IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA
CIVIL JURISDICTION

CIVIL APPEAL NO: ABU 0017of2007
[On Appeal from a Judgment of the High Court, Suva in Civil Action No. 92of 2004]

BETWEEN:

KABARA DEVELOPMENT COPORATION LIMITED

Appellant

AND:

ATTORNEY GENERAL OF FIJI

1st Respondent

THE MINISTER FOR TRANSPORT & CIVIL AVIATION

2nd Respondent

Coram: J. Byrne, JA
D. Pathik , JA
D. Goundar, JA

Counsel: R. Matebalavu for the Appellant
Ms. S. Levaci & Ms. K. Vuibau for the Respondents

Date of Hearing: 17th September, 2009

Date of Judgment: 16th October, 2009

Judgment of D. Pathik, JA

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[1] I have had the advantage of reading the judgment of my brother Judges Byrne JA and Goundar JA and am in full agreement with their decision and the orders proposed by them.

[2] I would, however, like to make some observations of my own touching on matters pertaining to **'termination of contract'** herein by dealing with contract of service provided by ships and vessels under the Shipping Law in so far as it affects the contract in this case.

[3] It is the appellant's contention that the contract for the extended period of ten years was unlawfully terminated.

[4] The issue for the court's determination is whether that was so or not.

[5] The appellant's services were terminated by letter dated 20th December 2004 by the Respondents on the ground that the appellant's vessel "Tai–Kabara" failed to provide services on two consecutive occasions between 8 October and 3 December 2004.

[6] Under the initial contract of three years it was required that the vessel **"must be maintained in a <u>seaworthy condition</u> and continue to have all safety certification and to carry all necessary safety and navigation equipment". [emphasis mine].** Failure in this regard would be a cause for termination of the contract.

[7] It will be seen in this case that the appellant as the 'contractor' failed to provide services albeit only on two consecutive occasions. However, in October 2004 when the vessel was carrying passengers and cargo it was discovered by the owner [appellant] that there was malfunctioning of the generator. Inspection was carried out and defects were found. Consequently the vessel was considered an **unsafe vessel** and had to be dry-docked pursuant to a report prepared by Misaela Vakararawa.

[8] For terminating the contract the respondent relies on a clause in the contract ['Call for Tenders'] which reads:

> **"The principal may cancel the contract if the Contractor .... fails for reasons other than weather conditions or <u>Force Majeure</u> on two [2] consecutive occasions to operate a service nominated in the service schedule."**

[9] With the above as the background I wish to add to what my brother Judges have said in their Judgment when dealing with the issue whether the contract was validly terminated.

[10] I agree with them that **'force majeure'** does not apply in this case.

[11] This clearly was a case of an **'unseaworthy'** vessel with so many defects found in it. These defects have been listed by the learned Judge in the High Court which leaves no doubt that the vessel was neither fit to carry passengers nor cargo. In the light of decided cases, the vessel will not be regarded as 'seaworthy'.

[12] In this case the learned counsel for the appellant was making a bold attempt to convince the court that this was a case of 'force majeure' which it was not with the view to enabling the appellant to keep the contract. He did not say anything about seaworthiness of the vessel.

[13] That contract entered into by the appellant involved providing shipping services, as already stated, to maintain the vessel in **'a seaworthy' condition and continue to have all safety certifications and to carry all necessary safety and navigational equipment."**

[14] The appellant knew what the contract involved and in shipping law there is also an **implied warranty** that the ship will be seaworthy, but here it was specifically stated that it had to be 'seaworthy'. Hence there was a **warranty of seaworthiness.**

[15] In the case of **National Trading Corporation Ltd –v- Stuart Hugget & Carpenters Fiji Limited MBF** *[45 FLR, 1999 page 41]* in the High Court I had occasion to deal at some length with what the word 'seaworthiness' means and what it imports.

[16] Here it was just as well the vessel was dry-docked because of defects found, otherwise casualties that befell the sinking of vessels like Ovalau and the Princess Ashika of just a few weeks ago could have occurred. It was no use being wise after the event. It could be that the respondent's liability would have been too great had some incident occurred due to defects in the vessel.

[17] The Marine Department was very wise in terminating the contract in such circumstances. I would however like to say this that proper legal advice should always be taken when entering into contract of service by ships and vessels as there are some special laws and rules pertaining to maritime matters. We should learn from bitter experience of causalities that have occurred in Fiji waters as a result of not complying with the legal requirements with the resultant loss of lives and damage to cargo and ships amounting to millions of dollars.

[18] The appellant has no ground to talk of unlawful termination in this case when the vessel was not seaworthy.

[19] I think I should seize the opportunity to state here particularly for the benefit of people involved in marine matters what the words 'seaworthy' and 'seaworthiness' mean in shipping law with reference to decided cases.

[20] The House of Lords in **Steel et.al –v- The State Lines Steamship Company** [1877]3 App Cas. 72 held, inter alia, that "**there was an implied engagement to supply a seaworthy ship**". The **Lord Chancellor** in his judgment on the meaning of the word **seaworthy** in this context stated thus:

> **" By 'seaworthy', my Lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon that question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract."**

In regard to '**seaworthiness**', for the principles applicable to this appeal, I would like to refer to the following passage from the judgment of **Lord Blackburn** in **Steel** [supra at p86] which I consider apt:

> **"I take it my Lords, to be quite clear, both in England and in Scotland, that there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, <u>unless something be stipulated which should prevent it, that the ship shall be fit for its purpose</u>. That is generally expressed by saying that it shall be seaworthy; I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' <u>not merely that they should do their best to make the ship fit, but that the ship should really be fit</u>. I think it is impossible to read the opinion of Lord Tenterden, as early as the first edition of Abbott on Shipping, at the very beginning of this century, of Lord Ellenborough, following him, and of Baron Parke, also in the case of Gibson –v- Small [4 H.L.C 353], without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of contract to carry on board ship."** [emphasis added]

Lord Blackburn in **Steel** [supra at p.87] goes on to say and this is pertinent:

> **"In the case of Kopitoff –v- Wilson, where I had directed the jury that there was an obligation, I did certainly conceive the law to be, that the ship-owner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and bona fide endeavoured to make her fit." [emphasis mine].**

It was stated in **Kopitoff –v- Wilson & Ors** [1876] 1 QBD 377 [in the head note] that *"in every contract for the conveyance of merchandise by sea there is in the absence of express provision to the contrary, an implied warranty by the ship-owner that his vessel is seaworthy".*

[21] Also Parke B. in the case of **Dixon –v- Sadler** [1841] 5M & W 405 at 414 [E.R. Vol 151 p.172] [approved in **Jessie Hedley [Pauper] –v- Pinkney & Sons Steamship Company Limited** [1894] A.C. [H.L.] 222 at 227] defined seaworthiness of vessel thus:

> **"..... it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall lie in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it."**

Conclusion

[22] In this case the specific provision in the earlier contract requiring the vessel to be seaworthy has been broken as a consequence of the numerous defects in the vessel referred to in detail by the trial Judge in his judgment.

[23] The Appellant's assertion that it made efforts to find a substitute vessel and that it had an unblemished service record are of no avail in law. The appellant should not merely "**do its best to make the ship fit, but that the ship should really be fit**" [Steel, supra].

[24] Even if there was no specific requirement as to seaworthiness, there is in law an implied warranty in that regard and that had also been broken in this case which entitled the Respondent to terminate the contract.

[25] To conclude, whilst agreeing with the reasons given by my brother Judges for holding that the termination of the contract was warranted and legal, I find that the **un-seaworthiness** of the vessel in itself was a weighty enough reason to terminate the contract.

[26] I also agree that the appeal must be dismissed with costs in the sum of $5000.

Dated at Suva this 16th day of October 2009

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Hon. Justice D. Pathik

Judge of Appeal