine inspector arrived, some of the taro was already packed in non-aerated plastic bags and he simply looked at the taros. The defendant packed 500 bags of taros for export shipment. As to the container, the defendant's managing director says that the first plaintiff brought the refrigerated container to the defendant's premises a few days before the ship was to leave. The container

was then hot as it had not been switched on. When the container was filled with bags of taro there was hardly any hot air left in the container as it was filled with taro. He also says that 4.5°C or 5°C is the normal container temperature for taro shipped to New Zealand.

On arrival of the container in New Zealand, it was discovered that the taro had gone rotten. The defendant now counterclaims for the value of the taro and for loss of profit in the total sum of NZ$18,000.

For the second plaintiff, there is the evidence of the manager of the first plaintiff that they have taken shipments from the defendant on several occasions prior to this one. On this occasion, they prepared and cleaned a refrigerated container and took it up to the defendant's premises on 16 October 1992. On 19 October, the container was brought back loaded and taken to the wharf where it was connected to the power supply of the ship Baltima Marsh in order for the refrigerator to keep the container cool. This refrigerated container, like other reefer refrigerated containers, is fitted with a chart which records on a graph the temperature inside the container once the temperature is set and the refrigerator is switched on. The refrigerator for this container was switched on on 19 October here in Apia as it appears from the chart. According to this witness at 4.00pm on 19 October, the chart recorded a temperature of 5°C. The chart then recorded temperatures of 6°C for the next three days from 20 October when the ship sailed from Apia. After 22 October, the chart recorded daily temperature of 5°C, except for three days when the recorded temperature was 4.5°C, until the ship arrived in Auckland on 30 October. Overall the average daily temperature inside the container while in transit from Apia to Auckland was 5°C. I must note here that

there is a day difference between New Zealand and Samoa so that 30 October in New Zealand would be 29 October in Samoa as New Zealand is one day ahead of Samoa.

The manager of the first plaintiff also says that they did not receive any information from the defendant that its taro consignment was rotten until they sent a fax to the defendant as to why it had stopped payment of its cheques dated 30 November 1992, 1 December 1992 and 3 December 1992 which paid for freight and handling charges for the defendant's various consignments shipped to Apia on the vessels Baltima Marsh and Socofl Stream. The defendant's managing director reply was that its taro consignment had gone bad on arrival in Auckland and the defendant was therefore using the freight money to pay for its taro consignment. Subsequently, the first plaintiff received a report from a surveyor in Auckland together with photographs saying that the taro was in a bad condition on arrival in Auckland. The author of that report and photographs was not called to give evidence.

The manager of the first plaintiff also produced a copy of the bill of lading executed by the defendant as shipper of the container of taros and taamu. It is quite obvious from the bill of lading that the carrier was the second plaintiff whose name appears in big blue capital letters on the top left hand side of the first page. The bill of lading upon enlargement clearly contains a number of clauses limiting the liability of the carrier and its agents in some instances and exempting them altogether from any liability in other instances. Clause 14 of the bill of lading exempts the carrier as well as its agents and servants fromy any loss or damage to any cargo shipped in the carrier's refrigeration chambers

no matter how that loss or damage arose whether it was by the negligence, fault or error of judgment on the part of any servant of the carrier.

The plaintiffs also called the former Director of Agriculture, Tupuola Tavita, who had held that position for a number of years until the end of 1992. His evidence was that while he was the head of the Agriculture Department ventilated bags like sugar and flour bags were stipulated for packing taros before placed in a refrigerated container for export. The reason for this is to allow for air ventilation to reach the taro. He also says that the day before he came to give evidence, he called up the Agriculture Department and also spoke to the deputy head of the produce guarantine division about the kind of bag to be used for taros and he was advised that the Department was still stipulating ventilated bags. Those people whom this witness spoke to in the Agriculture Department were also not called to give evidence. In any event this witness says that non-aerated plastic bags are not allowed for packing taros for export and it will take much longer to cool taro in a non-aerated plastic bag than in a ventilated bag. He also says that 5°C is approximately equivalent to 42°F which should be the right cooling temperature for taro shipped for export in a container.

The plaintiffs also called Letelemaana Rees who is a refrigeration engineer and has been in the refrigeration trade for 36 years. He also services the refrigerated containers used by the first plaintiff. He says taht a refrigerated container of the kind used here has a temperature control board affixed to the container. A chart is fitted to this temperature control board to record the temperature inside the container from time to time. The temperature control board also has a time clock which turns on from the time the container's refrigerator is turned on until the time

the refrigerator is switched off. The temperature at each point in time is recorded on a graph on the chart. In this case, this witness says that it appears from the graph on the chart that the temperature of the container was set at 5°C on 19 October. However the temperature does not remain constant but normally fluctuates from time to time and because of that there is a cut-off and a cut-in point effected by the refrigerator itself in order to bring the temperature to the level of temperature which had been set for the container. In that way, the temperature does not go too high above or too low below the temperature set for the container. In this case the temperature was set at 5°C on 19 October then it went up to 10°C then it came down again and from 23 to 30 October the temperature was at 5°C. In this witness's opinion the refrigerator was doing its job properly.

Coming now to the crucial question whether the second plaintiff as carrier was negligent in carrying the defendant's taro consignment to New Zealand, I am of the clear view that it was not. The evidence of the chart shows that the refrigerated container was doing its function properly and I accept the evidence of Letelemaana Rees who has had 36 years experience as a refrigeration engineer and is quite familiar with the kind of refrigerated container in this case as he services the refrigerated containers used by the first plaintiff. As I understand this witness's evidence, the container maintained its proper temperature which was 5°C from the time the container was shipped from Apia to Auckland. The initial fluctuation in temperature was quite normal but the cut-in and cut-out operation of the refrigerator kept the temperature within range of the temperature of 5°C in which the refrigerator was set on 19 October.
I also prefer the evidence of Tupuola Tavita, the former

Director of Agriculture, to that of the produce guarantine inspector called by the defendant. In terms of experience and expertise in this area of packing, I accept that the former Director of Agriculture level of experience and expertise must be superior to that of the produce guarantine inspector who has only been in his present job for five years. I also accept the evidence by the former Director of Agriculture that the Department had stipulated for ventilated bags to be used for packing taros for export and non-aerated plastic bags were not allowed. Even the produce guarantine inspector stated in cross-examination that aerated bags were better for packing taros.

I was also not impressed by the actions taken by the defendant's managing director. His taro consignment arrived in Auckland on 30 October and he never informed the plaintiffs for more than a month that there was anything wrong with his taro. Then he paid for the freight of the defendant's consignments shipped on the second plaintiff's ships to Apia with three cheques dated 30 November to 3 December and then called the Bank to stop payment of those cheques for the reason he told the first plaintiff that his taro consignment had gone bad on arrival in Auckland. In other words the defendant's managing director knew when he signed the three cheques that he was not going to honour payment of those cheques as he was going to stop payment of all three cheques. So the cheques were only a means he used to uplift his consignments from the first plaintiff with the intention of not paying any freight at all. Then he comes up with this counterclaim more than a month after the arrival of the taro consignment in Auckland and says that the taro had gone bad on arrival. If that is really true, I would have expected the defendant's managing director to lodge a complaint with the plaintiffs as soon as the taro was found bad on arrival in Auckland but not more than a month later after

he had stopped payment of the three cheques he paid the plaintiffs. I find these circumstances very suspicious. I am also not prepared to accept the defendant's evidence that other taro exporters use non-aerated plastic bags to export their taros without any evidence from those other taro exporters that that was always the case with their taro exports.

The evidence by the defendant's managing director and the produce guarantine inspector were also that not all the taro was inspected as only 25 bags were emptied for inspection. Even though the produce guarantine inspector says he also looked at 210 bags of taros, the evidence by the defendant's managing director is that the defendant exported 500 bags of taros in this consignment. The defendant's managing director also says that what was involved in the inspection was looking at the taros. That would only be an external examination which may not reveal the internal quality of the taro. I do not accept that this kind of external examination is a safe and sound test of the internal quality of a taro whether it is hard, "susu" or dry especially as the defendant's taros are not self-grown but purchased from planters around the country.

There is also the exemption clause in the bill of lading which seems to protect both plaintiffs for liability in negligence. In view of the conclusion I have reached on other evidence perhaps it is not necessary to rely on the exemption clause.

In all then, I find the defendant liable to the first plaintiff in the sum of $997.66 for unpaid handling charges. I also find the defendant liable to the second plaintiff in the sum of $14,000 for unpaid freight. The counterclaim is dismissed.

Judgment is therefore given for the first plaintiff in the sum of $997.66 and for the second plaintiff in the sum of $14,000. The claim for interest of $253.58 is also allowed. Costs are awarded to the plaintiffs to be fixed by the Registrar.

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CHIEF JUSTICE