IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Appeal Case No. 7 of 2015

BETWEEN: TUNA FISHING (VANUATU) LIMITED
Appellant

AND: IFIRA WHARF STEVEDORING LTD
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Stephen Harrop
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr N Morrison for the Appellant*
Mr D Yawha for the Respondent

Date of Hearing: *Wednesday 15 July 2015*
Date of Judgment: *Thursday 23 July 2015*

JUDGMENT

Introduction

1. On this appeal there is a short point to be decided. It is whether clause 14 of the Ports (Dues, Fees and Charges) Regulation ("the Regulation") under the Ports Act [Cap. 26] authorizes the imposition of a *"penalty storage charge"* after a container received at the wharf operated by the respondent has been removed from the wharf, but whilst the shipper who used the storage facilities of the wharf has not paid the storage fees.

2. The precise point was not clearly raised before the trial Judge, but was raised on the appeal by counsel for the appellant. Counsel for the respondent did not oppose the point being raised, and was in a position to respond to it. That was a sensible position to have taken, as the issue is simply one of construction of the relevant clause of the Regulation, and it could be addressed on the basis of the documents presented at the trial by the respondent and on the findings of the trial Judge.

3. The answer to the point is that, in the circumstances, clause 14 (3) does not authorize the imposition of a *"penalty storage charge"*. Its function is to prescribe the storage charges applicable for the storage of a container on a wharf operated by the respondent after the storage rates prescribed by clause 14 (1) for the first 20 working days have been incurred. That is, in effect, after the first month of storage.

4. The appeal is to be allowed and the judgment entered by the primary judge is varied so that judgment is entered for the respondent against the appellant in the sum of Vt 5,072,547. It is not necessary to alter the orders made by the trial Judge about interest, namely that interest should be payable on that judgment sum from 1 April 2008 at the rate of 10%. Given the prevailing interest rates in the community generally in the last several years, it would seem to be implicit (and we make it explicit) that the interest is to be calculated as simple interest rather than compounding interest. There is also no reason to discharge the order the primary judge made that the appellant pay the respondent costs of the trial fixed at Vt 70,000.

5. As the appellant has succeeded on the appeal on a matter not expressly raised before the primary judge, and as the respondent assisted the appeal process by preparing the appeal books for the use of the Court, it is appropriate also to order that there be no costs order of the appeal.

The Facts

6. The respondent is the operator of the main Government wharf in Port Vila in relation to wharfage, storage and transportation of international cargos. The appellant stored a container from the Southern Pacifika at the wharf on 1 October 2007. It remained in storage at the

wharf until 28 March 2008. It is common ground that it removed the container from storage in the custody of the respondent at that time.

7. The storage rates are prescribed by the Regulation. Clause 14 of the Regulation provides for storage charges in the following terms:-

" Storage Charges

(1) Storage charges payable in respect of any cargo intended for import or export and stored at a Government wharf, warehouse or in the open but within the controlled port areas of Port Vila or Luganville shall be at the rates, per metric ton or part thereof given below-

(a)	*first 5 working days*	*Free;*
(b)	*second 5 working days*	*Vt 363;*
(c)	*third 5 working days*	*Vt 847*
(d)	*fourth 5 working days*	*Vt 1,573*

(1A) Any empty container intended for re-export and stored anywhere within controlled port areas of Port Vila and Luganville shall be charged at the following rates –

(a)	*first 30 working days*	*Free*
(b)	*thereafter per container per day*	*Vt 500*

(2) The storage charges payable under sub regulation (1) shall be payable by the consignee or the shipper to the Director of Ports and Harbour within 1 month from the date the cargo reaches the wharf warehouse or in the open but within controlled port areas, as the case may be.

(3) Where the storage charges referred to in sub regulation (1) are not paid within 1 month from the date the cargo reaches the wharf, warehouse or in the open but within the controlled port areas, as the case may be, an additional charge of Vt 1,573 per day per metric ton or part thereof is payable by the consignee or the shipper to the stevedoring contractor.

(4) *After a period of 3 months from the date on which the storage charges are due, the stevedore may with the written consent of the Director of Ports and Harbour, take legal proceedings for the forfeiture and sale of the goods in question.*

(5) *In the event of a dispute, the stevedore shall undertake the necessary weighing and measuring operations to establish the charges prescribed by these regulations.*

(6) *If the weights and measurements –*

(a) *are greater than those declared the cost of such weighing and measuring operations shall be borne by the consignee or shipping agent;*

(b) *are lower than those declared the cost of such weighing and measuring operations together with that caused by the resulting delay shall be borne by the stevedore."*

8. The respondent issued an invoice for storage fees for the container for the period 1 October 2007 to 28 March 2008. It is contained in the material before the primary Judge. It shows that storage charges were calculated for each of the four weeks provided for in clause 14 (1), and then a late payment charge covering the period on 2 November 2007 to 28 March 2008 calculated under clause 14 (3). The total of those charges is Vt 5,072,547. The appellant accepts that the invoice reflecting that amount accurately identifies the periods applicable, the rates applicable, and accurately quantifies the amount payable. It is that amount in respect of which we have substituted judgment.

9. The contentious issue arises from the final item on that invoice. It is described as *"late payment of storage charges"*, covering the period 29 March 2008 to 31 August 2012 (1653 days) and totalling Vt 65,004,225. That sum was calculated, and charged, according to the respondent, in accordance with its entitlement to do so under clause 14 (3) of the Regulation.

Consideration

10. In our view that charge was not entitled to be made by the respondent. It is fair to point out that the primary Judge did not have the point argued before him. Indeed, on the material presented to the primary Judge, he did not have the benefit of the basis of the *"late payment of storage charges"* item being clearly explained to him, or that the container had left the custody of the first respondent on 28 March 2008, although a proper understanding of the invoice of the respondent shows that.

11. We do not consider that the respondent was entitled to charge that amount simply because under Clause 14 (3) storage charges for the period whilst the container remained in storage at the wharf were unpaid. In our view, the proper construction of clause 14 (3) of the Regulation is that it prescribes the rate at which storage may be charged for a container which remains on the wharf in the custody of the first respondent after the period referred to in clause 14 (1) of the Regulation.

12. There are a number of indications in the text and context of the Regulation to support that conclusion. First, clause 14 is headed *"storage charges"* and does not otherwise prescribe penalties for non-payment of storage charges. Secondly, there is no other term in clause 14 to prescribe the storage charges which apply to the storage of a container after the first 20 working days (or one month) covered by regulation 14 (1). It can therefore be seen that sub clause (3) is intended to cover that circumstance. Otherwise, there could be no basis for the respondent to charge storage charges for a container left in its custody beyond one month provided the fees for that month were paid. On the other hand, it could charge the very large amounts for *"penalties storage charges"* where the container has left the wharf but the storage charges are not paid. At one extreme, if a container was removed from the wharf during week 2 of the period covered by clause 14 (1) – where the rate is Vt 363 per metric ton per day – but the storage fees were not paid, the respondent could immediately impose a penalty storage charge at Vt 1,573 per metric ton per day until that fee was paid. It is not likely that that was intended. Clause 14 (4) supports that conclusion, because it prescribes a power in the respondent, after a period of three months, in certain circumstances to take proceedings for the forfeiture and sale of the container and its contents to recover storage

charges unpaid. In other words, there is a logical sequence of events covered by clause 14: storage rates for the first month, storage rates for succeeding months, and in the event after three months, where the container is still present or where storage charges are unpaid or both, the container and its contents may be sold and applied to the outstanding storage charges.

13. That also accords with the context and purpose of the Regulations. That there should be a storage charge for a container kept in the custody of the respondent with some fee incentive for its removal, so that it can then receive and store other containers at the wharf and so be entitled to charge for the space provided for that storage. On the other hand, there is no purpose apparent to us why such a penalty rate should be applied for non-payment of storage charges, which, in effect, represents the value to the respondent of the storage space actually being used when it is not being used.

14. Finally, it may be said, that the construction contended for by the respondent is potentially unreasonable. In the first place, a storage penalty charge on the basis that the respondent contends for would produce (as it appears to do in this circumstance) very unfair and unreasonable results. That may be fortified by pointing out that the respondent's argument would apply to a circumstance where all but a relatively small part of the actually incurred storage charges have been unpaid. Let it be assumed that the appellant had paid all but Vt 10,000 of the Vt 5,072,547 owing by it for storage charges. If the respondent is correct, it would nevertheless have been entitled to charge the additional penalty storage charges as it has done. That is clearly inappropriate and illogical. It is not consistent with a sensible construction of Clause 14(3) that it should accommodate such an outcome.

Conclusion

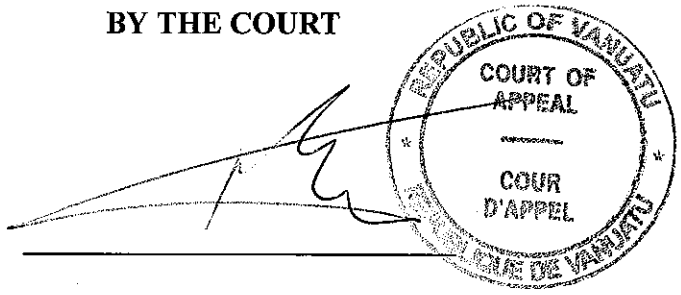
15. For those reasons, the orders are as set out in [4] above. It has been unnecessary to consider the appellant's application to adduce fresh evidence. It emerged in the course of submissions on that issue, that the facts which the appellant's fresh evidence was designed to establish were in fact demonstrated by the respondent's own documents produced at the trial, although (as we have said) the focus on clearly identifying when the container left the custody of the

respondent, and the precise basis upon which the storage penalty charge was applied were not subject to detailed submissions before the primary judge.

16. For the reasons given, the appeal is allowed and the orders referred to in [4] above are made.

DATED at Port-Vila this 23rd day of July, 2015

BY THE COURT



Hon. Chief Justice Vincent LUNABEK