IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 195 of 1976

BETWEEN:

BURNS PHILP (SOUTH SEA) CO. LTD. Plaintiff

- and -

TIMBER BUILDING SUPPLIES (FIJI) LTD. Defendant

Mr. J.R. Singh, Counsel for the Plaintiff
Mr. C. Gordon, Counsel for the Defendant

JUDGMENT

The plaintiff in this case Messrs. Burns Philp Ltd., sue the defendant for $3104.15 as the balance due in respect of goods sold and delivered to the defendant along with a claim for interest at 10%. The Statement of Claim alleges that particulars have been supplied and that short particulars are attached. The word "short" is very operative and the particulars really amount to nothing more than a statement that $18,276.79 was owing on 31.5.76; $15,425.75 were paid on 2.7.76 and the balance plus interest is $3104.15. The writ was filed on 31.8.76.

The Statement of Claim sets out no agreement for interest and no evidence was led to show any agreement for interest arranged between the parties. Consequently the demand for interest fails.

The defendant admitted that there had been a liability of $413.45 and alleged in evidence and in the Statement of Defence that this had been repaid but the plaintiff made no issue of this at the hearing.

When the plaintiff gave evidence I expected him to tender statements of the accounts which had from time to time been rendered to the defendant showing how a balance of $18,276.79 was arrived at. In fact they could most usefully have been annexed to the Statement of Claim. No such

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statements were tendered. There might also have been a subsequent statement of account revealing the payment of $15,425.75 and the balance which is now claimed by the plaintiff. Once again no such statement was produced.

The Statement of Defence made it clear that the total alleged indebtedness of $18,276.79 was in dispute and that the amount owed had not exceeded about $15,850, the plaintiff should have been ready at the hearing with copy invoices and supporting proof that the goods therein had been delivered. Proof may have been shortened by notice to admit; interrogatories, etc. This was not done and invoices were not referred to in any affidavit of documents.

B.K. Harak, Acting Manager for the plaintiffs' Credit Department was the only witness for the plaintiff. He had a file from which he began to read the plaintiff firm's record of balances, of amounts of goods ordered and payments made by the defendant. I was not prepared to record a monologue of this nature which should have been prepared in the manner I have indicated and annexed to the Statement of Claim or served upon the defendant.

In cross-examination he said he had not checked for invoices; he agreed that there were invoices but he had not brought them.

There must have been something said or written by the defendant which gave notice to the plaintiffs that there was some dispute as to the amount owed and which caused them to file the action. Evidence thereof may have been helpful in fixing a point at which the parties were ad idem as to any balance and from which point invoices, monthly statements and so forth could have been tendered and proved. No attempt was made to prove the build up of the account in any such way and the plaintiff was unable to point to any invoices.

In the face of the defendant's denial of indebtedness it is possible for me to find for the plaintiffs in the absence of proof.

The defendant filed a counterclaim against the plaintiff in connection with a consignment of

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of timber which had been delivered to Lautoka by a cargo vessel as long ago as 1973.

It is alleged in the Statement of Defence that the defendant ordered the timber from the plaintiffs under a written agreement. The date of the agreement was not given and it was not produced in evidence by the defendant. In fact the defendant in evidence completely changed his ground and stated that he had ordered the timber from the Western Pacific Co., a Canadian firm, in 1973. He tendered 2 bills of lading showing a consignment contained in 179 bundles. The plaintiffs as agents for the vessel S.S. Montreal Star off-loaded the timber. When the defendant's manager D.W.1 arrived at the Customs area he claims to have seen that many bundles had obviously been broken open and that some timber was damaged and missing.

The counterclaim gives the value of timber damaged and missing at $849.48. D.W.1 said its value was $23.24 per 100 super feet and the Statement of Claim alleges a loss of 3659 super feet.

He said that the broken bundles had to be made up again on the wharf before they could be removed from the customs area and that the shipping agent had to employ labour and a forklift truck for the extra work causing an extra cost of $722.00.

The clearing agent, D.W.2, said that some bundles were damaged and his bill for clearing the timber and the labour needed amounted to $224.95. He did not refer to any added costs.

How the defendant's claim for $722 arises I cannot tell on the evidence. The counterclaim also alleges having to pay double-handling costs amounting to $613.00 because of defective ship's slings; there was no evidence given as to how this sum of $603.00 was made up.

Apart from D.W.1's bald assertions there is no

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evidence of the number of super feet lost as damaged or missing. Was the consignment carefully measured? Who actually counted the pieces? When was this done and where?

Was any complaint made to the plaintiff at the time? What was their reactions? There is no evidence on those aspects.

The value of the timber lost is alleged to be $848.00 and the counterclaim alleges that retrieving timber from broken packages on the wharf and transporting it to his timberyard cost almost $1400.00. I find that D.W.1's evidence, unsupported as it is by any documents or by the breakdown of any figures most difficult to accept.

Mr. Gordon, for the defendant stated that the plaintiffs were not being sued as agents and that they were being sued for negligence. But as I have pointed out the counterclaim alleges that it is based on a contract in writing between the parties under which the plaintiffs allegedly agreed to sell and deliver the timber. Now then can the short supply of timber give rise to an action for negligence? In fact the defendant's manager, stated in evidence that he was suing for short delivery.

Even if the defendant were allowed to plead damage caused by breach of contract but prove his damages in tort for negligence there is no evidence of negligence. The shipowners may have been negligent in the course of off-loading the bundles of timber but there is no evidence that the negligence was theirs or that it was the negligence of the plaintiff.

It is note worthy that although the defendant allegedly suffered this damage in August 1973 he appears to have made no complaint about it but suddenly raises it when the plaintiffs sued him for goods sold and delivered.

The counterclaim is also dismissed.

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There will be judgment for the defendant on the plaintiffs' claim and judgment for the plaintiff on the defendant's counterclaim.

In the circumstances I order that each party shall bear his own costs apart from any interlocutory orders for costs which may have arisen hereinbefore.

LAUTOKA,
5th May, 1978.

(sgd.) J.T. Williams,
JUDGE

Messrs. Sharma, Singh & Co., for the Plaintiffs.
Messrs. Gordon & Co., for the Defendant.

Date of Hearing: 12th April, 1978.