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IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0034 OF 2002S  
(High Court Civil Action No. 282 of 2002)

BETWEEN:

NAUTICAL PILOTS CO. (FIJI) LIMITED

Appellant

AND:

PORTS TERMINAL LIMITED

Respondent

Coram:

Reddy, P  
Smellie, JA  
Penlington, JA

Hearing:

Monday, 25th November 2002, Suva

Counsel:

Mr G. P. Shankar for the Appellant  
Mr H. Lateef and Ms B. Narayan for the Respondent

Date of Judgment:

Friday, 29th November 2002

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JUDGMENT OF THE COURT

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This appeal concerns the imposition of demurrage or storage charges by the respondent under Regulation 13(1) of the Ports Authority of Fiji (Tariffs) Regulation 1995.

## Background

The respondent is a company owned by the Fiji Government. It was incorporated following the enactment of the Public Enterprises Act 1996. Up until then the Ports Authority of Fiji, created by the Ports Authority of Fiji Act Cap. 181 Rev. 1985 had the responsibility for the provision of all ports services and facilities in, inter-alia, the Port of Suva. The Public Enterprises Act effected a re-organisation. The respondent was established as a commercial arm and the existing Authority was reconstituted as the Maritime Ports Authority of Fiji (MPAF). There was a Re-organisation Charter issued under the authority of the Minister. That charter stipulated the activities of both the Respondent and MPAF.

As to the MPAF it was to be the landlord and regulatory authority for all maritime activities within the port. Initially it was to undertake the activities of landlord and property development, port and maritime regulation and licensing within the port and port state control.

The respondent on the other hand was to be responsible according to the charter, for the:

***“3.1.1 stevedoring and cargo handling in Suva and Lautoka ports;***

***3.1.2 pilotage both in designated ports and on coastal routes;***

***3.1.3 all aspects of warehousing in Suva and Lautoka ports;***

***3.1.4 local wharves at Suva and Lautoka.”***

The appellant is a company incorporated in 1996 to provide pilotage services. In 1998 it imported a hulmatic designed pilot vessel into Fiji. The vessel was shipped from Brisbane on the Princess Cathryn which arrived at the Suva Wharf on 9 October 1998. Because of the nature of the cargo the vessel was unloaded directly into the water by the MPAF. It was then docked at the wharf. The respondent took no part in the unloading of the vessel. The vessel was not physically on the wharf at any time.

On 12 November 1998 Captain Peckham, a marine pilot and a director of the appellant obtained a custom's clearance for the vessel. The customs dues on the vessel were paid through the appellant's shipping agent together with the extra charges for the customs officers special attendance to clear the vessel

The shipping agent for the appellant gave security for dockage and wharfage charges to be imposed by the MPAF. The vessel was subsequently removed from the wharf to another maritime location after it had been cleared by the MPAF.

On 15 December 1998 the MPAF issued an invoice for dockage and wharfage charges amounting to \$676.50 (inclusive of VAT). The amount levied was duly paid.

On 23<sup>rd</sup> January 1999 the vessel was released for use as a pilot vessel.

The Procedural History

In 1999 the respondent commenced an action in the Magistrates Court against the appellant. In an amended statement of claim the respondent pleaded, inter alia:

***“Due to the nature of the cargo (the hulmatic vessel being a boat) rather than physically taken into bond the hulmatic vessel was left at the dock.”***

The respondent alleged “a storage of the hulmatic vessel”. It claimed \$8,684.50 for demurrage and storage charges.

In an amended statement of defence the appellant denied the respondent’s claim. The appellant’s pleading incorporated an affidavit by Captain Peckham. The affidavit had been previously filed in another unrelated proceeding.

Captain Peckham confirmed that the vessel had been off loaded from the deck of the Princess Cathryn straight into the water alongside the wharf at Suva. The Captain deposed that the vessel

***“... Did not attract any demurrage because it was never in storage or bonded at Inland Freight Station.”***

Captain Peckham also deposed to the payment of the dockage and wharfage charges to the MPAF and the Customs clearance of the vessel.

On 18 January 2001 a hearing took place in the Magistrate's Court in the absence of the appellant or its counsel. (The hearing date had been obtained by another counsel without proper instructions.) The evidence for the respondent confirmed that the vessel "was placed in the water" and that the respondent classed the vessel as "cargo" which had been brought into Fiji. The evidence also disclosed for the first time the make up of the claim. It was calculated under Regulation 13(1) of the Ports Authority of Fiji (Tariffs) Regulation 1995 and Table 12 of that Regulation. There had been no pleading to that effect. Regulation 13(1) of the Ports Authority of Fiji (Tariffs) Regulations provides:

***"Storage charges - Cargo***

***13.(1) Subject to this regulation, where goods are stored on the Authority's premises the owner of those goods shall pay storage charges to the Authority calculated in accordance with Table 12."***  
***(The emphasis is ours)***

Table 12 is Appendix 1 to this judgment. For the purpose of the respondent's calculation it treated the vessel as having a cubic capacity of 200 cubic metres. The calculation was based on the rate for "covered storage" in Table 12. The result was then divided by 2 on the basis that the vessel was in "open storage" VAT was then added.

The Magistrate entered judgment against the appellant for the amount claimed together with costs. In giving judgment he recorded the respondent's contention that the vessel did not come into the wharf under its own steam but rather it was brought into port on a ship and was therefore "cargo" and subject to demurrage charges. The Magistrate did not set out or analyse the components of Regulation 13(1).

On 13 March 2001 the appellant moved to set aside the judgment obtained on 18 January 2001. After a hearing on 15 June 2001 the Magistrate made an order setting aside the judgment against the appellant on condition that the sum of \$8,684.50 was paid into Court within 21 days together with costs \$200. The order was not complied with by the appellant.

On 18 February 2002 the appellant applied to set aside or vary the setting aside order. Alternatively the appellant sought leave to appeal against the latter order. After hearing counsel the Magistrate dismissed the appellant's application. He held that it was misconceived in that it had been brought under O. 30 r.5 which allows the Court to set aside a judgment obtained in the absence of a party. He ordered \$120 costs against the appellant.

The appellant thereupon sought the leave of the High Court to appeal out of time. It contended that the respondent did not store the vessel and accordingly demurrage and storage charges were not properly payable. It further contended that the judgment obtained on 18 January 2001 was irregularly obtained and that the appellant as of right was entitled to have it set aside; and as to the delay in bringing the

application the appellant asserted that it was not responsible for that delay.

The application for leave to appeal out of time was heard by Pathik J. on 15 July 2002. After hearing argument the Judge dismissed the application on the grounds that there had been excessive delay which he held had not been explained. Counsel did not go into the merits of the claim and the Judge, likewise, did not do so.

The appellant then came to this Court on 2 July 2002. It moved for leave to appeal out of time. After hearing argument leave to appeal was granted by Reddy P. on terms. Those terms were subsequently complied with by the appellant.

### The Contentions on this Appeal

On this appeal the case for the appellant is that the respondent did not have a cause of action because as the result of the events which occurred it was not entitled to charge demurrage or storage as the vessel was not stored on the premises of the respondent at any time but rather it was discharged into the water and then docked along side the wharf for which the appellant was properly charged dockage and wharfage charges by the MPAF, which the appellant duly paid.

The appellant in support of its case made the following submissions.

(1) that the sea in front of the wharf where the vessel was docked did not form part of the respondent's premises; (2) that the respondent did not at any time, do anything

in relation to the vessel (3) that the vessel was not landed on the wharf and was never in open storage; (4) that it was not placed in any form of covered storage ; and (5) that demurrage or storage charges can only be imposed under Regulation 13(1) if the item is on the land and is "**stored**" by the respondent in open or closed storage.

The case for the respondent on the other hand is that, in the events, which occurred it was entitled to charge demurrage. It contends that the vessel did not come into the wharf under its own steam but rather it was brought into Fiji as cargo (as found by the Magistrate). The respondent says that the vessel, being "cargo" entitled it to charge demurrage thereon.

The respondent further contends that "**the premises**" of the respondent in terms of Regulation 13(1) include the sea in front of the wharf. It says that that area together with the wharf are part of the designated Port of Suva as set out in the Declaration of Ports which appeared in the Fiji Royal Gazette published on 27<sup>th</sup> March 1987 under the Authority of Section 3(1) of the Ports Authority of Fiji Act. Mr Lateef submits that prior to the Reorganisation the Ports Authority of Fiji had jurisdiction over that area and that since the Reorganisation the respondent has assumed jurisdiction over it for the functions it performs.

During the argument Mr Lateef was referred by us to the designated functions of the respondent under the Reorganisation Charter. He conceded in response to questions from the bench that the respondent had not, in relation to the vessel carried out any stevedoring or cargo handling function and that the vessel had not



been on a wharf or in a warehouse at any time. The effect of these concessions in our view is that the respondent did not do anything in relation to the vessel (which is what the appellant contended).

### Our Conclusions on the Appeal

The starting point in our consideration of this appeal is the statutory scheme. First there is the Ports Authority of Fiji Act under which the Ports Authority of Fiji had responsibility before Reorganisation for the provision of all the ports services and facilities in the Port of Suva. Under that Act it was authorised to make various charges. Under Section 28(1) it was entitled to levy dockage dues; under Section 29(1) port dues; under Section 30(1) wharfage dues, and under Section 31 rates. Section 63 authorises the making of regulations.

The Ports Authority of Fiji (Tariffs) Regulation 1995, to which earlier references have been made, was promulgated under the authority of Sections 28, 29, 30, 31 and 63 of the Ports Authority of Fiji Act.

That regulation specifies the charges which the Authority could impose for a wide variety of services and activities connected with the operation of the port and the cargo coming into and going from the port. The breadth of the regulation is evident from the topics covered - port dues, wharfage charges, dockage dues, tug services, labour hire charges, miscellaneous labour charges, mechanical plant hire charges, storage

charges, empty container storage charges, hopper storage charges, fresh water supply charges, washing and steam cleaning charges, weighbridge charges, pilotage dues, fumigation charges, incinerator charges, cooler charges and freezer charges.

Here it is to be noted that the phrase - "**stored on the Authority's premises**" which appears in Regulation 13(1) also appear in Regulation 14(1) relating to the storage of empty containers. It is also to be noted that the phrase - "**on the Authority's premises**" - is used in the regulations relating to hopper storage charges (Regulation 15) washing and steam cleaning charges (Regualtion 17) fumigation charges (Regulation 20) and incinerator charges (Regulation 21). All these activities pertain to matters on the land and not on the sea.

The terms "**premises**" "**store**" "**open storage**" and "**closed storage**" are not defined in either the Act or the Regulation. On the other hand the term "**goods**" is defined in Section 2 of the Ports Authority of Fiji Act to include "**animals, carasses baggage, and other movable personal property of any kind whatsoever**" In our view that definition is wide enough to cover a vessel, at least, when it is on the deck of another vessel or is on the dry land.

As we have already noted the Public Enterprises Act effected a significant change. It created two entities. It divided up the functions of the Ports Authority of Fiji and allocated them in accordance with the Reorganisation Charter. We were informed from the Bar that now some of the charges authorised by the Regulation are imposed by the MPAF while others are imposed by the respondent.

Having considered the designated functions of the respondent under the Reorganisation Charter it seems to us that the respondent is concerned, amongst other things, with cargo once it has been brought off the ship and on to the shore. On the facts of the present case while the vessel could be described as "cargo" - and we do not disagree with the Magistrate's finding - it was never landed on the wharf. Indeed it was never on the land and so it was never either in the open on the dry or under cover. The respondent had nothing to do with the vessel. That was the effect of Mr Lateef's concessions.

In our view therefore the vessel being in the water in front of the wharf was plainly a dockage and wharfage situation which was within the MPAF's area of responsibility; and that was exactly how the MPAF saw it. In these circumstances the MPAF levied dockage and wharfage charges on the vessel under sections 28(1) and 30(1) of the Ports Authority of Fiji Act and Regulations 4(1) and 5(1) of the Ports Authority of Fiji (Tariffs) Regulation 1995; and we think correctly so.

Did then the respondent also have the right in the particular circumstances to impose demurrage or storage charges on the appellant? In our view a charge or due authorised by statute can only be imposed if the necessary pre conditions for the making of the charge or due are satisfied and if the amount levied is within the statutory authority permitting the charge or due to be made. To the extent there is any ambiguity or equivocality in the authorisation the benefit of that doubt should be given to the subject.

In our view for the respondent to justify the valid imposition of demurrage or storage charges on the appellant under the Regulation 13(1) of the Ports Authority of Fiji (Tarriffs) Regulation 1995 it had to show ;

- (a) that the vessel was within the definition of **“goods”** in the Ports Authority of Fiji Act; and
- (b) that it had been stored; and
- (c) that the storage was on the respondent's premises.

.Here we have read **“the respondent's”** for **“the authority's”** in Regulation 13(1) because of the effect of the Reorganisation Charter.

As we have said earlier we are satisfied that the vessel was **“goods”** within the definition set out in the Ports Authority of Fiji Act, which would apply to the Ports Authority of Fiji (Tarriffs) Regulation which was made under the authority of that Act.

That then leads to the second question. Was the vessel stored at any time? In the Shorter Oxford Dictionary the word “store” in relation to “goods” is defined as:

**“deposit in a store or warehouse for temporary safe keeping.”**

And in the Random House Dictionary of the English Language College Edition 1968 the word "store" in relation to "goods" is defined as:

***"- to deposit in a storehouse warehouse etc  
- to take in or hold supplies goods etc for future use."***

Having regard to what happened to the vessel in our view there was no storage on the land either in the open or in a closed place. The vessel was in the sea. We do not consider that when the vessel was in the sea it could be said to have been stored there. Further it is clear from Mr Lateef's concessions that the respondent did not in any event take any action at all in relation to the vessel whether on the land or in the sea. We therefore conclude that the respondent was unable to satisfy the second requirement.

That notwithstanding, we now consider the third requirement. Was the vessel stored ***"on the respondent's premises"***? In our view the answer to that question must be in the negative. We now set out our reasons for that conclusion.

First the word ***"premises"*** as we have already noted is not defined in either the Act or the Regulation. What then does the word mean? Mr Shankar helpfully cited *Hobhouse and Others v. Wall* [1963] 2 All E.R 604. In that case Upjohn LJ said at page 608

***"We were very properly referred to a number of authorities as to the meaning of the word "premises," and, indeed, there is a long list to be found set out in Stroud's Judicial Dictionary (1953), 3rd ed., Vol. III, p.2272 et seq. As Turner L.J. pointed out in Lethbridge v. Lethbridge: "there is no doubt, on the other "hand, that the word admits of a limited as well as an enlarged***

*“sense, and that the context and surrounding circumstances must “determine whether it was used in an enlarged or in a limited” sense.” For my part, I do not think that one is really assisted by authorities on wills or other statutes. We must construe the words of the section and, as I have already said, I do not think it is one which is easy of solution.”*

Hobhouse v. Wall was approved by the House of Lords in *Manunsel v Olins* [1975] AC 373 (HL) [1975] 1 All.ER 16 (HL), also cited by Mr Shankar.

The approach put forward by Upjohn LJ requires an examination of whether the context and the surrounding circumstances demand an enlarged sense or a limited sense. In terms of this case does the term *“premises”* extend to the sea in front of the wharf? We think not. Giving the word its ordinary and natural meaning we consider that *“premises”* would not include the sea. Rather it connotes a place or building or similar structure or at least an area on the land. We do not consider that the Declaration of Ports in the Fiji Royal Gazette published on 27 March 1987 assists the respondent.

Secondly as we have already pointed out the phrase *“on the respondent's premises”* is repeated in several regulations authorising a variety of charges or dues. In all those other regulations the activities referred to take place on the land. They do not and in deed could not take place on the sea.

And thirdly we cannot see how the vessel could be said to be *“on the respondent's premises”* if the premises included the sea when the vessel was in fact

in the sea and not on the sea.

We therefore conclude that the respondent could not bring a valid claim for demurrage or storage charges, in the circumstances of the appellant's vessel, within the four corners of Regulation 13(1). Accordingly it was not legally entitled to levy the charge imposed on the appellant.

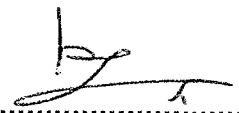
As we have already noted the Magistrate did not address Regulation 13(1). It was before him but it seems that he was not invited to test the matter in the way in which we have done. We think that he might well have been led into error by the submission that the vessel as "cargo" did not come into the port "*under its own steam*".


We think that the way the vessel came into the port is an irrelevant consideration. Had the Magistrate addressed the correct question and applied the proper interpretation of Regulation 13(1) as we have found it to be then we are confident that he would have rejected the respondent's claim.

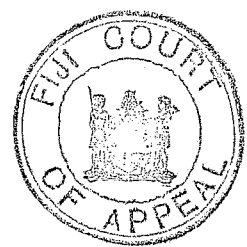
For completeness we note that the Ports Authority of Fiji (Tariffs) Regulation 1995 has now been repealed and has been replaced by the Maritime and Ports Authority of the Fiji Islands (Tariffs) Regulations 2001 which came into force on 1 July 2001.


**Result and Costs**

For the reasons given the appeal is allowed. The respondent's action fails. The Judgment in the Magistrates court is vacated. There will be costs to the appellant in the sum of \$750.00. The earlier costs orders against the appellant in the Magistrates Court and the High Court are vacated.

  
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Reddy, P

  
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Smellie, JA



  
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Penlington, JA

**Solicitors:**

Messrs. G. P. Shankar & Company, Ba for the Appellant  
Messrs. Lateef & Lateef, Suva for the Respondent



APPENDIX 1

TABLE 12

Total charge for number of days or part of a day of storage for each tonne or part of a tonne of goods

| Numbers of days After Relevant Day   | Goods other than In FCL Containers |              | Goods in FCL Containers  |                          |
|--------------------------------------|------------------------------------|--------------|--------------------------|--------------------------|
|                                      | Covered Storage                    | Open Storage | Each Small FCL Container | Each Large FCL Container |
|                                      | \$                                 | \$           | \$                       | \$                       |
| 1.....                               | ...                                | ...          | ...                      | ...                      |
| 2.....                               | ...                                | ...          | ...                      | ...                      |
| 3.....                               | ...                                | ...          | ...                      | ...                      |
| 4.....                               | 1.85                               | 0.95         | 24.50                    | 48.80                    |
| 5.....                               | 2.30                               | 1.15         | 30.65                    | 61.20                    |
| 6.....                               | 2.75                               | 1.40         | 36.80                    | 73.60                    |
| 7.....                               | 3.20                               | 1.60         | 43.25                    | 86.10                    |
| 8.....                               | 3.80                               | 1.90         | 51.25                    | 102.20                   |
| 9.....                               | 4.40                               | 2.20         | 59.25                    | 118.35                   |
| 10.....                              | 5.00                               | 2.50         | 67.45                    | 134.80                   |
| 11.....                              | 5.60                               | 2.80         | 75.45                    | 150.90                   |
| 12.....                              | 6.25                               | 3.15         | 83.85                    | 167.70                   |
| 13.....                              | 6.85                               | 3.40         | 91.95                    | 183.85                   |
| 14.....                              | 7.45                               | 3.70         | 99.99                    | 199.95                   |
| Charge for each week or part of week |                                    |              |                          |                          |
| 15 and subsequent days               | 5.50                               | 3.00         | 75.00                    | 148.00                   |