

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

H.C.A. NO. S-1756 OF 1989

B E T W E E N:

C. L. SINGH TRANSPORT SERVICE LIMITED PLAINTIFF

AND

SEA LAND SERVICE INC. DEFENDANT

BEFORE THE HON. MR. JUSTICE STOLLMAYER

Appearances:

Mr. F. Hosein for the Plaintiff

Mr. C. Kangaloo for the Defendant

REASONS

The issues for determination in this matter were whether, first, there was in existence in Trinidad and Tobago in 1986 a custom or usage of the inland transport contracting trade that demurrage be paid in respect of container chassis retained by a hirer beyond a particular time period and if so, second, whether it was an implied term of the contract between the Plaintiff and the Defendant. The Plaintiff's claim arose out of a contract with the Defendant by which the Defendant had retained the Plaintiff's services, and the Plaintiff's chassis, to transport 40 foot shipping containers from the Port of Port-of-Spain docks to a consignee's premises in Tunapuna. The consignee had retained those chassis for a period of some weeks.

The facts are that the Plaintiff was at the material time, and still is, in the business of, amongst other things, providing transport services to the shipping industry and in particular the haulage of shipping containers on its chassis.

The Defendant is a shipping line or agent providing, amongst other things, the international carriage of cargo in various sizes of shipping containers, particularly 40 foot containers. It began doing business in Trinidad and Tobago in or around 1970 and arranged the delivery of containers to consignees using the services of independent transport contractors.

As between the Plaintiff and the Defendant they entered into a written contract on the 1st February 1985 for the haulage by the Plaintiff of the Defendant's containers. That contract cannot be said to set out all what one might usually expect to find in a contract of that nature,

and obviously contemplated the Plaintiff and the Defendant arriving at a series of one or more individual contacts which would be agreed upon as and when the need for the Plaintiff's services arose during the course of time. No haulage rates were fixed by this contract and indeed, a number of other terms and conditions which might ordinarily be expected to be found in a contract of this nature are not there. In particular, no mention is made as to the length of time for which the Defendant or a consignee would be permitted to retain the chassis, nor is there any mention of payment of demurrage or of any fee for the retention or detention of the chassis beyond a stipulated time.

The Plaintiff provided these services to the Defendant without, it would seem, any disagreement until some time in 1986. During the course of that year the Defendant contracted the Plaintiff's services for the haulage of certain 40 foot containers from the Port-of-Spain docks, the contents of which were consigned to Pioneer Import Traders ("Pioneer") at Tunapuna. The containers were delivered to Pioneer on or about the 20th July 1986 but the cargo in them was not unstuffed or unloaded for some time thereafter. The Plaintiff was eventually able to haul the now empty containers back to the Port-of-Spain dock on or around the 10th September 1986 and thus regained the use of the chassis, but during this period the Plaintiff did not have, and could not have, the use of those chassis for the very simple reason that the containers, still fully loaded, were on the chassis and could not be lifted off.

The Plaintiff was paid by the Defendant for its haulage services but the Defendant refused to pay any demurrage or detention fee for the period during which the Plaintiff did not have the use of its chassis.

The Plaintiff's claim was for \$251,250.00 being monies due and owing by the Defendant to the Plaintiff for demurrage charges on chassis supplied by the Plaintiff to the Defendant at the Defendant's request. Particulars of the claim are as set out in a number of Invoices which were admitted into evidence.

During the course of the trial the Defendant, very properly in my view but contrary to what was pleaded in the Amended Defence, conceded that there existed a contract for these services. Indeed, the Defence generally bore strong resemblance to a posture of "I have nothing to say save that I deny everything. Prove your case if you can." This, as the evidence unfolded, was not untypical of the viewpoint or the philosophy of the Defendant.

Before going further, however, I think it necessary to have some regard to the question of what is properly regarded to be as demurrage.

It is a term which has its origin in the maritime transportation industry but which over the course of the centuries has found its way into other trades as well. *The Shorter Oxford Dictionary On Historical Principles, 3rd Edition*, defines demurrage as being the "detention of a vessel by the freighter beyond the time agreed on; the payment made in respect of this."

This is a definition which goes back to 1641. It also defines it as being “*a charge for detention of railway trucks,*” a definition which goes back to 1858. And similar definitions are to be found in the *Random House Dictionary of the English Language, The Unabridged Edition (1966)*. “*The detention of a vessel, as in loading or unloading, beyond the time agreed upon*”; “*the similar detention of a railroad car, truck, etc.*”; “*a charge for such detention.*”

Looked at in what might be regarded as the maritime context, *Carver in Carriage by Sea, 13th Ed. Vol. II*, at paragraphs 1812-1813 says:

“The charter, in addition to allowing certain times for loading and unloading, very frequently also allows the charterer to occupy additional days, up to a certain number; and provides that he shall pay for them at a specified rate. The payment for these additional days is for the demurrage.

And strictly, that only is the meaning of demurrage; but the word is also commonly used to denote damages which become due to the shipowner for detention of the ship, in breach of the charterparty or bill of lading. Such damages may become due in addition to demurrage proper Or they may be payable without any demurrage proper being due

Damages for detention are generally calculated at the [rate agreed for demurrage]. But either party may show that that is not the true measure of the loss” The basis of this payment is that “*The shipowner should have just compensation for his loss, and not more, or less.*”

Summerskill in Laytime (1982) says, at paragraphs 9-38-39:

“Damages for detention have been described as a payment ‘in the nature of demurrage.’ This description indicates the similarity in function of the two payments, which are both designed to compensate the shipowner for delay, and may be calculated at the same rate. the view that ‘demurrage’ in the strict sense is not a claim for damage, but is in the

nature of a payment in respect of the continued use or hire of the vessel for the charterer's purposes after the expiry of the lay days. [That] is a theory of demurrage which at one time received some countenance, and which is certainly supported by Lord Traynors' opinion in the case of Gardener v. MacFarlane, McCrindell & Co.

In my opinion, however, the more correct view is that demurrage is 'agreed damages to be paid for the delay of the ship in loading or unloading beyond an agreed period.'

In other words the distinction between 'demurrage' and the damages for detention is that the one is liquidated damages and the other unliquidated. A claim under either head is a claim in respect of detention, and is in the nature of a claim of damages. Among mercantile men, indeed, 'demurrage' is often used in a wider sense as including both demurrage strictly so called and damages for detention "That is derived from the opinion of Lord Salversen in Moore Line Ltd v. Distillers Co. Ltd. 1912 S.C. 514 D 520.

Finally, at page 211-212 Summerskill continues:

"'Demurrage' is a sum named in the charterparty to be paid by the charterer as liquidated damages for delay beyond such lay days.

The ship owner is entitled to sue for "damages for detention" if:

- (i) the lay days have expired and demurrage has not been provided for; or*
- (ii) the time for loading or discharge is not agreed, and a reasonable time for loading or discharge has expired; or*
- (iii)*

In the case of a claim for 'damages for detention' the damages are unliquidated, i.e. it is for the Court to assess what loss has been suffered by the shipowner by his vessel being detained"

This learning provides the background and sets the stage for a claim in demurrage. It is consonant, to some extent at least, with the evidence given at the trial that a practice had developed within Trinidad and Tobago that payment of a fee was made where containers were kept beyond a reasonable length of time while being unstuffed. That payment was referred to as “demurrage” and is indicative of payments of this nature being a concept which has spread very considerably beyond its original use in relation to the detention of ships. I have no doubt as to its applicability now in relation to the use of an inland transport contractor’s chassis.

A claim in demurrage is therefore a liquidated claim with the quantum of that claim being known or easily and clearly established. Such a claim is predicated upon a time period for the permitted retention, or detention of the vessel, or other item, being known and agreed in advance, and a daily rate or fixed sum for its continued retention or detention thereafter also being agreed or readily ascertainable. What the Plaintiff seeks in this action is not a liquidated claim: it is in reality, and law, a claim in breach of contract or for the detention of goods.

On a strict interpretation of the law and the pleadings as they stand, the Plaintiff’s claim must therefore fail, it being for a liquidated claim. I did not think, however, that this would represent, or do justice to, the Plaintiff’s case and I consequently exercised my discretion and further considered whether the Plaintiff might succeed on a claim for damages for detention of the Plaintiff’s chassis in breach of a term of the contract existing between the Plaintiff and the Defendant, that term being implied by custom or usage of the trade, and requiring the Defendant to return, or make available for retaking of possession of, the Plaintiff’s chassis within a

reasonable time of their arriving at the consignee's premises, allowance being made for a reasonable time within which the contents of the container would be "unstuffed" i.e. removed, by the consignee.

The custom or usage which a party seeks to have imported into a contract must have certain characteristics. It must be notorious, it must be certain, it must be reasonable and it must not be contrary to law. *Phipson on Evidence 14th Ed.* paragraphs 17:07 - 17:11 is very instructive in this regard. Also of assistance is the decision in *Cunliff Owen v. Teather & Greenwood [1967], 3 ALL E.R. 561, at pages 572I – 573E.*

“ ‘Usage’ is apt to be used confusingly in the authorities in two senses, (i) a practice and (ii) a practice which the Court will recognise. ‘Usage’ as a practice which the Court will recognise is a mixed question of fact and law. For the practice to amount to a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist that those who conduct business in that market contract with the usage as an implied term, and it must be reasonable. The burden lies on those alleging usage to establish it. The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion of even the most highly qualified expert as to what is desirable that the practice should be. However, the evidence of those versed in a market, so it seems to me, may be admissible and valuable in identifying those features of any transaction that attract usage and in discounting other features which for such purpose are merely incidental and if there is a conflict of evidence about this it is subject to being resolved like other conflicts of evidence. Arrangements or compromises to the same effect as the alleged usage do not establish usage, they contradict it. They may be the precursors of usage, but usage presupposes that arrangements and compromises are no longer required. It is, in my view, clearly not necessary that a practice should be challenged and enforced before it can become a usage as, otherwise, a practice so obviously universally accepted

and acted on as not to be challenged could never be a usage. However, enforcement would be valuable and might be conclusive in establishing usage. What is necessary is that for a practice to be a recognised usage it should be established as a practice having binding effect

A party to a contract is bound by usages applicable to it as certain, notorious and reasonable although not known to him.”

This passage was cited by **Gopeesingh J.A.** in *Civil Appeal 49 of 1986, Sanchez v. Quesnel.*

Proof of usage, and the means of proof, is dealt with in *Phipson at paragraph 17-10.*

In essence this can be said to be that the usage must be proven either by:

- (1) Actual direct evidence of witnesses. The evidence is to be positive and not mere opinion. If it is mere opinion then particular occurrences or non-occurrences are admissible in corroboration or rebuttal;
- (2) Additionally, the usage can be proven by a series of particular transactions in which it has been acted upon; or
- (3) By proof of similar custom in the same or analogous trades in other localities.

Evidence on behalf of the Plaintiff was given by Mr. Clyde Lutchmansingh, Mr. Patrick Clifford of Patrick Clifford Transport Services Ltd., and Mr. Keith Lutchmansingh of Paramount Transport and Trading. Mr. Jaggernaut Ablack of Frontier Equipment Ltd. and Mr. Vidoo Maharaj testified on behalf of the Defendant. All of these individuals were, save for Mr.

Maharaj, in the inland transport contracting trade at the material times. Mr. Maharaj became an employee of the Defendant in 1970 and in 1986 was its Operations Manager.

Based upon the evidence before me, I was satisfied that there existed in 1986 a practice whereby hirers of chassis were charged demurrage (as I will refer to it in this judgment) by transport contractors. I was so satisfied on a balance of probabilities, and I was also satisfied that this practice existed for some 15 years prior to 1986, and that it continues to the present date. The evidence of Vidoo Maharaj and Jaggernaut Ablack cannot defeat that of the Plaintiff and of his witnesses in this regard. Patrick Clifford, for example, charged demurrage and so did Paramount Transport and Trading. This is in my view corroborated by the opinion evidence given by the witnesses as to other contractors charging demurrage. I was also satisfied that demurrage charges were payable by the hirer, i.e. the person retaining the services of the transport contractor, whether that hirer was a shipping line, or a shipping agent, or a consignee and I was further satisfied that the hirer would be the party liable to pay the demurrage, even if the hirer sought to pass that charge on to a third party with whom it had itself contracted. To say that the consignee is the person primarily liable to the transport contractor for this payment without the consignee itself being the hirer, would require evidence of some such binding obligation as to which no such evidence was forthcoming. There was admittedly, evidence that demurrage was paid by consignees, but this was in instances where the consignees were the hirers of the chassis

Turning to those four characteristics stated in *Cunliffe Owen v. Teather & Greenwood*

which are required to be proven and, first, that the usage must not be contrary to law, I can see nothing contrary to law in the making a charge or fee for the retention of someone's equipment beyond a specified contracted period of time. There is indeed no allegation or evidence indicating that the charging of demurrage is contrary to law and it is difficult to conceive as to how this might be illegal. The law is clearly that if a ship or, as in this case, a chassis used for transporting shipping containers, is kept by the hirer beyond a stipulated period of time, then the hirer will be liable to pay damages in respect of the period in excess of that originally agreed.

Further, I did not agree with Mr. Hosein's submission that the question of illegality would arise if the Plaintiff was required to sue the consignee. Recovery and enforcement of such a payment against the consignee might not be possible because of the doctrine of privity of contract, but that would not necessarily make such an agreement illegal if, indeed, there were in fact such an agreement, as to which there was no evidence in the instant case.

Second, I did not accept that the charging of demurrage can itself be regarded as an unreasonable term or provision of a contract. Clearly, such a provision cannot be regarded in principle, as unreasonable, or unfair or dishonest. It is a provision for which any prudent businessman would ask, if not expect, as Vidoo Maharaj himself said, in what I might regard or describe as a moment of rare forthrightness. I might add that Mr. Maharaj's evidence was otherwise in my view almost entirely unconvincing.

Expressed differently, it would be unreasonable to expect a person to permit another to keep his property for an indefinite length of time without any compensation, all the more so if that property is used in order to earn an income.

The questions of certainty and notoriety are perhaps not so easily disposed of. As to the requirement of certainty a party must establish the true nature of the usage or custom, and so establish it without there being a degree of doubt which would render it impossible or impractical to enforce that term or provision which a party seeks to imply into a contract.

The evidence was that there was no stipulated time within which a consignee was required to unstuff or unload a container. The evidence as to the reasonable length of time to do so varied from one day to three days. Similarly, no *per diem* rate was established with respect to the detention of the chassis beyond that time. Nor was there on the evidence any formula for ascertaining a *per diem* rate. Any such rate was a matter for negotiation between the parties, if indeed the transport contractor decided in all the circumstances that he should be or was in a position to make such a charge. I therefore came to the decision that the requirement of certainty was not satisfied. There was a practice in 1986 of charging demurrage but neither the practice nor the terms of that practice were themselves clearly established, and the practice itself was not indulged in with such regularity as to make it certain, or reasonably certain, that demurrage would, or would in all probably, be charged in a transaction of this nature.

As to the element of notoriety, it is not necessary that the practice, custom or usage be known to the whole world or by all the persons in the trade, or even by the person against whom the custom or usage is being asserted. That is clear. It is, however, a requirement that the term be sufficiently well known and acquiesced in by the particular trade so that a party carrying on business within that trade, and not merely dealing with someone in that trade, can be taken as being reasonably expected to know of it, even if he does not actually know of it.

There were, according to the evidence, perhaps over twenty transport contractors in the 1986. This was the evidence of Mr. Clifford. There were, however, possibly as many as thirty or forty such contractors. That was the evidence of Mr. Keith Lutchmansingh. Most of these contractors were small, such as Ablack, Frontier Transport, Rambarran Transport, or Kissoondath Transport. Jaggernauth Ablack said that he did not charge demurrage and that the other four transport contractors whose names he could remember amongst the small contractors did not charge, so far as he knew. There were perhaps seven larger contractors: the Plaintiff, Patrick Clifford, Paramount Transport and Trading, Sirjoo, David Brown Transport, Dindial Transport and Battoo Brothers. These were the larger contractors, the “major players” according to Keith Lutchmansingh, and they all charged demurrage.

As to whether the practice of charging demurrage was so widespread as to constitute a custom or usage was in my view doubtful. I was mindful of the evidence as to the state of the Trinidad and Tobago economy at the material time. Both Clyde Lutchmansingh and Jaggernauth Ablack said that they were difficult times; that they were very competitive. A transport contractor did

not charge demurrage because he very probably would not get the job or, if he had got the job, he would not get work from that person again. Whether you charged demurrage, and if you did charge, the rate at which you charged, also depended on how much work you did for a particular customer. There was no set tariff.

In my view the evidence disclosed a situation in which a contractor would charge demurrage only if he believed he could get it paid, and also that it would not cost him future work. So the small contractors did not charge, and the larger contractors did not always charge demurrage.

In the final analysis, the obligation lies upon the Plaintiff to establish the custom or usage. On the evidence before me I was not satisfied that the required extent or degree of notoriety had been demonstrated and I came to this conclusion for three principal reasons.

First, it was not sufficient in my view for seven out of twenty of the members in the transport contracting trade, to charge and be paid demurrage. That is perhaps 33% of the trade. On the evidence, the number of persons in the transport contracting trade was perhaps as high as 30 or 40, thus yielding a percentage of members charging demurrage as low as 17% to 23%. In my view, it is the number of persons in the trade, as a percentage or proportion of persons in the trade, which is material to deciding this question of notoriety, not the percentage of the market. I did not accept Mr. Hosein's submission that if there was one transport contractor controlling 99% of the market that the practices of that particular member of the trade should properly be regarded as usages or customs of the trade, even if all the other members of that trade did not

also adopt those same practices. In any event, it must be kept in mind that not all of the larger contractors always charged demurrage. The Plaintiff did not always do so, and in fact never charged any demurrage to the Defendant at any time during their business relationship prior to this claim. Further, and even if I had been minded to accept Mr. Hosein's submission, there was no evidence before me as to the percentage of the trade controlled by those members of the trade who did charge, and receive payment of, demurrage.

Second, the evidence was that even as amongst those who did charge demurrage at the material time, there was no uniformity with respect to the charge made and that it depended entirely upon the business relationship which the individual contractor enjoyed with the particular customer. Nor was there uniformity as to the length of time which was regarded as being a reasonable for a consignee to unstuff a container. That time appeared to vary between perhaps one day and three days. Again, this depended on the individual contractor's relationship with the particular customer. Sometimes the particular customer would be charged, on other occasions that very same customer might not be charged at all. The rate charged, as I have said, was not uniform. It was by negotiation. The contractor sat and discussed with the customer what the rate would be and this lack of uniformity goes to the question of certainty as well as to that of notoriety.

Third, some contractors never charged any demurrage at all. This was because they were small and did not consider themselves in a position to make, or to ask for, the charge, much less to collect it, or attempt to collect it. The position of the country's economy generally and the

position of some contractors in particular, including the Plaintiff, led them to the view that they could not afford to raise this question of demurrage because it could cost them a contract, present or future. Those were rough times for some contractors. Some sank, said Keith Lutchmansingh, in his evidence. In the event, demurrage was charged on a case by case basis as and when a contractor, even the larger contractors, including the Plaintiff, were of the view that the response from the customer would not be negative.

In summary, I was not satisfied that the Plaintiff had discharged the required burden of proof, at least to the extent to satisfy me that the practice of charging and paying demurrage, as the Plaintiff alleges, was in 1986 so reasonably certain and so generally acquiesced in that a Court could conclude that it formed a custom or usage of the trade as well as an ingredient of the particular contract between the Plaintiff and the Defendant. If there was reasonable certainty, which I found there was not, then there was not sufficient notoriety by way of uniformity and consistency of the practice so as to constitute it a custom or usage of trade at the material time.

I also considered the question of similar customs in the same or analogous trades in other localities being sufficient to establish the custom or usage contended for by the Plaintiff, but regret that I was unable to accept the submission for the Plaintiff that this has been proven.

Although I accepted Keith Lutchmansingh's evidence that most shipping lines charged demurrage on containers in 1986, at least in so far as he was aware, and despite that evidence being supported at least to some extent by that of Vidoo Maharaj when he spoke of

conferences and the tariffs, I remained of the view that the decisions to which I was referred can be distinguished. and *Noble v. Kennaway 99 ER 326* and *Plaice v. Alcock 176 ER 913* were decisions in which a custom in one locality were put forward to support a contention of the same custom in another locality. In *Fleet v. Murton (1871) 7QB 126* a custom in the colonial fruit trade was adduced in corroboration of a similar custom in the London fruit trade. In the instant case there was no evidence before me of demurrage being paid on chassis in any other locality, or market, if the latter expression be preferred. I did not think it appropriate or safe to conclude as Mr. Hosein submitted I should, that adducing evidence of demurrage being paid on containers used in marine transportation trade, is sufficient to persuade me that there existed in 1986 a custom or usage of the inland transport contractors trade within Trinidad and Tobago for charging demurrage on their chassis detained beyond a reasonable period of time.

In *Fleet -v- Murton* it was proved that “*the trades were very closely allied to each other. All brokers were very closely connected with each other.*” They all dealt with merchants and with much the same merchants in the general way of business but if regard is had to the circumstances of *Fleet -v- Murton* and the evidence which was adduced in support and corroboration of the custom or usage of the trade there, I did not think the same degree of evidence obtains here.

Having come to these conclusions it was not necessary for me to come to a determination on the Defendant’s other submissions, such as that relating to the implied exclusion of any implied

term in its contract with the Plaintiff by the course of past dealings. I made no determination as to those submissions.

I concluded that in all the circumstances that the Plaintiff had not discharged its obligation to establish the custom usage of the trade.

I consequently dismissed the action with costs to be taxed in default of agreement.

DATED this day of August 1999

C.V.H. STOLLMEYER
JUDGE