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

Civil
Case No. 18/1879 SC/CIVL

BETWEEN: FR8 LOGISTICS LIMITED
Claimant

AND: GOVERNMENT OF THE REPUBLIC OF VANUATU
Defendant

Before: ***Justice D. V. Fatiaki***

Counsel: *Mr. Chris Kernot in person for the Claimant*
Counsel – Ms. A. Bani for the Defendant

Date of Delivery: *22nd August 2019*

DECISION

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1. On 9 July 2018 the claimant which has been ably represented throughout by its Director (**Chris Kernot**) issued proceedings in the Supreme Court seeking interalia payment of the sum of VT6,706,267 for "*freight logistic services*" provided to various government departments at the request of the Prime Minister's Office over the period September 2016 to May 2018. The total amount claimed includes an interest component of VT2,316,044.

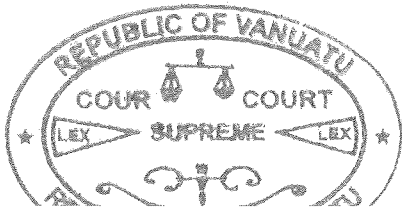
2. On 26 November 2018 the claimant prematurely filed an application for summary judgment on the basis that no defence had been filed [***see:*** Rule 9.6(1) of the Civil Procedure Rules ('**CPR**')]. The application conveniently summarizes the nature of the claim as follows:

   "*This matter is purely about FR8 Logistics invoices for FR8 Logistics Services provided for the clearance costs, Wharf Charges, Storage charges in the initial importation of 25 vans, 2 SUV Vehicles and the Spare Parts accompanying them;*

   Subsequent Service invoices relate to further services provided in the form of storage for a single van left in FR8 care since October as well as Vehicle Spare Parts which have a cubic measurement of 42.70m3 and which goods have a Vatu value of VT47,697,566;

   Further invoices reflect FR8 Logistics Terms and Conditions relating to late payment for services rendered accruing at 4% per month, compounding".

3. On 13 December 2018 the defendant filed a Defence in which it states that after filing of the claim "*the parties agreed to settle out of Court*". The defendant then says that it made several payments on divers dates in 2017 and 2018 in respect of thirty three (33) numbered invoices with a total value of VT4,620,586.



4. As for the remaining unpaid invoices relating to "*spare parts*" and "*storage and interest*" the defendant says that: "*... there is a dispute between the parties on a substantial question of fact, namely, the claimant's entitlement to charge and claim for storage and interest*" in respect of the stored items.

5. In particular, the Defence sets out the following relevant factual background (in paras. 2.9 to 2.19), namely:

> "*... around 18 October 2017, the spare parts concerned were imported on the vessel Pacific Islander Voyage from Beijing in one consignment along with the vehicles and some other spare parts for purpose of the* ***2017 Pacific Mini Game*** *("imported goods");*
>
> *... after the imported goods were declared goods for the game, they were then delivered to the Claimant's logistic warehouse at No.3;*
>
> ***... the delivery of the goods at Claimant's warehouse was a logistic error as the area was too small;***
>
> ***... the goods were then moved to at Korman stadium except one white Datong motor vehicle and the current spare parts in issue which were left at the Claimant's warehouse in a container;***
>
> *... the understanding at that time was that all goods would be released from the Claimant's warehouse one week before the game;*
>
> ***... that one vehicle and spare parts were left in the Claimant's warehouse by mistake;***
>
> ***... the organisers for the game were so busy at that time that they did not remove that vehicle and spare parts from the Claimant's warehouse to Korman during the game;***
>
> *... in January 2018 when the games were over, the Defendant through the Vanuatu Sports Commission's officers attempted to remove the goods concerned from the Claimant's warehouse but the Claimant refused to release it;*
>
> *... the Claimant's refusal was on the basis that the Defendant had yet to settle its duty and stevedoring charges for the consignment, which FR8 paid on behalf of the Defendant;*
>
> ***... there was no agreement that the Claimant would keep the Dalton vehicle and the spare parts nor any goods in its warehouse until the Defendant sort out all its outstanding fees;***
>
> *... there was also the understanding between the parties that all goods which arrived in that one consignment would be released from the Claimant's warehouse and be delivered at Korman with the relevant authorities;"*
>
> (my highlighting)

6. On the face of the above, there is a clear shortfall of VT(6,706,267 – 4,620,586) = VT2,085,681 on the principal sum claimed in the claimant's invoices without reference to a similar amount claimed as interest on outstanding unpaid sum(s).

7. Be that as it may, the averments are reinforced and mirrored in the sworn statement of **George Lapi** the Government Liasing Officer during the Vanuatu 2017 Pacific Mini Games ("*Van 2017*") wherein he deposes (at paras. 5 to 14):

> *"As part of the Van 2017 agreement between the Defendant and China, it was agreed that the latter (China) would be responsible for providing transportation for purpose of the Van 2017.*
>
> *... around October 2017, China shipped 2 new cars, 25 new buses and automobile spare parts (the "imported goods") through the vessel Pacific Islander Voyager from Beijing to Port Vila.*
>
> *The imported goods were shipped in one consignment and were all consigned to the Prime Minister's Office.*
>
> *Upon arrival, the imported goods were released by Department of Customs ("Customs") to the Claimant as it (Claimant) was designated to declare goods on behalf of the PMO and or Ministry of Youth & Sports for purpose of Van2017.*
>
> *... **18 October 2018, after the imported goods were declared goods for the Games, they (imported goods) were then delivered to the Claimant's logistic warehouse at No. 3.***
>
> ***The delivery of the imported goods at the Claimant's warehouse was a logistic error as the area was too small to accommodate all the imported goods.***
>
> ***... the Defendant through its officers led by Mr Rowan Lulu as Logistic officer moved the imported goods to Korman stadium except one white Datong motor vehicle and the current spare parts in question.***
>
> ***Before and during the Van 2017, the Defendant through its officers were so busy that they did not remove the remaining vehicle and spare parts from the Claimant's warehouse to Korman.***
>
> *... in January 2018, when the Games were over, I along with Rowan Lulu as the Logistic Officer went to the Claimant's office and asked Mr Chris Kernot ("Mr Kernot") to release the remaining imported goods kept in its warehouse.*
>
> *... **Mr Kernot refused to grant our request and said that he would not release the goods until the Defendant settle its duty and stevedoring charges for the consignment, which it (Claimant) paid on behalf of the Defendant** ..."*
>
> (my highlighting)

8. In light of the above, the sole issue appears to be that there was no clear agreement for the claimant to store any of the defendant's goods in its warehouse and to charge for such storage as well as interest on outstanding payments on unpaid invoices.

9. **George Lapi** also relevantly deposed in his further sworn statement that:

> "*... there was an oral agreement made by me as Government Liaising Officer and Chris Kernot (Mr Kernot). **The oral agreement was that the claimant would declare the imported goods on behalf of the defendant, release them to the defendant and provide invoices accordingly***".
>
> (my highlighting)

10. If I may say so that is precisely what happened and in that order. The provision of "*invoices*" is undoubtedly so that the defendant would know what services were provided by the claimant and what payment was required and when and how the payment was to be made to the claimant for the service(s) rendered under the oral agreement.

11. In his response **Chris Kernot** deposes that the defendant's goods that were delivered to his warehouse premises were: "*... fully custom cleared*" on 18 October 2017 *vide*: **Customs Release Note VSEA 017 C2720** and was no longer of any interest or concern to Customs and need not have been stored in a Custom Controlled or Bonded Warehouse.

12. It is accepted that the claimant acted on behalf of the defendant in declaring the goods and obtaining their release from Customs and such services were satisfactorily performed. In further performance of the oral agreement the claimant released all of the goods to the defendant's representatives except for a vehicle and spare parts that were left in the claimant's warehouse at the request of and/or with the full knowledge and agreement of the defendants' representative(s).

13. Between 22 September 2016 and 14 June 2018, the claimant issued forty (40) Invoices to the Prime Minister's Office for various services provided including for interest charges for overdue accounts as well as for storage charges for: "*1 x 21 seater bus*" and "*6 crates spare parts*".

14. On the face of each Invoice are the following common pre-printed features:

    - There is a clear statement that payment terms is: "***Cash on delivery***";
    - Each invoice also clearly states: "*...* ***storage fees ... start 5 days after arrival for sea freight***";
    - and lastly, each Invoice records that: "*...* ***late payment will attract an interest fee of 4% per month calculated on all outstanding amounts***".

15. On the basis of the above features and the absence of any immediate challenge or objection by the defendant, to the claimant's Invoices that charged "*storage fees*" and "*interest fees for late payments*" and viewed in a commercial/business context and the history of dealings between the claimant and the defendant, I reject the defendant's contrary claims and assertions.

16. I am satisfied on the evidence that there is only one possible and reasonable answer to the so-called question posed and that is to say that there is no substantial question of fact or difficult question of law raised by the defendant's defence and sworn statements in support.

17. Be that as it may, defence counsel writes in her submissions disputing the claimant's entitlement to charge "*storage*" or "*interest*", on the basis of "*... the following factual reasons and/or question of law*":

"*(i)* *The claimant being a custom agent, its main duty was to declare goods and release them to the consignee who in this case is the defendant through the office of the Prime Minister.* ***It has no duty to keep or store it and charge interest daily;***

(ii) *The claimant was never issued with a licence to operate the warehouse in question which keeps the spare parts in and therefore* ***such storage is contrary to section 15(c) of the Customs Act No. 7 of 2013;*** *and*

(iii) *The defendant had attended the claimant's office sometimes in January 2018 after the Van2017 games and demanded the release of the remaining goods including the spare parts; however the claimant refused to release them. Thus,* ***the claimant is keeping the goods at its own will and cannot claim interests for what he is keeping at its own will***". (my highlighting)

18. **As to (i):** the claimant pleads and Chris Kernot deposes that it is: "... *a locally incorporated company involved in offering freight and logistic services as well as removal services (both inbound and outbound), courier services, freight storage, transport and packaging ...*" (**see:** para. 1 of the Claim). That paragraph of the claim is unconditionally admitted by the defendant (***see:*** para. 1 of the Defence). Accordingly, this basis for disputing the claim having been admitted, is misconceived and baseless.

19. **George Lapi** the principal defence witness also deposed that after the defendant's goods were cleared by Customs on 18 October 2017 they: "... *were delivered to the claimant's logistic warehouse at No. 3*" and from there, the defendant's goods were moved by its officers to Korman Stadium "***... except one White Datong motor vehicle and the current spare parts ...***" which remained at the claimant's warehouse and were never removed because the defendant's officers: "***... were so busy before and during the*** (2017 Pacific Mini Games). Nowhere in his sworn statement does he claim or depose that the leaving of the items was a "*mistake*".

20. On that basis also there can be no dispute whatsoever that the defendant's servants and officers who were responsible for the removal of the defendant's goods, knowingly left a van and vehicle spare parts in the claimant's warehouse and failed to remove them for several months, until when the defendant's officers eventually sought the release of the goods in early 2018 ("***the left items***").

21. In my view, the act of leaving the left items in the claimant's warehouse (occupying a total area of "***42.70 cubic metres***") with the intention of removing them at a later date, means that the defendant's representatives intended for the claimant to keep and store the left items securely and safely within its warehouse premises and facilities until such time as they were removed by the defendant.

22. Furthermore the claimant's **Invoice No. 50045118/G** dated 02 March 2018 which is specifically addressed to: "***Attn: George Lapi***" clearly refers to a "*bus*" and "*spare parts*" and identifies the basis of the charges as being: "***Destination Storage/Warehouse from 20/10/17***". This invoice has not been specifically denied by **George Lapi** nor is there any suggestion that he objected to its issuance or challenged the basis or service charged as might be expected of someone who was the other party to the "*oral agreement*" set out in **para. 9**

(above) and who claims there was no agreement to store any of the defendant's goods.

23. The defendant accepts firstly, the "***logistics error***" in delivering the defendant's goods to the claimant's warehouse on 18 October 2017, secondly, that a "***mistake***" was made in leaving the left items in the claimant's warehouse and lastly the defendant's representative admits its "***oversight***" in not removing the left items until well after the **Pacific Mini Games** were over. In my view none of these excuses is a good or sufficient reason or justification for not paying the claimant's unchallenged "*storage*" and "*interest*" invoices that were issued after the service(s) were rendered and after payments remained outstanding and after the left items were not removed by the defendant's representatives.

24. As for **issue (ii)**, the short answer is that that is not a matter specifically pleaded in the defence as it should be [***see:*** Rule 4.2(1)(c) of the CPR] and potentially undermines the defendant's claim that there was no "*storage*" of its goods. But, in any event, and even if pleaded in the terms mentioned in counsel's submissions which makes reference to the provisions of Section 15(c) of the Customs Act 2013, I am satisfied that this issue too is misconceived and baseless.

25. Section 15 occurs under Division 2 of the Customs Act 2013 entitled: Customs Controlled Areas. It is limited to areas notionally controlled by Customs and used for various designated purposes including:

> *"(c) the temporary holding of imported goods for the purposes of the examination of those goods by Customs";*

26. It is common ground that the defendant's goods were duty-exempted as having been "*... purposely imported to be used by Van2017 Pacific Mini Games*". Furthermore **Tony George** a Customs Senior Officer, Border Section desposes that: "*... the goods were released by Customs to* (the claimant) *as the designated declarant and agent of the Prime Minister's Office which was the "consignee* (importer) *of the goods*". It is also undisputed that the defendant's goods were released to the claimant pursuant to a Customs RELEASE ORDER **No. VSEA 2017 C 2720** dated 18 October 2018.

27. In light of the foregoing I am firmly of the view that the defendant's goods (including the left items) having been cleared and lawfully released by Customs into the claimant's possession, were no longer required to be kept, in the words of subsection (c) above: "*... for the purposes of examination by those goods by Customs*". There is nothing of substance in issue (ii) which is dismissed.

28. As for **issue (iii)**, whilst the retention of the left items and the refusal to release them when requested by the defendant's representatives in early 2018 is common ground, the parties clearly differ on the basis or justification for the claimant's retention and refusal.

29. In this regard although not pleaded in a reply, the claimant relevantly writes in support of the application for summary judgment:

"*... without payment in full for all services provided including the services of financing the Government with an extended, unasked for, unsecured and non-approved line of credit,* (the defendant's) *goods would be held until payment had been affected (sic) in full as bailment, or a common law lien similar to a lawyer holding legal papers relating to a client until payment in full for legal fees has been done*".

And later:

"*FR8 holding the van and spare parts as bailment against payment is not a violation of the Customs Act*".

30. The defendant for its part, asserts that the claimant's retention of the left items after the defendant's request for their release is "*... without lawful basis*" and the left items are being kept "*... at* (the claimant's) *own will and cannot claim interest*". Whilst accepting that the claimant's refusal to release the left items:

"*... was on the basis that the defendant had yet to settle its duty and stevedoring charges for the consignment which FR8 paid on behalf of the defendant*"

nevertheless, the defendant claims:

"*... there was no agreement that the claimant would keep the Datong vehicle and the spare parts ... in its warehouse until the defendant sort out all its outstanding fees*".

However, no oral or written submissions were provided by defence counsel on the claimant's claim of a "*common law lien*".

31. Plainly the defendant has over-looked the claimant's assertion of a lien over the left items because it claims there was no agreement permitting the claimant to retain the left items until all its outstanding fees were settled by the defendant. I disagree with this averment which misunderstands the nature and purpose of a "*common law lien*".

32. In this regard in Tappenden (trading as English & American Autos) v Artus and Another [1963] 3 All ER 213 at 216 Lord Diplock relevantly said:

"*The common law lien of an artificer is of very ancient origin, dating from a time when remedies by action on contracts not under seal were still at an early and imperfect stage of development; see the old authorities cited by Lord Ellenborough C J in Chase v Westmore.* ***Because it arises in consequence of a contract, it is tempting to a twentieth century lawyer to think of a common law lien as possessing the characteristics of a contractual right, express or implied, created by mutual agreement between the parties to the contract. But this would be to mistake its legal nature.*** *Like a right of action for damages, it is a remedy for breach of contract which the common law confers on an artificer to whom the possession of goods is lawfully given for the purpose of his doing work on them in consideration of a money payment.* ***If, pursuant to the contract, the artificer does the work, he is entitled to retain possession of the goods so long as his charges, whether agreed in advance or (if not so agreed) payable on a quantum meruit, are satisfied.*** *..... But this does not mean that the remedy of lien, any more than the remedy in damages, is the result of an implied term in the contract to which what we may conveniently call The Moorcock criteria, relevant to implying terms in a contract, apply. ...*

The common law remedy of a possessory lien, like other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help. ***It is a remedy in rem exercisable on the goods, and its exercise requires no intervention by the courts, for it is exercisable only by an artificer who has actual possession of the goods subject to the lien.*** *Since, however, the remedy is the exercise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession adverse to the right of the person who, but for the lien, would be entitled to immediate possession of the goods.* ***A common law lien, although not enforceable by action, thus affords a defence to an action for recovery of the goods by a person who, but for the lien, would be entitled to immediate possession.'***

The above judgment was authoritatively applied in ***Your Response Ltd v Datateam Business Media Ltd*** [2014] 4 All ER 928.

(my highlighting)

33. In light of the foregoing there is not the slightest doubt in my mind that the claimant was entitled to retain the left items until after payment of its Invoices is made in full including for "*storage*" and "*interest*". Issue (iii) is also without merit and raises no substantial questions of law or fact.

34. Accordingly, judgment is entered against the defendant as follows:

    (1) In the sum of **VT9,022,311** to be paid within 21 days;

    (2) Interest of **14% per annum** on the sum in (1) with effect from 9 July 2018 until fully paid;

    (3) Standard costs to be taxed if not agreed.

DATED at Port Vila, this 23rd day of August, 2019.

BY THE COURT

D. V. FATIAKI
Judge.