IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 341 OF 1980

Between:

PACIFIC LINES LIMITED — PLAINTIFF

- and -

PORTS AUTHORITY OF FIJI — DEFENDANT

Mr. H.M. Patel for the Plaintiff.
Miss A. Prasad for the Defendant.

J U D G M E N T

The plaintiff's claim against the defendant is for the sum of $1,560.28 alleged loss suffered by the plaintiff as a result of the defendant's failure to work the vessel "TUI CAKAU" at Lautoka on the 8th March, 1980.

The plaintiff states its agent paid the defendant the sum of $1,424.80 for labour and equipment required to unload the vessel on the understanding that the vessel would be worked on the 8th March, 1980.

The defendant in its Defence does not deny receiving the said sum of $1,424.80 on the understanding the vessel would be worked on the 8th day of March, 1980. It alleges it assembled labour and equipment in order to commence work on the vessel at 2200 hours on the 8th March. The vessel had been expected to arrive at 1800 hours that day but it did not arrive according to the defendant until 1.45 a.m. on Sunday the 9th March.

The defendant further states in its Defence that in accordance with its agreement with the Union representing its employees and in accordance with normal practice, both known to the plaintiff, it had to pay its employees the sum of $1,424.80 out of funds deposited with it by the plaintiff although the employees did not work the ship because it failed to arrive in time.

It is not in dispute that the defendant did unload the vessel on Monday the 10th March, 1980 but no unloading was done on Sunday the 9th March.

The difference between the $1,560.28 claimed and the said sum of $1,424.80 paid to the defendant represents moneys paid by the plaintiff to its agent for providing clerical officers and to another firm for trailer hire. The services were paid for but not utilised because the defendant did not unload the vessel on the 8th or 9th March. No evidence was led by the plaintiff on these items possibly because Mr. Patel, counsel for the plaintiff, appreciated that the defendant in any event could not be held liable for that loss which arose due to the vessel not arriving when expected.

Neither counsel referred to or commented on the Ports Authority of Fiji (Tariff) Regulations 1975.

The proper basis for the plaintiff's claim in my view should have been to seek recovery of the sum claimed on the ground that the defendant was not entitled to charge the plaintiff for stevedoring charges alleged to have been incurred on the 8th March, 1980 being the sum of $956.80 for labour supplied and $468 for hire of equipment making the total of $1,424.80, claimed or alternatively refund part of that sum as being in excess of the sum the defendant could lawfully charge.

The regulations I have referred to cover the charges the defendant can lawfully make for its services.

The plaintiff, however, framed its claim on what appears to be a claim for damages for breach of

contract. One agreed term of such contract was that work on the vessel was to commence at 2200 hours on the 8th March, 1980 some four hours after the vessel was expected to arrive at Lautoka. To this claim the defendant contended work could not commence at 2200 hours because the vessel had not then arrived. The defendant had however by that time assembled the labour and equipment requested by the plaintiff's agent and since the vessel did not arrive until after midnight that night it was not possible to work the vessel on the 8th March.

On the pleadings the claim for what is really special damages for breach is met by the Defence that the contract was frustrated by the failure of the vessel to arrive on the 8th March, 1980 the date the defendant contracted to start unloading. If the 'Tui Cakau' is owned by the plaintiff as to which I have no information it was open to the defendant to contend that the failure of the vessel to arrive prevented the defendant from fully performing its part and that it had rescinded the contract and that it was entitled to payment for work actually done at the rates provided in the Regulations.

Properly pleaded also the basis could also have been laid for the contention that the foundation for the contract was the unloading of the 'Tui Cakau' on its arrival and that the defendant on its arrival on the 9th March should have commenced unloading it and that as a result of the defendant's delay in not starting work on the vessel until the 10th March the defendant incurred loss or was improperly charged the sum of $1,424.80 which sum the plaintiff seeks to recover.

The defendant did have labour and equipment ready and available to start work on the vessel at 2200 hours on 8th March. The defendant, between 10 past and 25 past midnight that evening paid off the labour. Being a ~~Sunday~~ Saturday night the labour were to be paid at overtime rates of 1½ times their hourly rate. That is for 12 hours for an 8 hour shift. They were on this occasion paid 12 hours wages for doing no work for 2 hours. The defendant's case

is that under its agreement with the Union representing its employees its employees were on that occasion entitled to 12 hours pay whether they worked or not and that the end of a shift on a Saturday night (except in special circumstances) was midnight. Their shift started at 2200 hours and ended at midnight when they were paid. According to the defendant the dock labour were entitled to 12 hours wages.

The evidence discloses that the 'Tui Cakau' hove in sight around Vuda Point at 11.30 p.m. and she commenced berthing at 25 minutes past midnight while the labour were still being paid.

The defendant paid off the labour on the night in question because the vessel had not arrived before midnight and the defendant contends the agreement between it and the Union precluded the labour starting a shift after midnight on Saturday.

The agreement between the Union and the defendant was not produced. Miss Prasad belatedly sought to tender it when re-examining Mr. Choy, the defendant's Lautoka wharf manager. Mr. Patel objected to the agreement being tendered because his client was not concerned with the agreement. His objection was upheld because the document should have been tendered when Mr. Choy was examined.

Production of the agreement would have assisted the Court because there was a conflict of evidence on the issue whether dock labour would work a ship carrying general cargo after midnight on a Saturday.

Carpenters Shipping Suva were the plaintiff's agents and by Order No. 014 dated the 8th March, 1980 addressed to the defendant they furnished a list of labour required at 2200 hours that day and also equipment required for that time to unload the 'Tui Cakau'.

The defendant in its account lists the labour and equipment it supplied that night. More labour was supplied than ordered and that was also the case with the equipment. In addition the plaintiff had requested services of a 20 ton forklift for 12 minutes. The defendant charged for 3 hours "worked" at overtime rates. Counsel did not refer to these details which I will refer to later.

Mr. Choy stated that on the 8th March, 1980 at 1500 hours he ascertained from the watchtower in Suva that the 'Tui Cakau' would be delayed and he informed the plaintiff's agents that if the vessel arrived before midnight they would work the ship but not if it arrived after midnight. It is significant that Mr. Choy did not state that he advised the plaintiff's agents that the labour would not in any event work after midnight.

Mr. Josefa Turewa an assistant supervisor of Shipping at 11.30 p.m. on the 8th March contacted the Secretary of the Dockworkers Union and obtained his confirmation that his Union labour would work the 'Tui Cakau' when it arrived. Mr. Turewa said he informed Mr. Choy of the Union's agreement but Mr. Choy said he never spoke to Turewa on the matter that night. Mr. Turewa gave details of his conversation with Mr. Choy. He said he had informed Mr. Choy the Union would work the ship but Mr. Choy said it was after midnight and there was an agreement between the defendant and the Union.

Mr. Timoci Waivure the local secretary of the Union confirmed Mr. Turewa's story. He says he went to the wharf a little after midnight to let the defendant know the Union would work the ship only to find the defendant in the process of paying off the labour. He says he saw Mr. Choy and spoke to him. Mr. Choy on the other hand stated he did not see Mr. Waivure that night.

Mr. Waivure said the labour were casual labour and that the defendant would also have to agree

to work the ship after midnight. 000153

The labour were rostered that night for an 8 hour shift to commence at 2200 hours. Clause 7 of the Union agreement was referred to on a number of occasions. That clause provides that no shift should start between 1 a.m. and 6 a.m. It is clear from what Mr. Choy stated that he interprets the starting of work on the ship as the start of the shift. In fact the shift started at 2200 hours on the 8th and the men were on standby for 8 hours. They could have started work after midnight without being in breach of the agreement unless there was anything else in the agreement which qualified clause 7.

As to the alleged agreement that an 8 hour shift on Saturday night ended at midnight notwithstanding it may have started only 2 hours previously, since the agreement was not produced there is no acceptable evidence before me that it contained a provision to that effect. Mr. Waivure in answer to a question from the Court stated he did not know why the men were paid off at midnight. He said they were rostered to start work at 2300 hours and if the ship had been there they would have worked until 7 a.m. next morning.

Mr. Inia Sukaqoro works supervisor placed the order for labour and equipment on the 8th March. He confirmed that the Union had agreed to work the vessel when it arrived and that it was not worked when it arrived after midnight. He testified he had to place a second order and money was paid a second time and ship was worked the day after she arrived.

The facts I find established are as follows :

On the 7th March, 1980 the plaintiff's agent Carpenters Shipping Company paid the defendant a deposit of $3,955 on behalf of the plaintiff in respect of stevedoring charges for unloading the 'Tui Cakau' which was expected to arrive at Lautoka at 1800 hours on the 8th March, 1980. On that day the plaintiff's agent placed an order for labour and other personnel, listed in Order No.014 of that date, to

commence work at 2200 hours. The order also listed equipment, 7 forklifts, 3 ton required for 10 p.m. and a "PAF108 x 20T (which I assume is a forklift of 20 ton capacity) for "12 MIN" which I assume means '12 minutes'.

When the order was placed it was mutually understood by the parties that the vessel would arrive on the 8th March and the work of unloading would start at 2200 hours that day.

The defendant agreed to provide labour and equipment to unload the vessel and pursuant to that agreement it had labour and equipment available at 2200 hours.

Prior to accepting the deposit and the order for labour and equipment the defendant did not inform the plaintiff's agent that the 'Tui Cakau' would not be unloaded on the night of 8/9 March if it arrived after midnight but did so inform one of the agent's employees a short while before midnight on the night in question. Nor did the defendant advise the plaintiff or its agents that the vessel if it did arrive before midnight that the vessel would only be worked until midnight and that the defendant's charges would be based on an 8 hour shift at time and a half as it was a Saturday. The vessel was not worked on the 8th March as it did not arrive until just after midnight on the night in question. It was not worked on Sunday the 9th March.

The defendant's Lautoka wharf manager, Mr. Choy, at 1500 hours on the 8th March was informed by the watchtower Suva that the 'Tui Cakau' would not arrive in Lautoka until after midnight. Mr. Choy could have cancelled the labour at 1500 hours that day but did not do so.

I do not believe Mr. Choy when he says the reason for not cancelling the labour was because Mr. Inia Sukaqoro assured him the vessel would arrive before midnight. I accept that he did check with the watchtower Suva and had official notice the vessel would not arrive before midnight. He did not convey that information to the plaintiff's agents.

I accept Mr. Josefa Turewa's evidence that on the evening of the 8th March he spoke to Mr. Choy on the telephone and was informed by Mr. Choy that if the vessel arrived before midnight the vessel would be worked but not otherwise. On the evidence before me this conversation must have been some time before 10.30p.m. on the 8th March when it must have been apparent to Josefa Turewa and Inia Sukaqoro that the vessel was delayed and they accordingly then sought to obtain the Union's confirmation, which they received, that the labour would start unloading the vessel as soon as it arrived.

I am satisfied also and find as a fact that the Union's approval to the men unloading the vessel when it arrived was conveyed to Mr. Choy that night just after midnight and before the vessel had berthed.

Mr. Choy terminated the hiring of labour and equipment at midnight and the labour were paid off between 15 and 30 minutes past midnight when vessel was actually in port. It started berthing at 25 minutes past midnight as from which time the defendant charged docking fees. The vessel did not arrive at 1.45 p.m. as pleaded by the defendant. If arrival means arrival in port it may have arrived before midnight but all I am certain about is that the first line from ship to shore was at 0025 hours on the Sunday.

I also find as a fact that the sum of $1424.80 was not paid to the defendant's employees that night as pleaded by the defendant. Nor was it true, as Mr. Choy testified, that that sum was "amount we paid dockworkers and for equipment". The Court stated at the time that there should be documentary evidence available on this issue which Mr. Choy then produced. It was then disclosed that the defendant actually paid the dockworkers $405.07. The defendant did not pay out $468 for hire of equipment - it was its hire charges for "PAF stevedoring". Mr. Choy stated defendant paid some outside people for equipment hire but produced no evidence of such payment.

By invoice No. 1772 dated 20th March, 1980 the defendant charged the plaintiff's agent $6,631.35 for stevedoring charges in relation to the unloading of the

'Tui Cakau'. Of this sum the first two items in the invoice namely, labour and equipment, total the sum of $1,424.80 purporting to be the defendant's stevedoring charges for the 8th March, 1980.

If the parties respective solicitors had properly briefed the evidence the Statement of Claim and Defence would have been in different form.

The plaintiff alleged the sum of $1,424.80 was paid for labour and equipment and clause 2 of the Statement of Claim is so worded as to convey this sum was paid on the 8th March. The defendant did not deny this. The documentary evidence discloses this particular sum was never paid on the 8th March or at any time but that a deposit of $3,955 was paid on the 7th March to the defendant.

The defendant also pleaded it had to pay the sum of $1,424.80 to its employees. This was not factual. The plaintiff's agent was debited (inter alia) with alleged charges for labour and equipment on 8th March totalling $1,424.80.

Inia Sukaqoro was permitted to state without challenge that he had to place a second order for labour and equipment and money was paid a second time. The plaintiff produced the invoice and other papers which indicates there was no second payment on behalf of the plaintiff. If what Inia stated was correct it could have been held that the second order and payment was on account of a second contract to unload the vessel on the 10th March 1980 the first contract having been frustrated or rescinded by the defendant.

If the plaintiff's case is that there was a breach of contract, and they were entitled to special damages I would have to dismiss the claim. The contract was to unload the 'Tui Cakau' and this work the defendant performed albeit belatedly. Strict compliance with the terms of the agreement were not possible because the vessel did not arrive on the 8th March. The defendant raised

the defence of frustration but pleaded also that it had to pay its employees $1424.80 out of the moneys deposited with it by the plaintiff.

The real issue between the parties is whether the plaintiff was liable in all the circumstances to pay for stevedoring charges and for equipment for the alleged first shift on 8th March, 1980 when no work was performed by the defendant. There is no evidence that the plaintiff suffered any loss by the delay in unloading the vessel which could have been completed a day earlier if work had started after midnight on the Saturday, other than having to pay out a total of $1560.28 due to late arrival of the vessel.

No objections were taken by either party to the state of the pleadings and the real issue between the parties, as I have earlier stated is whether the defendant could lawfully charge for stevedoring on the 8th March. I propose to consider this issue.

The plaintiff through its agents ordered labour and equipment for 2200 hours on 8th March and this was supplied by the defendant. Labour were on standby whether for 8 hours or 2 hours does not really matter as the defendant discharged them after 2 hours.

Whatever the agreement is between the defendant and the Union representing its employees that is of no concern to the plaintiff. The charges for cargo handling are statutory charges and are covered by item 25 of the Regulations where there is provision for a rate per hour. Item 25 also provides that overtime hours are to be converted into ordinary hours. No where in the Regulations are there any provisions that charges on a Saturday night shall be a minimum of 12 ordinary hours irrespective of the hours worked by dockworkers.

If the defendant when the contract was entered into had specified that the plaintiff must pay for 12 hours whether worked or not that would be another matter. It did not do so.

In respect of hire of equipment item 16(j)(ii) provides that a charge shall be made whether equipment is used or not. There is not in item 16 any provision that overtime is to be converted to ordinary hours. There is a higher overtime charge. "Overtime" in that context is time outside normal working hours which are later specified. It is to be noted that the defendant not only charged the overtime rate but treated the equipment like labour and converted the two hours into three and charged accordingly at the overtime rate. This is clearly an overcharge and I will refer to this later.

The defendant terminated the contract by paying off the labour two hours after the time rostered. According to item 25 of the Regulations they could have charged at the rates provided for 3 hours only. They have charged for 12 hours and also for night meal and transport allowance which they apparently have to pay their employees. The Regulations do not appear to cover such charges. I would expect the rates to cover such expenditure by the defendant.

I consider that the plaintiff should pay for the labour and equipment which they ordered at the statutory rates but only for the time they were on standby namely 2 overtime hours or 3 ordinary hours. The defendant elected to terminate their services at midnight and cannot charge for more than 3 hours notwithstanding their alleged agreement with the Union.

I note also that the defendant provided more labour and equipment than was ordered. The plaintiff's agents ordered :-

1	Supervisor
3	Overseers
4	Riggers
10	Labourers
2	Sorters
2	Drivers
22	

The defendant provided 25 men including 1 logger, 1 timekeeper and 1 recruiter which were not ordered by the plaintiff. I was not informed why they should have been provided. The plaintiff's agent also ordered 7 3 tonne forklifts, 8 were provided and charged for. No 6 tonne forklift was ordered but one was provided and charged for. The 'PAF x 20T' was ordered for 12 minutes. One 20 tonne forklift was charged for for 3 hours here.

In respect of this 20 ton forklift Regulations provide for half rates if equipment is used for less than 30 minutes, but full rate if not used at all.

In the circumstances, however, equipment would have been held available for 2 hours 'overtime' and I consider it equitable that plaintiff pay for 2 hours at the 'overtime' charge provided in the Regulations.

Doing the best I can on the evidence before me, the defendant was entitled to charge $457.25 made up as follows :

1	Supervisor	$4.55	3 hrs.	$13. 65
3	Overseers	3.40	9 hrs.	30. 60
4	Riggers	3.00	12 hrs.	36. 00
10	Labourers	2.70	30 hrs.	81. 00
2	Sorters	3.00	6 hrs.	18. 00
2	Drivers	3.00	6 hrs.	18. 00
				$197.25
7.3 tonnes forklift overtime rate 14 hrs at 10 =				140. 00
1 20 tonne (only 25 tonne specified) 2 hours at 60 =				120. 00
				260. 00
	Add cost labour			197. 25
				$457. 25

But for the fact that there is statutory provision for charges had the contract been frustrated only the defendant's actual out of pocket might have been payable. The difference between the two figures, however, is only a little over $50 and could approximate each other if the defendant did in fact pay out money for hire of equipment.

In my view the defendant could legally have charged the plaintiff through its agent the sum of $457.25. It purported to charge or debit the agents with the sum of $1424.80 or $967.55 in excess of that sum which must be refunded to the plaintiff since there is no dispute that this sum was paid by the plaintiff to the defendant.

There will be judgment for the plaintiff for the sum of $967.55 and costs.

(R.G. KERMODE)
J U D G E

SUVA,

27 FEBRUARY, 1981.