

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 182 of 2014

BETWEEN : **VITI FOODS LIMITED** a limited liability company duly incorporated and having its registered office at Lot 1, Kaua Road, Laucala Beach Estate, Nasinu.

Plaintiff

AND : **NEW INDIA ASSURANCE COMPANY LIMITED** a limited liability company duly incorporated and having its registered office at Greig Street, Suva.

Defendant

COUNSEL : Mr. E. Narayan with Ms. K. Singh for the Plaintiff.

Mr. G. O'Driscoll for the defendant.

Date of Hearing : 30th May, 2016

Written Submissions : 14th June, 2016 and 27th June, 2016

Date of Judgment : 15th July, 2016

JUDGMENT

- [1] The plaintiff exported to India 1000 cartons of canned fish in the ship "Yellow Moon / 1114" from Suva under the Bill of Lading No. 500015045 dated 23rd March 2011. The shipment was stored at the Maersk Storage Yard and part of the consignment was damaged by fire that erupted in the yard due to an explosion. According to the plaintiff value of the consignment was US\$31,440.
- [2] This consignment was insured with the defendant and when the plaintiff made the claim the defendant offered US\$1,729 on the basis that due to the fire only 55 cartons were damaged and the balance 945 cartons were saleable.
- [3] The plaintiff instituted these proceedings to recover the value of the entire consignment from the defendant.
- [4] At the pre-trial conference the parties agreed that the following are the issues to be determined at the trial;
- I. Did the plaintiff by way of mitigating its loss seek to re-ship the intact cartons but they were lost and/or destroyed while in the care, custody and control of Maersk storage facility to where they were shipped and unloaded?
 - II. Whether the plaintiff is entitled for full indemnity for the losses sustained amounting to US\$31,440.00 in terms of Marine Open Policy No. 922623/MRO3122430056?
 - III. Whether the plaintiff is only entitled to partial indemnity for the losses sustained amounting to US\$1,729.00 in terms of Marine Open Policy No. 922623/MRO3122430056 as assessed by the defendant?
 - IV. Is the plaintiff entitled to interest on any sum awarded at such rate and for such period as this honourable court shall think fit, costs and any further remedy or relief this Honourable court deems just?

V. In the event the court finds that the defendant's assessment of the loss is correct as per issue III, is the plaintiff entitled to its costs on full indemnity basis?

- [5] The plaintiff at the trial called two witnesses to testify; the Risk and Insurance Officer of C.J. Patel & Company of which the plaintiff company is a subsidiary and the Insurance Broker. Both these witnesses were not very well conversant with the factual position of the case. Their evidence was based on the documents tendered in evidence. The facts pleaded in the statement of claim that 55 cartons out of 1000 carton were destroyed by fire and the balance 945 cartons were saleable, the defendant offered to indemnify for the destroyed 55 cartons and that the plaintiff intended to re-export unaffected cartons were facts admitted by both parties. Therefore the main issue for determination is whether the plaintiff is entitled to be indemnified for the balance 945 cartons of the consignment.
- [6] It is common ground that the insurance policy also covered the loss of or damage to the consignment caused by fire or explosion.
- [7] The plaintiff's own pleadings show that only 55 out of 1000 cartons were damaged. The documents (P10, P11 and D1) tendered in evidence show that the plaintiff was making arrangements to re-export the reaming cartons of the consignment to see whether they could be sold in Fiji with the intention of minimising the loss.
- [8] The document "P7A" is a document prepared by the plaintiff company. In the said document it is stated as follows;

As a consequence of this unforeseen circumstance, the product cannot be sold as Machli Tuna because in doing so, it will give rise to misinformation as far as the label is concerned.

However, that does not warrant the product inedible as shown in the organoleptic from Enviro Laboratory (India), the products are acceptable for human consumption.

[9] This evidence shows that the contents of the remaining 955 cartons were suitable for human consumption although quality may have gone down to a certain extent. In the circumstances the plaintiff should have brought the remaining 955 cartons back as it intended, to ascertain the exact loss caused by the fire. The plaintiff was not able to bring the consignment back to Fiji because it was destroyed by the customs authority in Mumbai. Before destroying the goods were confiscated and the plaintiff was ordered to make certain payments to the customs.

[10] Paragraph (i) of the order (D1) of the Additional Commissioner of Customs (Import) reads as follows;

I confiscate the goods imported vide Bill of Entry No B/E No. 3487748 dated 12.05.2011 under Section 111(d) and (m) of Customs Act, 1962. However, I give an option to the importer to redeem the goods which were unaffected by fire for re-export to the same supplier on payment of fine of Rs. 50,000/- (Rupees Fifty Thousand only), under section 125 of the Customs Act, 1962. The option to redeem goods, if exercised, shall be done within Fifteen days of the receipt of this order. The goods shall be released only on payment of appropriate duty, fine and penalty and other dues applicable.

[11] Since the plaintiff failed to comply with the above order the custom authority in Mumbai destroyed the remaining cartons of the consignment.

[12] It is the plaintiff who brought this action and therefore, the burden of proving the matters averred in its pleadings is fairly and squarely on the plaintiff. The evidence adduced by the plaintiff does not prove that the remaining cartons of the consignment were damaged by fire for the defendant to become liable to indemnify the plaintiff. It appears from the evidence that the 945 cartons which were not damaged by fire has been destroyed by the Indian customs authorities when the plaintiff failed to comply with order of the Additional Commissioner of Customs (Import).

[13] Once the pleadings are filed the matter the court has to adjudicate upon circumscribed in the pleadings. In this case the plaintiff has failed to aver in its pleadings or to adduce any evidence to show the basis on which it claimed damages for the 945 cartons which were not damaged by fire.

[14] For the above reasons I make the following orders.

ORDERS

- (1) The writ of summons of the plaintiff is struck out and the action is dismissed.
- (2) The plaintiff shall pay the defendant \$2000 as costs (summarily assessed) of this action.

 *Liyona Seneviratne*
Liyona Seneviratne,
JUDGE
15th July 2016.