

**IN THE HIGH COURT OF FIJI AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 157 OF 2013**

**BETWEEN** : **SESEFO SIKURI INOKE** and **SARAH INOKE** both of  
Martintar, Nadi.

**PLAINTIFFS**

**A N D** : **WILLIAMS AND GOSLINGS LIMITED** a limited liability  
company having its registered office at 80–82 Harris Road,  
Suva.

**DEFENDANT**

**Appearances** : Mr Roopesh Singh for plaintiffs

Mr N. Prasad for defendants

**Date of Hearing** : 13 March 2017

**Date of Judgment:** 15 August 2017

# **J U D G M E N T**

## **Introduction**

[01] The plaintiffs brought this action against the defendant seeking among other things damages in the sum of \$99,991.00 for breach of contract. The defendant denied the plaintiff's claim and stated that they are not liable for damages.

- [02] The court declined summary judgment by its interlocutory judgment delivered on 25 November 2014.
- [03] At the trial, the second named plaintiff, Sarah Inoke (*PW1*) gave evidence on behalf of the plaintiffs. The defendant called three witnesses namely Andrew Cotton (*DW1*), Radhika Raj (*DW2*) and Romana Andrews (*DW 3*). I will summarise shortly what each witness stated in their evidence in my discussion.

### **Factual backgrounds**

- [04] On 17 August 2012, the plaintiffs and the Defendant entered into a written contract by which the defendant was to pack and store the plaintiffs' belongings in a container at the defendant's yard in Lautoka for shipment on a later date to a destination overseas to be advised by the plaintiffs. While the goods were stored in the defendant's yard the container was flooded and water seeped into it and damaged the plaintiff's goods.
- [05] The plaintiffs alleges that there was an implied condition to ensure that the plaintiffs' belongings would be safe from flood and damage and that the defendant breached it. Alternatively, the plaintiffs alleges that the defendant owed the plaintiffs a duty of care to keep the plaintiffs' belongings safe from harm and damage.
- [06] At the defendant's request, the plaintiffs lodged a claim for compensation for \$99,991.00. The defendants refused to pay despite the plaintiffs' demand.
- [07] According to the defendant, there was a term of the Pack and Store Contract that once the belongings had been packed into the 40 foot container in which they were to be stored, the defendant would not be

liable for any damage sustained by the belongings. The defendant admits that the belongings sustained damage due to flood, but denied that all belongings were damaged or completely damaged. The defendant also denied that it had refused to release any undamaged belongings to the plaintiffs.

## **Discussion**

### *No liability issue*

[08] The first cause of action the plaintiffs rely on is that the defendant breached an implied condition of the document of Storage of Personal Effects (“*the contract*”) that the defendant would keep the plaintiffs’ items safe from flood and damage. On the other hand, the defendant has pleaded that they are not liable in damages as they had issued an email stating that they will not be liable for any damage to the goods of the plaintiffs. The issue as following from these pleadings is whether the no liability email the defendant sent to the plaintiff forms part of the contract.

[09] The defendant claims that the contract comprises the email of 13 August 2012 sent to Sarah by Radhika (“DE2”). The email reads:

*“Dear Sarah,*

*“Thank you for choosing WG to do your packing. Our team can be at your house at 9.00am to commence packing. If we damage anything during the packing then yes we are liable to pay you.*

*“However, **once goods have been packed, we cannot be held liable then.***

*“I’d recommend you take and (sic) insurance cover for goods whilst it’s in storage. We can arrange this for you. Our charges are 4% + Vat of the total value declared to us.*

*“Please let me know if your (sic) any further queries, I’ll be happy to assist.*

*“Kind regards*

*“Radhika”*

[10] Sarah responded to the email and says:

“Hi Radhika

“Can you quote me for \$25,000 insurance please.

“Regards

“Sarah Inoke”

- [11] The contract between the parties was for packing and storage of goods, by which the defendant was to pack and store the plaintiffs' belongings in a 40 foot container at the defendant's yard in Lautoka for shipment on a later date to a destination overseas to be advised by the plaintiffs.
- [12] The fundamental obligation of the defendant under the contract includes not only packing but also storing.
- [13] By the no liability email, the defendant seeks exclusion of liability for damages whilst the goods were in storage.
- [14] The parties' ability to control the content of their contracts is not unrestricted, however both the courts and Parliament may interfere to prevent the inclusion and use of terms that are regarded as 'unfair'.
- [15] Clauses which purport to exclude or to limit liability for breach of contract are common form of what are referred to as 'exemption clause'. Exemption clauses are an important feature of modern contract. The exemption clause is an important device for allocating the risks of the contract between the parties.
- [16] The defendant relies upon an exemption clause contained in an email sent to the plaintiff as a defence to liability. In other words, the defendant relies upon an exemption clause which is not in the contract itself.

[17] It is recognised that in order to be able to rely upon the exemption clause as a defence to liability, the party seeking to rely upon the clause has the burden of establishing that the exemption clause was incorporated and covers the liability which has occurred in the circumstances in which it occurred.

[18] The exemption clause stated in the email had not been incorporated into the signed agreement between the parties. I would, therefore, find that no liability clause found in the email does not form the content of the agreement between the parties. As such, the defendant cannot rely on the purported exemption clause contained in the email to exclude or limit liability for breach of contract.

*Liability issue*

[19] The second issue that need to be determined by the court is whether the plaintiffs suffered loss and damages due to the breach of contract and negligence of the defendant.

[20] The defendant agreed to pack and store the plaintiffs' items mentioned in the list of items in a container and place at the defendant's yard until further advice by the plaintiffs.

[21] While the goods were in storage with the defendant in their container, it was discovered that water had seeped into their container due to flash flood. There was water damage to the plaintiffs' items. The plaintiffs claim a sum of \$99,991.00 against the defendant as compensation for water damage. The plaintiffs rely upon the quotations they obtained from the Courts Fiji Limited to claim such a sum as compensation.

[22] The defendant admits that the belongings were damaged as a result of water seepage. However, they denies that all were damaged or completely damaged.

- [23] Although the damages sustained by the goods were due to flood, the defendant, for one reasons or the other, did not plead act of god. The defendant's has pleaded even if it is liable to the plaintiffs, it is not liable for the amount claimed by the plaintiff.
- [24] According to the plaintiffs, the contract contains an implied condition, if not expressed, the defendant would keep the plaintiffs' items safe from flood and damage. The plaintiffs also allege that the defendant owed a duty of care to keep their belongings from damage and it failed in that duty. The defendant denies that any such duty of care existed.
- [25] The defendant agreed to pack and store the plaintiffs' chattels in a container. By this agreement, the defendant agreed to keep the goods safely for shipment. In other words, they (defendant) were under an obligation that they must store the goods safely until shipment. The fundamental obligation under the contract was to store the goods safely. Such obligation is implied in fact on the basis of an intention imputed to the parties from the actual circumstances. I would, therefore, find that the contract imposed a duty upon the defendant to store the plaintiffs' chattels safely.

*Defendant's breach of obligation*

- [26] I now turn to consider whether the defendants breached their obligation under the contract that they must store the goods safely. Whilst in the storage, water seeped into the container in which the plaintiffs' belongings were stored and damaged the belongings.
- [27] When visiting the defendant's yard, PW1 noted that the items were soaked in water, there was mud everywhere in the yard, and the boxes which had items such as clothes and books were not handled properly as the boxes were torn and the items were falling out of it in the mud.

[28] Under cross examination, DW3 confirmed that there were a lot of containers in the yard when the flooding occurred, and out of all, only the container that had the plaintiffs' items inside was damaged.

[29] The fact that out of numerous containers in the yard only the container containing the plaintiffs' items got water inside when the flood occurred proves that either the container was not properly stacked so as to prevent water submerge or that the defendant had failed to store the plaintiffs' items in a water proof container. I would accordingly find that the defendant failed to exercise their duty of care towards the plaintiffs' personal effects and that as a result of that failure the plaintiffs suffered loss and damages.

#### *Damages*

[30] Let me now return to the issue of damages the plaintiffs would be entitled to as compensation.

[31] The plaintiffs claim damages in the sum of \$99,991.00. Their claim is based on the quotations they obtained from Courts Fiji Limited. They claim damages for all the items that were stored in the container. However, PW1 stated in evidence that her items were less than a year old and the damages should be more than \$70,000.00.

[32] The items that were stored in the container were used items. At the time when they give the items for storage they were more than a year old. PW1, during cross examination, admitted this.

[33] The quotations the plaintiffs had submitted are brand new items.

[34] There is evidence before the court, which I accept, that only some of the items that were stored in the container sustained water damage and that most of the items were dry and rescued. I also accept the evidence of the

defendant that some of the items were released to Sarah Inoke's daughter on her (Sarah's) request.

- [35] The dispute arose when the defendant refused to pay compensation as per the quotation the plaintiffs had submitted.
- [36] The defendant had assessed the damages through a Loss Adjuster, Andrew Cotton (DW1). He has submitted his report known as 'McLarens Report' to the court.
- [37] DW1 gave evidence that he is a Loss Adjuster. He assesses insurance claims for insurance companies for damage to property due to fire, flood and other events. For the purpose of assessment of water damage to the items whilst in storage, he visited the site and inspected the items. He had valued the loss at \$25,439.08. The inspection was carried out in 2016 when the damage occurred in 2012. He personally checked out each item damaged and undamaged and tested the undamaged item and took photograph of all the items. Very clear colour photographs are printed in his report.
- [38] DW1 when assessing damages had identified three separate costing methods which include: (1) Direct Replacement Cost on or about the date of loss, (2) Depreciated Value of the entire claim and (3) Depreciated Value of those items we regard to have been affected by water based on the inspection. In assessing damage, he had with him the quotations submitted by the plaintiffs. He had only deducted 25% of the claim made by the plaintiff for the damaged items considering assumed age of the items. In doing so, he had considered the period of time that has passed since the damage occurred. It is noteworthy that DW1 in the report states: *'...we are surprised by the relatively low level of damage noted during our detailed inspection of these assets.'*



- [39] I am satisfied with the McLarens Report on assessment of water damage. His independence was not in dispute. I would accept his assessment of water damage as independent. I accordingly allow special damages in the sum of \$25,439.00, as assessed by McLarens. This award of special damages will not preclude the plaintiffs from removing the items designated as 'No Damage'. Such items include: twin drawer dishwasher (\$2,174.25), LG Flat screen TV (\$2,666.00), clothes Dryer (\$1,199.33), 4 x Laser Printer Colour (\$1,333.33), 4 x Battery backups (\$213.97), HP Fax Machine (\$450.00), Photocopier (\$10,028.00), Mandolin and case (\$405.00), Pool Table (\$1,500.00) and 2 x chest of drawers (\$412.50). The figures indicated in the bracket are depreciated value as given in the McLaren's report. The defendant is to release these items to the plaintiffs, if not pay the sum of \$20,382.38 to the plaintiffs.
- [40] The plaintiffs also claim general damages for breach of the contract.
- [41] A breach of contract will occur where, without lawful excuse (e.g., frustration) a party either fails or refuses to perform a performance obligation imposed upon it under the terms of the contract.
- [42] In this case, the defendant had breached their obligation to take reasonable care to keep the items safely arising out of the implied terms of the contract. I find that the plaintiffs are entitled to claim general damages for breach of contract. I accordingly allow \$7,500.00 as general damages.
- [43] The plaintiffs are entitled to costs of these proceedings, which I summarily assess at \$2,500.00. All other claims including interest are declined.

### **Final Outcome**

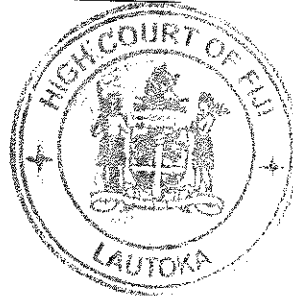
1. The plaintiff will be entitled to special damages in the sum of \$25,439.00.

2. The plaintiff will also be entitled to general damages in the sum of \$7,500.00.
3. The defendant will release to the plaintiffs all undamaged items as designated in the McLaren Quantum Assessment Report. If not, the defendant is to pay the plaintiffs the sum of \$20,382.38, being the depreciated value of the undamaged items.
4. The plaintiffs will be entitled to summarily assessed costs of \$2,500.00.

*M.H. Mohamed Ajmeer*  
15/8/17

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**15 August 2017**

Solicitors:

For plaintiffs: M/s Patel & Sharma Lawyers, Barristers & Solicitors

For defendant M/s Mitchell Keil Lawyers