

IN THE SUPREME COURT OF FIJI

Admiralty Jurisdiction

ACTION NO. 1 OF 1982

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Between:

S.E. TATHAM (FIJI) LIMITED

PLAINTIFF

- and -

THE OWNERS OF THE MOTOR VESSEL  
"KEKANUI"

DEFENDANT

Mr. H.K. Nagin for the plaintiff.

Mr. F.G. Keil for the defendant.

J U D G M E N T

The plaintiff commenced this action in rem against the motor vessel "Kekanui", a foreign vessel which appears to be registered in Tahiti; claiming the sum of \$67,054.02 Australian currency being the amount alleged to be owing to the plaintiff for goods and materials supplied to the vessel for her operation and maintenance.

There was also filed at the same time as the writ of summons a Request to Execute Warrant to arrest the vessel. There was filed in support of this Request an affidavit sworn by Mr. Rahim Zullah, Managing Director of the plaintiff company, in which he confirmed the particulars stated in the statement of claim. He stated in his affidavit that the goods were supplied at the request of the "Kekanui".

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The Warrant was issued and the vessel was arrested on the 28th January, 1982.

No Appearance was entered to the writ within the time stated in the writ. On the 3rd February 1982, the plaintiff purported to enter up judgment by default and moved for appraisalment and sale of the vessel.

The judgment was defective as the plaintiff had not complied with Order V Rule 1 of the Supreme Court (Admiralty) Rules which require an admiralty action in rem to be entered for trial upon default of Appearance.

The judgment was set aside on the 22nd February 1982. The plaintiff had in error filed an amended statement of claim four days previously before seeking to have the judgment formally set aside.

The amendments were extensive and resulted in the Statement of Claim endorsed on the writ being completely replaced. In the amended claim the plaintiff split its claim and alleged that A\$11,802.03 was owing for goods and materials supplied for the operation and maintenance of the vessel. The balance A\$55,251.99 was alleged to be loss suffered by the plaintiff as a result of (inter alia) the breach by the defendant of a contract of carriage in respect of the said goods.

The day before the amended statement of claim was filed Messrs. Mitchell, Keil & Associates had entered an Appearance for the defendant and applied for an order that time for filing defence and counterclaim be extended.

Mr. Keil was apparently not aware of the judgment at that time.

The Defence which was delivered on the 8th March 1982 alleges (inter alia) that the vessel was at all material times owned by the COMPAGNIE POLYNESIENNE DE TRANSPORT MARITIME a duly registered company of rue Charles Viennot Papeete, Tahiti.

It also alleges that at all material times the vessel was under charter to SOCIETE WALLISIENNE ET FUTUNIENNE DE NAVIGATION TRANSPACIFIQUE (called "WANAPAC").

It is further alleged that the vessel is registered at Papeete.

The defendant also counterclaimed for an order setting aside the arrest of the vessel and for damages.

An Application to join WANAPAC as a third party was dismissed.

It was not until the 26th August 1982 that the action came on for hearing.

Mr. Nagin for the plaintiff was aware that Mr. Keil for the defendant was in difficulties because he had been unable to obtain further instructions from his client. Mr. Nagin had his own problems in obtaining the evidence required to establish his client's case and to meet the counterclaim. He had expected Mr. Keil to withdraw thus necessitating an adjournment of the action. Mr. Keil, however, was not in a position to ask

to be released and he intimated that he would remain in Court.

As far as I am aware, while an arrest of a foreign ship in Fiji is not uncommon, no action in rem against a ship has proceeded to a hearing. Also it is usual for the owners to obtain release of the ship by giving security or posting a bond while a claim is considered.

In the instant case the owners of the vessel, in addition to failing to fully instruct Mr. Keil, appear to have abandoned the vessel at least to the extent of removing the master and all crew thus leaving the Admiralty Marshall, an officer of this Court the responsibility of looking after the vessel.

To meet the problems faced by Counsel the Court suggested that copies of documents which Mr. Nagin wished to produce and to which Mr. Keil could have taken objection be admitted. Mr. Keil raised no objection to introduction of any document tendered by the plaintiff nor indeed did he object to plaintiff's witnesses giving hearsay evidence. Mr. Keil however decided to enter the arena and conduct the defence when he appreciated the nature and quality of the evidence adduced by the plaintiff. He cross-examined and on the close of the plaintiff's case he called witnesses but he did not seek to establish the counterclaim.

Mr. Keil's co-operation was not reciprocated by Mr. Nagin who objected to the introduction of a number of documents most of which were conditionally admitted subject to my later ruling on their admissibility.

Section 21 of the Supreme Court Act constitutes this Court a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890 of the United Kingdom. The section provides also that the Court shall have and exercise such admiralty jurisdiction as is provided under or in pursuance of subsection (2) of section 56 of the Administration of Justice Act 1956 of the United Kingdom.

At page 3546 et seq of volume 2 of the Supreme Court Practice 1967 (The White book) appears the relevant provisions of the Administration of Justice Act 1956.

The plaintiff now bases its claim on three subsections of section 1 of the 1956 Act.

As to the goods supplied to the ship (the ship stores") its claim is based on section 1(1)(m):

"any claim in respect of goods or materials supplied to a ship for her operation or maintenance".

In respect of the carriage of goods the claim is based on section 1(1)(g) and (h).

"(g) any claim for loss of or damage to goods carried on a ship".

"(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship".

Section 3 of the Act also has application and I will be referring to this section later in my judgment.

Mr. Rahim Zullah gave evidence and stated that in 1981 he was introduced to a Mr. Christain Morrell.

Mr. Morrell told Mr. Zullah he had arrived in the "Kekanui" and that he had a general merchandise business in Wallis Island. Mr. Morrell talked about a company called UNICOOP SARL of which company he said he was managing director. Mr. Morrell also spoke about the "Kekanui" which he said UNICOOP SARL owned.

Mr. Morrell then agreed to purchase the goods in question some of which he wanted for the vessel "Kekanui" and some for his company. Goods listed on Exhibit 2 (the "ship stores") Mr. Morrell wanted delivered to the vessel which was then in port. He asked that those goods be described as "ship stores".

The four invoices (Exhibit 2) two dated the 1st September 1981 and the other two dated the following day are addressed to :-

"SHIP STORES  
KEKANUI  
C/- UK UNICOOP SARL BP25  
WALLICE & FUTUNA ISLANDS".

The sales were only of whisky, cigarettes and tobacco. The store goods were delivered to the "Kekanui". The quantities and prices were as follows :

10x12x750 ml Red Label Whisky )	
6x12x750 ml Black Label Whisky )	\$A 859. 09
6x12x750 ml Dewars Scotch Whisky	308. 41
6 Cartons x 10,000 x 20's Benson and Hedges Cigarettes )	
20 Cartons (435.44kg.) Lord Beaconsfield Twist Tobacco )	5788. 64
6 Cartons 10,000 x 20's Rothmans Cigarettes )	
20 Cartons (320 kg) Irish Cake Tobacco	4845. 89
	<hr/>
	\$A11,802.03
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There is mention in evidence that these "ship stores" were consumed before the vessel arrived at Noumea.

The balance of the goods sold were to UNICOOP SARL. The sale price of the goods amounted to A\$55,251.99 and were consigned to UNICOOP at Wallis Islands.

Messrs. Burns Philp (South Sea) Company Ltd., the agents for the vessel "Kekanui" received the goods consigned to Unicoop Sarl for shipment and issued four shipping receipts. Photocopies of these four receipts were produced and admitted without objection. The conditions endorsed on the back of the photocopies of these receipts are quite illegible. There are indications that the receipts bear some endorsements which are also illegible.

Mr. Zullah said his company picked up the originals of the receipts from the shipping company and submitted them to the plaintiff's bank, Barclays Bank. The originals he said are with Indo Suez a bank in Noumea, New Caledonia. Mr. Zullah said the goods were consigned on 60 days term meaning it is assumed that payment had to be made within 60 days. He said that if the consignee did not pay within 60 days the consignee would not get possession of the goods. No draft or bill of exchange was produced by Mr. Zullah in confirmation of these allegations.

The basis of the company's claim is that if the goods had been delivered his company would have

received payment. The inference is that the company has not been paid although he then went on to disclose that his company after issue of the writ had received two payments on account namely \$5,710.22 and \$3,847.70.

Mr. Zullah did not explain how goods consigned to Wallis Islands were not to be delivered to the consignee at Wallis Islands when the consignee had 60 days within which to pay for the goods in Noumea, New Caledonia.

No documentary evidence was produced by the plaintiff to establish that the plaintiff retained ownership of the goods until the consignee paid for the goods and uplifted invoices and shipping papers.

It appears from the evidence before me that the sales were made by the plaintiff to Unicoop Sarl in Suva about August 1981 when Mr. Morrell personally ordered the goods on behalf of his company and directed they be shipped in the "Kekanui". It is immaterial whether the goods were sold in Suva or not. The plaintiff's case is that the defendant in breach of contract and/or negligently and/or in breach of its duty as common carriers either lost the goods or delivered them to an unauthorised person without obtaining the original Bills of Lading. As an alternative claim the plaintiff alleges the defendant fraudulently and without colour of right converted the said goods to its own use.

In evidence in chief Mr. Zullah disclosed that Mr. Morrell had rung him on many occasions seeking release of the ship which he said was on charter. Mr. Zullah said he spoke to Mr. Morrell about interest on his company's account. Mr. Morrell he said agreed to pay



000000 interest and to pay the whole debt.

In answer to a question from the Court Mr. Zullah said Mr. Morrell admitted he had received the goods which I take to mean that the consignee received the goods since Mr. Morrell was Managing Director of Unicoop Sarl. How the consignee obtained possession of the goods has not been explained.

Two payments were made by Unicoop Sarl and accepted by the plaintiff.

The evidence before me indicates the goods consigned to Unicoop Sarl were received by that company which defeats the plaintiff's claim that the goods were not delivered and other claims alleging negligence, fraud and conversion.

The only claim left is that the defendant is alleged to have been in breach of contract in delivering the goods without first obtaining the original Bill of Lading.

The plaintiff has not established that it was a term of the contract of carriage that goods were not to be delivered unless original Bills of Lading were produced or indeed established any breach of any such term. I am not prepared to assume that because the company has not been fully paid there has been a breach. All I have before me are photocopies of four shipping receipts with illegible conditions on the reverse thereof. Nor has the company established any loss as regards these goods. It has established that it has not been fully paid for the goods. It granted Unicoop Sarl credit terms and sub-

sequently had that company or Mr. Morrell personally agree to pay interest on the debt indicating that it looked to Unicoop for payment. There is no evidence that Unicoop Sarl has refused or cannot pay the balance. In fact the evidence is that Mr. Morrell has promised payment.

I turn now to the claim as regards the "ship stores".

The evidence is clear that Mr. Morrell personally ordered the "ship stores" and directed they be delivered to the ship. Payment for these goods was to be made by UNICOOP SARL and Bills of Exchange or Drafts FJOBC 81/97 and 81/99 (Vide Exhibit 5) were sent to Indo Suez. A number of issues arise as regards these goods.

1. Were the goods sold to the vessel for her operation and maintenance?
2. Were the goods sold to Unicoop Sarl or the owners of the vessel?
3. Should payments received by the plaintiff be applied in payment of the account for these stores in priority to the other account?

I do not consider that the supply of whisky, cigarettes or tobacco can by any stretch of the imagination be considered as "goods or materials supplied to a ship for her operation or maintenance" within the meaning of those words in section 1(1)(m) of the 1956 Act.

At page 3552 of volume 2 of "The White Book" there is mention in a note that claims under paragraph

1(m) are usually known as claims for "necessaries".

Brandon J. in The "Fairport" (No.5) (1967) 2 Lloyd's Law Reports 162 expressed the view that the claims described in section 1(1)(m) of the Act were certainly no narrower than the claims formerly described as claims for necessaries in the Supreme Court of Judicature (Consolidation) Act 1925. Consideration of cases heard before 1956 are not of much assistance because of the different wording of section 1(1)(m). However, had it been necessary to consider whether whisky, cigarettes and tobacco were "necessaries" within the meaning in the 1925 Act, no difficulty in my view would be experienced in holding they were not necessaries.

They could not come within the enlarged definition of Sir Robert Phillimore's in The Riga (1872) L.R. 3A & E 516 where he said he was unable to draw any solid distinction between necessaries for the ship and necessaries for the voyage.

There is no evidence in any event in this case that the master of the vessel ordered the goods.

Lord Esher in The Orienta [1895] C.A. 49 said at p. 54 :

"For a century or more it has been common knowledge that the master is only authorised to pledge the owners' credit for what may be called "things necessary" for the ship; that is to say, he can pledge his owners' credit if he is in a position where it is necessary, for the purposes of his duty, that these things should be supplied and he cannot have recourse to his owners before ordering them".

In my view an action in rem against the ship is not maintainable in respect of the alleged "ship stores" which were not required for her operation or maintenance.

Whether an action in rem is maintainable in respect of the two claims depends also on whether they come within section 3(1), (4) and (8) of the 1956 Act.

Only subsection (4) need be considered. That provides that claim in an action in rem against a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of the ship may be brought if at the time the action is brought the person liable in personam is the owner or beneficial owner of all shares in the ship.

According to the evidence Mr. Zullah, Mr. Morrell at the time he ordered the goods, said the company Unicoop Sarl owned the "Kekanui".

At the hearing the plaintiff produced a photocopy of an extract from the Bureau Veritas Register 1982 the French Register of Shipping indicating the "Kekanui" is owned by the company I earlier mentioned known for short as WANAPAC.

Mr. T.W. Billett a Marine Surveyor of Suva, called by the defendant, produced the Lloyds Register. On page 595 of this register there is an entry for the "Kekanui" which shows the name of the owner as being WING MAN HING Papeete.

Mr. Billett explained why the two registers could show different names for the owners of the vessel. Entries in Lloyds Register are the result of reports

from persons such as himself. Presumably the entries in the French Register came from reports of marine surveyors also. The document to rely on as evidence of ownership, he said, was the Register which is kept on the ship.

There was produced through Mr. Sweetman what purports to be the original ship's register of the "Kekanui". Mr. Nagin objected to this document being tendered which was provisionally admitted subject to my ruling on its admissibility.

It is immaterial whether the document is admitted or not as the plaintiff has not in any event established that the vessel was owned at the time of the sale by Unicoop Sarl or indeed by Wanapac. The plaintiff has not established that it can proceed in rem against the vessel.

I consider the ship's register would be admissible but the fact that it discloses that the S.A. Compagne Polynesienne de Transport Maritime owns the vessel makes no difference to the outcome.

On the facts before me the sale was made to Unicoop Sarl represented by Mr. Morrell who asked that the goods be delivered to the ship. There was no sale to the ship on order from the master and the fact that the goods were described as "ship stores" and treated as such by the Customs does not make them goods supplied to the ship for her operation or maintenance.

It is not necessary to consider whether the money already paid should have been credited to the earlier account for "ship stores" as consideration of the other

two issues indicates that no action in rem against the ship is maintainable in respect of the "ship stores". Nor is it necessary to rule on the admissibility of documents which were provisionally admitted since I have not had occasion to rely on them.

There has been no trial of the counterclaim. Mr. Keil closed his case without any reference to the counterclaim. The counterclaim is dismissed with costs to the plaintiff.

The plaintiff's claims against the defendant is dismissed with costs to the defendant.

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

S U V A,

20 SEPTEMBER, 1982.