IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 257 of 2017

BETWEEN : **SAAD AMJAD T/A PARADISE CARS** situate at 27 Manoca Street, China Garden, Nausori, in the Republic of Fiji.

PLAINTIFF

AND : **FIJI PORTS TERMINAL LIMITED** a limited liability company having its registered office situated at the Administration Building, Princess Wharf, Suva, in the Republic of Fiji.

FIRST DEFENDANT

AND : **CARPENTERS FIJI LIMITED** a limited liability company incorporated in Fiji and having its registered office at Robertson Road, Suva and trading in the name and style of **CARPENTRS SHIPPING** having its head office at Suva and branches in Lautoka and Nadi Airport.

SECOND DEFENDANT

Counsel : **Plaintiff: Mr Nand. A**
: **1st Defendant: Mr Narayan. E**
2nd Defendant: Toganivalu. D

Date of Hearing : **5,6,7 & 8 .10.2020**

Date of Judgment : **27.11.2020**

JUDGMENT

Catch Words

Sea Ports Management Act 2005, Sections 30,31,35 & 153 - Damage – custody-liability-tort-

INTRODUCTION

1. The Plaintiff filed its Amended Writ of Summons along with amended statement of claim in 2020 and pleaded Section 30 of Sea Ports Management Act 2005 for a claim

against first Defendant. Second Defendant was added to the claim in terms of Section 153 of Sea Ports Management Act 2005 for specific breaches pleaded, in the amended statement of claim. The Plaintiff's claim against first Defendant was for damages his vehicles, due to the negligence of first Defendant, where clinker unloading close to vehicles imported. The claim against second Defendant was for parking vehicles near clinker unloading and failure to report damages in terms of guide lines of first Defendant. The claims were in the nature of special damages for repainting said vehicles and additional storage charges, general damages for loss of business. Section 30 of Sea Ports Management Act 2005, exclude liability of first Defendant, to consignees, for damages claims, except in case of transhipment and other goods unless in writing declared **nature and value** of the goods, **before they are placed** in the *'custody'* or in control of first Defendant. Even in such an instance the liability is limited to a maximum of $2,000 in terms of Section 31(2) of Sea Ports Management Act 2005. It should be interpreted as $2,000 per consignment or in this instance for a single vehicle. There was no evidence that before the vehicles were *'placed in the custody'* of first Defendant the value of such vehicles and their nature were declared in writing, by the consignee and or its agents. Common Law liability in Tort against first Defendant is limited due to statutory limitation and or exclusions included in Sections 30 and 31 of Sea Ports Management Act 2005. It was a prerequisite to a claim for a damages to goods from first Defendant, to declare the nature of the goods and their values. Without this proof this action against first Defendant fails. Section 35 of Sea Ports Management Act 2005 has no application to this action, as all the vehicles were not 'accepted' by first Defendant to be kept in 'warehouse' as a ***'service'***. It should be noted Section 30 and Section 35 of Sea Ports Management Act 2005 are mutually exclusive. Admittedly, vehicles were kept in port premises as they were not delivered by way of 'direct delivery' in accordance to directions given by first Defendant. Thereafter, first Defendant allows three days to clear goods without a fee. Motor Vehicles in their nature are not kept in warehouses in Ports, due to high volume and massive space utilization. The guide lines of first Defendant applies when there are legal claims, and not otherwise. Failure to report under internal circular or guide line cannot eliminate a statutory claim under Section 30 of Sea Ports Management Act 2005. In the absence of proof of mandatory requirements under Section 31 of Sea Port Management Act 2005 the claim based on Section 30 of the same Act, is struck off. Accordingly, claim for failure to report, against second Defendant also struck off. There was no negligence proved against second Defendant prior to alleged damage in parking of vehicles near to clinker unloading.

FACTS

2. Plaintiff was engaged in the business of importing second hand vehicles for sale.

3. This claim relates to specific twenty eight cars imported by Plaintiff for sale.

4. Plaintiff's allegation is that external paints of all of them were damaged due to clinker dust, and this was due to clinker unloading done close to said vehicles.

5. There was no evidence of clinker dust unloading close to any of the vehicles, but Plaintiff had produced evidence of clinker dust on some of the vehicles.

6. First Defendant is the entity that manages operations of Port of Suva, including unloading of vehicles and also unloading of bulk cargo such as clinker.

7. Second Defendant was the agent of Plaintiff who engaged in clearance of all the vehicles alleged to have damaged while they were inside Port of Suva.

8. Plaintiff allege that in failure to taking proper and due care in storing/ parking the Plaintiffs vehicles, cement powder which also contained clinker was blown onto the cars and the dust settled on the vehicles and solidified. The Plaintiff claims as follows:

   a) Special damages in the sum of $115,000.00;
   b) The sum of $293,112.90 being the charges levied by the 1st Defendant to the 2nd
   c) Defendant and claimed by the 2nd Defendant to the Plaintiff;
   d) General Damages;
   e) Interest from the date of the cause of action to the date of Judgement; and
   f) Costs of this action.

9. First Defendant filed, Statement of Defence to Amended Statement of Claim on 1.5.2020 denying the allegations of the Plaintiff. First Defendant state Section 30 of Sea Ports Management Act 2005 was wrongly interpreted by Plaintiff to base their claim.

10. Second Defendant filed Statement of Defence and Counterclaim to Amended Statement of Claim on 1.5.2020. The counterclaim is relating to a written document where Plaintiff had admitted debt and repayment of the same. According to counterclaim of second Defendant, they cannot be sued, for any claim arising from clearance of cars of the Plaintiff.

11. The Plaintiff called **two** witnesses, namely, Mr. Azhar, and Mr. Arunesh Prakash, Self Employed, owner of a garage which he operates from his home. He gave evidence relating to restoration of damage to paints and special damages. Mr. Azhar said his vehicles were covered with clinker dust, with photographic evidence of some of them.

12. The first Defendant called one witness, namely, Mr. Nabeel Ali, Manager Operations of Fiji Ports Terminal Limited. In his evidence he said that clinker is categorized dangerous good in the classification of items in Port.

13. He further said clinker operations were never done close to vehicles that were parked in the port expecting clearance by respective consignees.

14. He also said vehicles can be kept in port for three days without any fee and after that a fee is charged each additional day. When the three day time period lapses keys of the vehicles parked awaiting clearance were taken by Customs and kept with them till clearance.

15. The 2nd Defendant called two witnesses, namely, Mr. Hoshnever Trombaywalla, General Manager of Carpenters Shipping and Mr. Ramesh Lal, Customs Supervisor of Carpenters shipping.

16. Plaintiff and first Defendant filed written submissions. Second Defendant did not file submissions. First Defendant had also filed a reply to Plaintiff's submissions.

ANALYSIS

17. Plaintiff's claim against first Defendant is for damages to twenty eight specific vehicles from clinker dust. Plaintiff was claiming for special, and general damages.

18. First Defendant's evidence admitted arrival and unloading of clinker within the time material for this action, but denied damage to vehicles as they were not properly reported before clearance.

19. It should be noted proper reporting or failure cannot exclude statutory liability in terms of Sea Port Management Act 2005.

20. There were no evidence of damage from clinker to any other vehicle in the port at that time, but Plaintiff produced photographic evidence to support his oral evidence that several of his vehicles in port covered with clinker dust.

21. Plaintiff's claim against second Defendant is based on negligence in parking said vehicles near to clinker unloading and or specific failures of guidelines of first Defendant relating to reporting of damages.

22. There was no evidence of negligence on the part of second Defendant in parking of the vehicles near clinker unloading. There was no evidence of unloading of clinker close to Plaintiff's vehicles. Plaintiff was unable to state how clinker dust damaged his vehicles.

23. At the time of unloading of vehicles were required to clear 'direct delivery', but this was not possible due to lack of documentation. This method was encouraged due to

high volume of vehicles unloaded at that time and limited space available in Port of Suva.

24. When direct delivery failed, all the consignees were granted three day period to clear consignments, without extra charge from first Defendant. There was no evidence that clinker dust damage happened during this three day time or after, as all vehicles were kept more than three days after unloading.

25. First Defendant had allocated a space for parking of vehicles for three days, when direct delivery was not possible due to various factors, and vehicles were parked on the allocated place. Second Defendant had no authority to select the space to park them and there was no evidence that it can demand a location of the consignments.

26. So, second Defendant did not select the place of parking vehicles. There was no evidence that any vehicle was moved from initial allocated place allocated by first Defendant.

27. Without prejudice to that, there was no evidence that at the time of parking vehicles inside port, there was clinker unloading near to that place. First Defendant denied any clinker downloading near vehicles parked, though he admitted clinker unloading during material time.

28. By the nature of clinker unloading it needs access to large vehicles to carry clinker hence cannot be conducted near to vehicles parking area of the port. To collect dusty clinker a hopper was utilized. This again needed fair amount of space, and cannot be conducted near vehicles parked. According to the evidence unloading happens inside hopper to reduce emission of clinker dust to environment, and hopper was cleaned thoroughly after unloading was completed.

29. The nature of clinker unloading from bulk of the ship through a grabber, can emit clinker dust to environment and can carry them from wind, but this depends on the manner of unloading and or other environment factors such as wind speed, rain etc.

30. First Defendant must take all precautionary means to minimise the emission of clinker dusts not only to goods in their custody but also to environment as well.

31. If the first Defendant is not liable for claim for damages, then the reporting of second Defendant cannot create any liability for damages. Hence the claim against second Defendant is contingent on the claim against first Defendant.

32. Without prejudice to above in any event failure to report itself cannot eliminate statutory liability of firs Defendant in terms of Sea Ports Management Act 2005.

33. Plaintiff in the amended statement of claim relied on section 30 and 31 of Sea Ports Management Act 2005. Section 30 of Sea Port Management Act 2005 excludes common law liability relating to damage to any good in their '*custody*' subject to declaration of nature and value of goods in terms of Section 31 of the same Act, and it reads;

> **30.** A port management company shall not be liable for any loss arising from the short delivery of or damage to any goods in its custody or under its control, **unless the nature and value of the goods has been declared** in accordance with section 31.
>
> *Transhipment and declared goods*
>
> **31.**-(1) Subject to subsections (2) and (3), a port management company **shall only be liable** for the **loss of or damage** to any transhipment goods or other goods **if the nature and value of the goods has been declared in writing before the goods were placed in the custody** or under the control of the port management company.
>
> (2) The liability of a port management company under subsection (1) shall be limited to a **maximum amount of $2,000**, and shall in the case of transhipment goods, cease when the goods have been delivered alongside the on-carrying vessel for loading.
>
> (3) A port management company **shall not be liable for the loss of or damage** to any goods to which this section applies arising from -
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> *(a)* fire or flood, unless caused by the company's negligence;
> *(b)* an act of God;
> *(c)* an act of war;
> *(d)* seizure of the goods under legal process;
> (e) quarantine requirements;
> *(f)* any negligence of the owner or carrier of the goods;
> *(g)* strikes, lockouts or stoppages of labour, from whatever cause;
> *(h)* riot or civil commotion;
> *(i)* the saving or the attempt to save life or property;
> *(j)* insufficient or improper packing of the goods or defective or insufficient markings or leakages from drums, containers or packages containing the goods;
> *(k)* any inherent susceptibility of the goods to wastage in bulk or weight, latent or inherent defect or natural deterioration;
> *(l)* any deficiency in the contents of unbroken packages of the goods; or
> *(m)* the **dangerous nature of the goods**.

(4) For the purposes of this section, "transhipment goods" means any goods landed from a vessel and placed in the custody of a port management company for the purposes of shipment on another vessel on a through bill of lading dated at the port of loading of the goods and showing that the destination is through the Fiji Islands, with the ultimate port of destination marked on each package or unit containing the goods and declared on a transhipment manifest lodged with the port management company prior to or at the time the goods are placed in its custody.(emphasis is mine)

34. Plaintiff is claiming against first Defendant for damages while goods in '*custody*' of first Defendant in terms of Section 30 of Sea Ports Management Act 2005. In terms of that, two prerequisites needs to be proved by Plaintiff and they were:

a. The goods were in first Defendant's custody, and
b. **Before they were placed in the *custody***, first Defendant was informed of Nature of the goods and also **Value** of the goods.

35. There was no evidence presented at hearing to prove that all or any of the vehicles that were kept in '*custody*' of fist Defendant were declared their nature and value **in writing** to first Defendant **before they were kept** in the '*custody*' of first Defendant.

36. In the absence of such evidence, Plaintiffs claim for damages in terms of Section 30 of Sea Ports Management Act 2005 fails.

37. First Defendant in the written submissions stated that Section 35 of Sea Ports Management Act 2005. This is quite contrary to the claim based on Section 30 of the Act, as the said provisions of law are mutually exclusive. One cannot claim under same part and seek exclusion under said part at the same time.

38. Plaintiff who is claiming under Section 30 of Sea Ports Management Act 2005 cannot at the same time seek exclusion contained in Section 35 of the same Act.

39. Section 35 of Sea Ports Management Act 2005 states,

'*Non-application of this Part*

35. This Part does not apply to any goods accepted by a port management company for storage in a warehouse as a service provided by it in relation to warehousing or storing goods.'

40. Without prejudice to what was stated earlier, exclusion contained in Section 35 of Sea Ports Management Act 2005, applies only to goods accepted by first Defendant for storage in a warehouse as a service.

41. In contrary it was admitted first Defendant did not have the keys to the vehicles after lapse of three days from unloading, and they were kept with Customs.

42. Any of the cars, were never kept in warehouse for a fee as a service. Plaintiff's vehicles remained in port for a long time due to Plaintiff's own failure to submit necessary documentations such as Bill of Lading for release of the vehicles and other financial difficulties he faced. Goods in the custody of port for longer period than three days was, cumbersome for smooth operation of port and that was the reason for charging a fee, to encourage consignees to clear the goods as soon as possible. So, it was not an amount paid to provide a 'service' in terms of Section 35 of Sea Ports Management Act 2005.Plaintiff had delayed submission of vital documentations for clearance and had also not settled their accounts with second Defendant promptly for timely clearance.

43. This delay according to the evidence was due to Plaintiff's financial status and his inability to meet the expectations and requirements of the stake holders. Second Defendant in evidence stated that even the credit limit allowed by them were fully exhausted without Plaintiff reimbursing the 'account' held by them. In such a situation second Defendant cannot be expected to clear Plaintiff's vehicles, before outstanding debt were settled.

44. Second Defendant's evidence was clear that Plaintiff was under financial stress and that was the reason for delay in clearance of vehicles.

45. Plaintiff had neither claimed negligence on the part of second Defendant for delay in clearance nor for failure on their part to declare nature of the goods and their values to first Defendant in order to make a claim in terms of Section 30 of Sea Ports Management Act 2005.

46. As stated earlier apart from negligence in parking, for which there was no evidence, all the particulars of negligence, pleaded against second Defendant were post incident, relating to damages from clinker, regarding failure to report.

47. Even if there was a failure to report, that will not eliminate a claim under Section 30 of Sea Ports Management Act 2005 , so this cause of action for failure to report needs to be struck off considering evidence present at hearing.

48. The guide lines regarding reporting of damages sustained to goods issued by first Defendant applies to any claim in terms of Sections 30 and 31 of Sea Ports Management Act 2005. These are guidelines issues to clearing agents addressed to Ship Agents. These are internal documents which are not binding on the consignee for an action against first Defendant based on Section 30 of Sea Ports Management Act 2005. These are 'Not for Publication' internal communications to streamline claims before they leave premises of port, but in no way exclude and or override statutory provisions contained in Section 30 of Sea Port Management Act 2005.

49. Without prejudice to that, in the absence of proof of liability under section 30 of Sea Ports Management Act 2005 the claim for failure to report fails.

CONCLUSION

50. Plaintiff's claim against first Defendant was in terms of Section 30 of Sea Ports Management Act 2005. A claim under this is restricted to $2000. In order to claim for a damage from first Defendant there Plaintiff must prove that **before the goods were kept in *'custody'*** of fist Defendant they were informed in writing the nature of the goods and the value of the goods. In the absence of the proof of prerequisites the claim against first Defendant fails. There were no evidence on the part of second Defendant's negligence. First Defendant had allocated certain specific area for parking of vehicles. There was no evidence of any clinker downloading close to where vehicles were being parked. Plaintiff's claim for negligence under tort, as pleaded, cannot be considered under common law due to statutory restrictions in terms of Section 30 of Sea Ports Management Act 2005. Internal circulars issues to Ship Agents for convenience and or for effectiveness cannot affect statutory liability in terms of Section 30 of the Act. Hence no claim can be based on failure to report in terms of that by second Defendant. There is no need to consider issue whether in any way Plaintiff was precluded from suing second Defendant due to their acknowledgment of debt. Considering circumstances of the case and legal issues raised, and importance no cost awarded.

FINAL ORDERS

a. Plaintiff's amended statement of claim is struck off.
b. No costs.

Dated at Suva this 27th day of November, 2020.

HIGH COURT CIVIL SUVA

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Justice Deepthi Amaratunga
High Court, Suva