

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 267 of 2014

BETWEEN : **RAMPRA EXPORTS (FIJI) LIMITED** having its registered office at
28 Rodwell Road, Suva, Fiji

PLAINTIFF

AND : **EXPORT FREIGHT SERVICES (FIJI) LIMITED** having its
registered office at Tamavua-i-wai, Suva, Fiji

FIRST DEFENDANT

AND : **SHIPPING SERVICES (FIJI) LIMITED** a limited liability company
having its registered office at 25 High Street, Toorak, Suva, Fiji

SECOND DEFENDANT

Civil Action No. 151 of 2016

AND : **EXPORT FREIGHT SERVICES (FIJI) LIMITED** a limited liability
company having its registered office at Lot 1, DP 7484, Tamavua-i-
Wai, Walu Bay, Suva, Fiji and having its postal address as G.P.O Box
13575, Suva, Fiji.

PLAINTIFF

BETWEEN : **RAMPRA EXPORTS (FIJI) LIMITED** a limited liability company
having its registered office at 28 Rodwell Road, Suva, Fiji.

DEFENDANT

Counsel : Mr. Naidu R. for Plaintiff
Mr. Solanki B. for 1st Defendant
Mr. Valenitabua S. for 2nd Defendant

Date of Hearing : 22nd, 23rd and 24th May, 2017

Date of Judgment : 12th September, 2018

JUDGMENT

Introduction

1. The Plaintiff filed the action against these Defendants in action No HBC 264 of 2014 and the 1st Defendant had filed an action against the Plaintiff in Action No 151 of 2016 and both actions were taken together for hearing as all evidence was common

to both actions and judgment accordingly relate to both cases *mutatis mutandis*. The reference to parties in the judgment are as in Action HBC 264 of 2014 (2nd Defendant is not a party in HBC 151 of 2016). The main contention between the parties is the payment of container detention charges beyond 14 day grace period for the return of the container from the clearance. The Plaintiff refused to pay container detention charges, when 1st Defendant instituted winding up action for non-payment of the accumulated debt due to non-payment of the container detention charges. The Defendants detained the goods in the respective containers. The 1st Defendant apart from selling freight rates also provided clearance of containers from the port and also provided bonded warehouse to keep the containers. 2nd Defendant is local agent of Maersk Shipping Line and both defendants claimed that they have a lien over the goods imported by the Plaintiff for non-payment of their dues including, container detention charges. The Plaintiff claims for damages for detention of its goods by the Defendants. Both Defendants claim container detention charges from the Plaintiff.

FACTS

2. On 12 September 2014 the plaintiff filed a writ of summons and statement of claim claiming:
 - (1) A Declaration that the said goods contained in container numbers: HLBU1317817, MSKU8640247, MRKU3745963, MSKU0762085 and MRKU2723548 are the property of the Plaintiff;
 - (2) A Declaration that the First and Second Defendants do not have a lien over the said goods;
 - (3) An Order that the First Defendant Export Freight Services Limited by itself and/or by its servants and/or its agents or otherwise howsoever do forthwith release and hand over to the Plaintiff, Rampra Exports (Fiji) Limited possession of goods more particularly toilet paper contained in container numbers: HLBU1317817 and MSKU8640247 and Treff cream biscuits contained in container number: MSKU0762085 that are currently stored at the First Defendant's bonded yard at Walu Bay in Suva;
 - (4) An injunction restraining the First Defendant Export Freight Services Limited by itself and/or by its servants and/or its agents or otherwise howsoever from interfering or hindering in any way with the Plaintiff's exercise of its right to take possession of goods more particularly toilet paper contained in container numbers: HLBU1317817 and MSKU8640247 and Treff cream biscuits contained

in container number: MSKU0762085 that are currently stored at the First Defendant's bonded yard at Walu Bay in Suva;

- (5) An Order that the Second Defendant Shipping Services (Fiji) Limited by itself and/or by its servants and/or its agents or otherwise howsoever do forthwith release and hand over to the Plaintiff, Rampra Exports (Fiji) Limited possession of goods more particularly giggles baby diapers contained in container number: MRKU2723548 that are currently at the Suva Wharf;
 - (6) An injunction restraining the Second Defendant Shipping Services (Fiji) Limited by itself and/or by its servants and/or its agents or otherwise howsoever from interfering or hindering in any way with the Plaintiff's exercise of its right to take possession of goods more particularly giggles baby diapers contained in container number: MRKU2723548 that are currently at the Suva Wharf;
 - (7) Damages in the sum of \$66,375.00 for expired Noodles;
 - (8) Damages for detention of goods;
 - (9) Damages for injury to business, loss of sales and revenue, damage to goodwill and reputation.
 - (10) Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the amount found to be due to the Plaintiff at such rate and for such period as the court shall think fit;
 - (11) Costs on an indemnity basis;
 - (12) Further or other relief.
3. This statement of claim was amended on 13th May, 2016 and accordingly statement of defences was amended, but counter claim of the 2nd Defendant was not amended. The reply to the counterclaim of the 2nd Defendant was not amended and contained in the copy pleadings in Civil Action 267 of 2014.
 4. There is no issue as to the following facts (as per the agreed facts in the pre-trial conference minutes in the 2 actions filed on 10 November 2016 and 26 January 2017 and following facts are admitted
 - a. The plaintiff is a limited liability company incorporated in Fiji engaged in the business of importing general grocery items, including instant noodles, biscuits, toilet paper, diapers etc from overseas countries and then either wholesaling in Fiji and or re-exporting to other Pacific Islands including Tonga.

- b. The Plaintiff imports goods into Fiji in containers owned by shipping lines including Maersk Shipping Line.
 - c. The first defendant is a limited liability company incorporated in Fiji and engaged inter alia in the business of custom brokerage, providing bonded warehouse facility and also wholesale shipping lines "freight rates".
 - d. 1st Defendant is the custom broker for Plaintiff and it also utilizes bonded yard facilities provided by them.
 - e. Kalgin International Freight Services is a freight forwarder who is in the business of whole selling freight rates to importers.
 - f. The second defendant is a limited liability company incorporated in Fiji and engaged in the business of providing shipping freight rates inter alia for Maersk Shipping Line and it is the local agent for Maersk Shipping Line in Fiji.
 - g. The Plaintiff buys shipping freight rate from Defendants for its business of importing goods.
 - h. On or about 17 October 2012 2nd Defendant, being the agents in Fiji for Maersk Shipping Line informed all their customers that they would be implementing a Container Detention charge if containers were not emptied and returned to them within 14 days from the date of arrival in Fiji.
 - i. The Plaintiff was made aware by 1st Defendant on 19 October 2012 of those detention charges.
5. The Plaintiff inter alia imported 4 containers of goods which were stored in bonded warehouse of the 1st Defendant and they were as follow

CONTAINER NUMBER	BILL OF LADING #	SHIPPING LINE	CONTENTS
HLBU1317817	HLCUHKG1406AQJE4	HAPAG LLYOD	TOILET PAPER
MSKU8640247	CANSUV000331 LLL/SUA/307042	ACE PROTRANS KALGIN	TOILET PAPER
MRKU3745963	FAK	INTERNATIONAL	NOODLES
MSKU0762085	867255609	MAERSK LINE	TREFF CREAM CRACKERS

6. The Plaintiff was the importer and the owner of the goods contained in the containers mentioned above.

7. In civil action no: 151 of 2016 the 1st Defendant is claiming \$130,695.00 from the Plaintiff, in container detention charges for 9 containers, details are as follows:

	Container Number	Detention charge start date	Detention charge end date	No. of days subject to Detention charges	Rate per day	Detention charges amount
1	CRXU9756039	05/09/13	30/01/14	134	\$20	\$2,680.00
2	PONU 7956781	26/01/13	27/09/13	14	\$20	\$420
				231	\$50	\$11,550
3	MSKU 8640247	11/06/13	21/11/13	14	\$30	\$420
				149	\$50	\$7,450
4	MSKU 1753299	8/02/13	21/11/13	14	\$30	\$420
				272	\$50	\$13,600
5	MSKU 0305047	08/01/13	26/11/13	14	\$30	\$420
				359	\$50	\$17,950
6	MRKU 457124	29/03/13	20/11/13	14	\$30	\$420
				222	\$40	\$8,880
7	KNLU 3346169/	13/10/12	23/05/13	14	\$20	\$280
				332	\$40	\$13,280
8	MAEU 7865744	13/10/12	23/09/13	14	\$20	\$280
				332	\$40	\$13280
9	MRKU 3745963	03/09/13	28/09/15	591	\$50	\$29,550
				151	\$65	\$9,815
	TOTAL					\$130,695

8. The First Defendant's Writ of Summons in Civil Action 151 of 2016 dated 28 June 2016 made a claim against the Plaintiff for the sum of \$130,695.00 being unpaid detention charges. During the hearing, the First Defendant witness, Ms. Bakani admitted that container number CRXU9756039 had no detention charges owing to the 1st Defendant, as the container belonged to another shipping line. The First Defendant has withdrawn the amount of \$2680.00 from its claim on that admission during the hearing. The First Defendant's claim is reduced to a sum of \$128,015.

9. The main issue in this case is whether the Plaintiff owes detention charges to the First and Second Defendants and if so whether there is a lien over non-payment of the same.
10. The 2nd Defendant in its counter claim had also claimed for the container detention charges incurred. The 2nd Defendant is claiming lien over the goods for unpaid container detention charges in terms of the Bill of Lading which contain a clause for lien in the following terms;

'The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and for general average contributions to whomsoever due. The Carrier shall also have a lien against the Merchant on the Goods and any document relating thereto for all sums due by the Merchant to the Carrier under any other contract whether or not related to this Carriage. The Carrier may exercise his lien at any time and any place in his sole discretion whether the contractual Carriage is completed or not. In any event any lien shall extend to cover the cost of recovering any sums due and for that purpose the Carrier shall have the right to sell the goods by public auction or private treaty, without notice to the Merchant. The Carrier's lien shall survive delivery of the Goods.' (emphasis is mine)

11. The word 'merchant' according to the definition contained in the Bill of Lading includes a consignee of the goods as well as any person having possession of the goods, as well. (see Definition Clause 1, of Bill of Lading marked as 2DW 1(1)).¹

ANALYSIS

12. It is an agreed fact between the Plaintiff and the First Defendant that on or about 17 October 2012, the Second Defendant, being Destination office for Maersk Shipping Line in Fiji did inform all their customers that they would be implementing a Container Detention Charge if containers were not emptied and returned to them within 14 days from release from the port to the date of arrival in Fiji. This was done via the issuance of an "Important Notice". It is an agreed fact that the First Defendant on or about 19 October 2012, did inform the Plaintiff of these detention charges.
13. That the First Defendant had sent an email on or about 19 October 2012 to the Plaintiff which included a 'Notice' discussing the implementation of detention charges. This is an admitted fact. No objection was raised by any party to that 'Notice'.

¹ 'Merchant includes the Shipper, Holder, Consignee, Receiver of the Goods, any person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such person.'

14. The Plaintiff continued to book freight with the First Defendant even after being made aware of the detention charges, and stopped from acting otherwise.
15. Before the arrival of vessel Arrival Notices are issued and they are collected by the Plaintiff through its employee.
16. Once the containers of the Plaintiff arrived at the Fiji Port, the containers would then be taken to the First Defendant's bonded container yard at Tamavua-i-wai. This facility allowed the Plaintiff's goods to be stored (in the containers) without payment of customs duty and other statutory dues. It is to be noted that containers are property of shipping line and needs to be returned.
17. In a container yard goods are kept in containers and it is to be understood that container cannot be considered as a permanent storage till the goods are sold or dispatched. So it is the duty of the Plaintiff to clear the content before 14 day time period from the container in the bonded warehouse or to pay the detention charges beyond the 14 day time period. The Plaintiff is the owner of the goods of all the containers that are material to this case, but it cannot hold to the container for long period.
18. According to the evidence the containers are owned by the shipping line. Irrespective of the ownership of the container, the contents could not be removed by the 1st Defendant, in order to return the empty container within 14 days to the agent of the shipping line.
19. The evidence on behalf of the Plaintiff confirmed that the Plaintiff would then liaise with the First Defendant to seek partial withdrawal of goods from the containers for either export or local consumption. Although the Plaintiff should pay all the duties and other charges and get the possession of the goods this was not done at once as the goods were held in bonded yard of the 1st Defendant, on the instructions of Plaintiff for its convenience.

20. The containers which are the subject of the First Defendants claim in Action No. 151 of 2016 were kept beyond the 14 days detention free period, through the conduct Plaintiff who failed to imply them during said time.
21. The First Defendant did not have authority to open the containers in bonded warehouse without authority from the Plaintiff and or to remove the goods, so as to allow the containers to be returned to the Second Defendant in order to return the empty container within 14 day time period.
22. The Plaintiff used the containers to store its goods at the First Defendant's bonded yard so as it could delay paying customs duty to the Fiji Revenue and Customs Authority (FRCA) until such time when the goods were required by the Plaintiff for local consumption or to be exported. In the commercial sense it is clear that if a container is kept for a longer period than required for transportation of the goods and unloading there is a cost involved to owner of the container and it needs to be paid by the importer as the owner of the goods inside. It is the Plaintiff who decide to take possession of the goods at interval it is not the obligation of the shipping line to allow such discharge of items periodically. So any additional charges for keeping the container needs to be paid by the Plaintiff and he cannot pass it over to any other party as he was aware of the container detention charges being imposed by the shipping line.
23. That on or about 19 March 2013 and thereafter, various email correspondences were exchanged between the Plaintiff, First Defendant and the Second Defendant in respect of unpaid detention charges by the Plaintiff and Food for Less (FFL), which Mr. Rudra Prasad was a director. These emails are exhibited as PW 1 (4) (from pages 35 to 45 of the Plaintiff's Bundle of Documents). These are all admitted by the parties.
24. It is worth analyzing those evidence produced by the Plaintiff, as nowhere in those correspondences, any denial or refusal of the payment of container detention charges. This is quite contrast to the position taken by the Plaintiff in this action, after demand notice was issued for winding up.

25. On 19.3.2013 Mr. Prasad had indicated that he would attend to the issue of container detention charges once he returned to Fiji and he was willing to do more business with the 1st Defendant and had indicated that he will be resuming rice business , too. This was a suggestion through implication, that container detention charges may be deferred in the light of more business that he would bring to the 1st Defendant through rice importation. Having said so and delaying payment, later he denied the payments.
26. On 11th July, 2013 the Plaintiff was informed that if the container detention charges were not paid that containers would be detained. The Plaintiff's reply 5 days after, was to arrange a meeting to resolve the issue and had not denied the container detention charges or had stated that they are not liable to pay them for any other reason. At the hearing not only denied any liability for payment of the container detention charges but also said a complete opposite position that such charges were waived through oral agreement, by a director of 1st Defendant.
27. At the meeting held, about 18 July 2013 at the premises of the first Defendant a part payment was suggested. Following that meeting, on the 8th of August 2013, Mr. Rudra Prasad arranged a payment of \$5000 to the Second Defendant for detention charges owed by FFL. Exhibit **1D-33** is the Second Defendant's receipt issued to the Plaintiff for that payment. The receipt specifically refers to invoice numbers 48805, 48901, 49094 and 48801. These invoices were issued by the Second Defendant to the First Defendant and some of them have been exhibited by the First Defendant and marked **1DWI (35)** (Inv. 48901), **1DWI (36)** (Inv. 49094), **1DWI (34)** (Inv. 48801)
28. Thereafter, there was no further payment made in respect of FFL, and no payment was made by the Plaintiff. A further email dated 13 September 2013 was sent by the First Defendant to the Plaintiff in respect of unpaid detention charges to which the Plaintiff did not respond.
29. On the 4th of March 2014, the First Defendant issued a letter addressed to the Plaintiff Company and FFL seeking payment of \$240,870. In that letter which is exhibited as **1DWI (44)**, the First Defendant explained as follows: "*We also herein confirm that we*

still have containers stored in our yard which is incurring charges by the shipping lines. Despite having regular meetings on this you are not taking the required action to have them delivered as per the 'Important Notice' sent to you by us and the shipping line..." The First Defendant in that letter further stated: *"In order for my team to facilitate the release of these containers, we will require the following (i) Your acknowledgment of the total sum outstanding. (ii) Payment schedule to the sum outstanding."* This letter also included the "Important Notice", schedules for each company and EFS invoices. However, the Plaintiff failed to respond to this letter, though he did not admit the sum stated, by not responding to the said letter and also part payment of the container detention charges for FFL he is stopped from denying the liability to pay the sum.

30. That the First Defendant issued a Winding Up Notice on 7 March 2014 [IDW1(40)] to the Plaintiff demanding a sum of \$110,970.00 as unpaid detention charges. Subsequently, on 24 of March 2014, the Plaintiff responded through its solicitor, and denied owing any detention charges. Till then no such denial of the debt from container detention was made.
31. As admitted by the Plaintiff's witness, Mr. Rudra Prasad, this was the first time that the Plaintiff denied in writing that it was not liable to pay any detention charges.
32. The First Defendant issued updated invoices for detention charges on or about 29 February 2016 to the Plaintiff and the same are marked Exhibit "IDWI (29)", "IDWI (30)" and "IDWI (31)".
33. The evidence of Plaintiff's witness, Mr. Rudra Prasad cannot be relied on the analysis of his evidence. In his evidence stated that the Plaintiff was not liable to pay detention charges because Mr. John Chan, a director of the First Defendant Company had agreed to waive all storage charge (including detention charges). This is again another complete different position taken by the Plaintiff.

34. This was never revealed in the earlier correspondence where Plaintiff had taken the position that they were contractually obligated to pay the same. If so why there was any undertaking by the Director of the 1st Defendant to waive, was not explained. This indicates that the oral evidence of Plaintiff's first witness is inconsistent and cannot rely.
35. Neither in the emails which are exhibited before the Court nor in the letters written by the solicitors of the Plaintiff make reference any verbal assurance by a director of the 1st Defendant. If oral evidence is correct position, why did he wait till the hearing to reveal such an important waiver. In the letter dated 24 March 2014 which is exhibited as **PWI (9)**, there was no reference to such an undertaking.
36. The Plaintiff's Statement of Defence there is no defence of estoppel pleaded against the First Defendant relating to waiver. As stated earlier it was a new position that is simply not supported by any of the documentary or other oral evidence presented in this case and not proved.
37. The Plaintiff was aware that detention charges were being imposed on Maersk Shipping Line containers which were not returned within 14 days.
38. The efficiency of shipping is increased in order to reduce the costs and timely return of the containers are also important part of that and a time of 14 days are given for the return of the containers. The duty of the shipping line is to deliver to goods and not to allow storage in their property for the convenience of the owner. The obligation of the shipping line is to deliver the goods and not to store them in containers after delivering.
39. The Plaintiff was aware of the imposition of the container detention charges and he continued to keep containers beyond 14 days time period and by conduct Plaintiff had accepted the payment of container detention charges. The Plaintiff was informed of the imposition of container detention charges and he continued to use such containers without a protest is admission of that charge, and he is bound by that notice after the date of the said notice which indicated the operational date and charges. All the

containers in this case arrived after that date and there was no issue raised by the Plaintiff when the detention charges were initially informed and it is implied that he accepted the terms and conditions imposed through conduct. This is evidenced from P4. This indicates that the Plaintiff was willing to work with the 1st Defendant despite, imposition of the container detention charges.

40. Mr. Rudra Prasad in his evidence said that the reasons why the Plaintiff was asked to pay detention charges was because the Plaintiff had stopped importing rice and this had upset the Plaintiff, this far from the truth. This is another fact that is not proved.
41. The evidence show that the Plaintiff imported goods using the services of 1st Defendant after 17 October 2012 and this is reflected in the arrival dates of various containers.
42. Mr. Rudra Prasad also claims that the arrival notices issued by the First Defendant and received by him do not contain the stamp pertaining to the detention notices. This is not relevant, as the Plaintiff admitted the receipt of the notice of imposition of the container detention charges
43. Lord Denning in the case of H.L. Bolton (Engineering) Co. Ltd v T.J. Graham and Sons Ltd [1956] 3 All ER 624 where Lord Denning stated that the state of mind of these managers is the state of mind of the company and is treated by law as such. In the case of Surrendra Overseas Limited v Government of Sri Lanka [1977] WLR 565² Kerr J. at page 577 he stated as follows:
"a part payment, like an acknowledgment, must be admission of liability for the debt claimed."
44. The discussion of the container detention was regarding Plaintiff and FFL and part payment of the accumulated sum also indicate at least admission of the container detention charges any payment of the same through FFL. Since the discussion related

² Cited with approval in the Fijian case of Total v Ministry of Agriculture, Sugar and Resettlement [2009] FJHC 368; HBC28.2009 (2 December 2009)

to the detention charges of both entities this payment does not in any way support the waiver or denial of the said charges.

45. In the oral evidence witness said that that payment was 'goodwill' payment but this is not proved on balance of probability.
46. It should also be noted that the Plaintiff Company has always paid other charges which have been passed on to it by the First Defendant. The First Defendant tendered in evidence its invoice number 00045689 marked as 1DWI (4), which was addressed to the Plaintiff Company. It contained various charges, surcharge fees for third parties and 1st Defendant's own charges. This indicates the practice in the trade where charges to other parties are paid by 1st Defendant, and reimbursed by the importer (the Plaintiff).
47. The First Defendant is lawfully entitled to claim the detention charges against the Plaintiff and that the Plaintiff is lawfully required to pay the same. That on a balance of probability the First Defendant has proven its case against the Plaintiff. Accordingly judgment is entered against the Plaintiff in the sum of \$128,015, as shown in the table above.
48. Next issue is whether there was lien over the goods imported and not cleared held in the containers due to non-payment of the container detention charges. The Plaintiff had denied the payment.
49. In the case of *Hammond v Barclay* (1802) 2 East 227, Grose J said: "*A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied*".
50. The Plaintiff is claiming a *general lien* over container numbers HLBU1317817, MSKU8640247, MRKU3745963 and MSKU0762085 and also a *particular lien* over containers two of them namely, nos. MSKU8640247 and MRKU3745963. A general lien entitles a person in possession of chattels to retain them until all claims or

accounts of the person in possession against the owner of the chattel are satisfied. Under common law, a *particular lien* is the right to retain goods for which charges have been incurred until those charges have been paid.

51. This lien may also arise from general usage. Furthermore, as stated in *Halsbury*: “*particular liens have always been allowed by the common law where a party was obliged by law to receive goods; in those cases where the law imposed the burden it also gave the power of retaining for the indemnity of the party so burdened*”³. Since the First Defendant was the consignee of the goods it had an obligation to receive the goods from the shipper.
52. The First Defendant was the consignee of the goods imported by the Plaintiff and this evidence is uncontroverted. Since the consignee is the First Defendant, it is entitled to take possession of and retain goods which are meant for the importer, being the Plaintiff, until all dues, including detention charges are paid to it. This is a right arising from general usage. From the evidence it is proved on the balance of probability that is common for a freight forwarder, who contracts on behalf of an importer or exporter to import or export goods, to hold the importer or exporter’s goods until all charges are paid to it. Without the right to lien over the goods, freight forwarders would lack protection against unpaid dues owed to them or claims made against it by shipping lines or shipping agents. Efficient maritime transactions are essential for the commerce and this is done through combination of common law and statutory provisions, and also trade practices.
53. The 2nd Defendant is relying on the clause contained in the Bill of Lading which was quoted in full earlier in this judgment. According to that the 2nd Defendant can hold goods for unpaid charges of a consignee. The Plaintiff as well as the 1st Defendant are consignee according to the definition. Since no container detention charges are paid 2nd Defendant had a lien over the goods it detained.

³ See paragraph 534 of Vol. 28: Lien- Halsbury Laws of England.

54. The Plaintiff in the submission state that Fiji lacks jurisdiction for a claim for container detention charges. The Bill of Lading issued to MRKU 2723548, which is the container involved with the claim against the 2nd Defendant at Clause 26 of the Bill of Lading marked as 2DW1(1) states

'For shipment to or from the US any dispute relating to this bill of lading shall be governed by US law and the United States Federal Court of the Sothern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to be exclusion of the jurisdiction of the court of another country. Alternatively, and at the carrier's sole option, the Carrier may commence proceedings against the Merchant at a competent court of a place of business of the Merchant.'

In terms of definition (clause 1 of Bill of Lading) word 'Merchant' includes a consignee or receiver of goods or any person entitled to possession of the goods and accordingly the objection to the jurisdiction is rejected.

55. The evidence of the witness called for the 2nd Defendant Ms. Ashika said that they had incurred costs for detaining container. These costs were stated in Invoice Nos. 0050349, 49987 and 50324 (\$12,670, \$3080 and \$7960 respectfully) for a total of \$23,710. The witness also said though they could sell the items and recover that was not done. If that was done loss could have been reduced. In terms of the Bill of Lading the 2nd Defendant could sell the items and recover dues.
56. In term of clause 16.7 the Plaintiff is liable for all the charges that the 2nd Defendant is liable and it states as follow

'16.7 Despite the acceptance by the Carrier of instructions to collect Freight, duties, fees, demurrage/detention and costs and expenses from the shipper or consignor or any other Person, then, in the absence of evidence of payment(for whatever reason)by such shipper or consignee or other Person when due, the Merchant shall remain responsible for an for the payment of such freight, duties, fees, demurrage/detention and costs and expenses on receipt of evidence of demand within the meaning of clause 16.3'

57. On the balance of probability the 1st and 2nd Defendants have proved that they have a lien over the goods imported by the Plaintiff until the discharge of the container detention charges. The 1st Defendant had proved its claim for \$128,015 and 2nd Defendant for a sum of \$23,710.
58. The evidence was that 2nd Defendant had lien over the container it detained for any sum of money due to 2nd Defendant from the Plaintiff. This is in terms of clauses 17, 16 and 1 of Bill of Lading.
59. The Plaintiff is claiming damages for its expired food items that were not released or sold to minimize its loss. The Plaintiff had not supplied with the accurate time of expiration of the said good, since there were more than one type of food item they should have provided expiry dates for each item separately for the 1st Defendant to decide on the auction of the goods, but this had not happened. The Plaintiff had again used perishing of the items inside as an excuse for release of the same rather than to provide accurate information to reduce its loss. So no claim can be made against the goods that expired after detention of the same.
60. The 1st Defendant had acted reasonably and was willing to release the goods if the container detention charges were deposited with independent body, but the conduct of the Plaintiff was not to accept such a reasonable offer.

Conclusion

61. The oral evidence of the first witness called for the Plaintiff said that container detention charges were waived by the Director of the 1st Defendant. This is an admission that there was a liability to pay container detention charges by the Plaintiff and it was waived. If so the burden of proof of waiver is with the party alleging the waiver, the Plaintiff. It had failed to discharge such burden on balance of probability. Without prejudice to that both 1st and 2nd Defendants have lien over the goods for unpaid container detention charges and any other charge. The liability is under common law, and or practice and or in terms of the Bill of Lading. There is no need to have separate written agreement or stamp on arrival notices to claim container

detention charges from Plaintiff. The Plaintiff was informed of the charges imposed by the shipping line through its agent in Fiji and this notice along with the other correspondence between the parties proved on the balance of probability that the Plaintiff is liable to pay container detention charges as well as other charges incurred to the Defendants as claimed and proved on the balance of probability. Accordingly the Plaintiff is liable to pay \$128,015 to the 1st Defendant along with 6% interest from the date of filing of writ 151 of 2016 (28.6.2016) to date of judgment. The 2nd Defendant proved a claim for container detention charges for \$23,710 and an interest of 6% from the date of writ (12.9.2014) to date of judgment.

FINAL ORDERS

- a. A Declaration that the said goods contained in container numbers: HLBUI317817, MSKU8640247, MRKU3745963, MSKU0762085 and MRKU2723548 are the property of the Plaintiff. Apart from that all the claims against Defendants are struck off.
- b. The Defendants have a lien over the goods imported by the Plaintiff for non-payment of the container detention charges.
- c. Judgment is entered against the Plaintiff for a sum of \$128,015 and interest of 6% from the date of writ to the date of judgment in favour of the 1st Defendant.
- d. Judgment is entered against the Plaintiff for 2nd Defendant for a sum of \$23,710 and interest of 6% from 12.9.2014.
- e. Cost of this action is summarily assessed at \$3,000 for each Defendant to be paid by Plaintiff.

Dated at Suva this 12th day of September, 2018



Justice Deepthi Amaratunga
High Court, Suva