IN THE COURT OF APPEAL OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA **AC 6 of 2007**

BETWEEN	***:***	***WALTER TRADING CO. LTD***	***:***	***Appellant***
AND	***:***	***PORTS AUTHORITY***	***:***	***Respondent***

Coram : ***Burchett J***
Salmon J
Moore J

Counsel : ***Mr. C. Edwards for the Appellant***
Mr. Garrett for the Respondent

Date of hearing : ***21 July 2008***

Date of judgment : ***25 July 2008***

JUDGMENT OF THE COURT

This is an appeal against a decision of the Supreme Court by which the Ports Authority (the Respondent) was held entitled to recover a large amount of wharfage fees from the appellant which operates inter-island ferries in Tonga.

The starting point is certain provisions of the Ports Authority Act 1998.
By S.12(2) it is provided:

> "Without limiting the generality of subsection (1), the Authority shall have the power to issue Standing Orders or Codes of Practice in respect of the following matters –

(a) operate or manage a port listed in the Schedule as a commercial undertaking and for that purpose may levy such port charges, fees and rates whatsoever arising from the management and operation of any port, and may similarly increase, decrease or abolish any such charge, fee or rate, thirty days after publication;"

By Ss.41, 42 and 43 it is provided:

"41 (1) It shall be lawful for the Authority to levy fees for the use of any of its infrastructure, facilities, assets or equipment, or the provision of any service provided by its employees, agents or sub-contractors.

(2) Such fees shall be determined by resolution of the Board and shall, subject to section 12, come into effect 30 days after publication of such fees.

42 (1) A fee shall be payable by the owners, operators, charterers or agents of a vessel for services provided by the Authority at any of the ports to which this Act applies.

(2) A fee shall be payable to the Authority for a permit to operate stevedoring or shore handling activities within jurisdiction under the control of the Authority.

(3) The Authority may charge fees for the use by others of any building or space for the storage of cargo, containers or equipment.

(4) Such fees shall be prescribed by the Authority and shall come into effect upon publication.

43 (1) Owners, operators, charterers or agents of a vessel shall be liable to pay fees in respect of any vessel using the port or its facilities or services.

(2) Stevedores or shore handling contractors shall be liable for the payment of permit fees or charges that may be applied from time to time by the Authority.

(3) Any person entitled to possession of the goods either as owner or agent for the owner shall be liable to pay any cargo handling fees."

Pursuant to S.12(2), the Authority determined to make a standing order 27(1) in the following terms:

"27(1) Wharfage Fee for Local Vessels Cargo per tonne - $3.00 (the greater of weight or measurement) The Ports Authority will be responsible for the collection of wharfage fees and the minimum charge is $3.00 per revenue tonne or part thereof"

A photocopy of the gazettal of this standing order was tendered at the hearing upon evidence that it was indeed a copy of the relevant Government Gazette published 8 September 2003. A question having been raised by the Appellant whether this standing order imposed any obligation on it as an owner, a further standing order was made and similarly evidenced at the hearing as gazetted on 11 August 2006 in the following terms:

> "The existing Standing Order 27(1) is repealed and replaced with the following Standing Order:
> 27(1) Wharfage fee for Local Vessels' cargo per tonne - $3.00 (the greater of weight or measurement).
> The Ports Authority shall be entitled to levy and collect wharfage fees from the owners or agents of ships, and the minimum charge is $3.00 per revenue tonne or part thereof."

The difference between the standing orders is simply the express statement in the second that the wharfage fees may be collected "from the owner or agents of ships", but the Authority contends this was no more than caution or its part because the Statute itself (particularly in S.43) directly imposed the liability on owners or agents, the wharfage fees being charged "in respect of [a] vessel *using* the port or its facilities or services." In our opinion, this is correct. The expression "in respect of" has been frequently described as a "wide phrase": see, for example, per Brennan J in Smith-v-Federal Commissioner of Taxation (1987) 74 ALR 411 at 418, a tax case. Once a vessel *uses* the port or its facilities, the liability is attracted and may be enforced against the owner.

In this case, it was acknowledged the Appellant's vessels used the Authority's wharves for the loading and unloading of goods in bins or containers. It will be noticed that the standing orders refer to a charge of "$3.00 per revenue tonne or part thereof" and also refer to "the greater of weight or measurement." Mr. Edwards argued that these expressions were too vague to be enforced, and he placed some reliance on the formerly much used proposition that a statute imposing a tax should be strictly construed. But a charge for a service is not a tax. In the present case, there was evidence given without objection as to the meaning of the expression "revenue tonne", from which the trial judge was entitled to conclude that a "revenue tonne" had, in the shipping industry, a technical meaning that included a cubic metre by measurement. Contrary to a submission made by Mr. Edwards, the evidence was that the Respondent took "only the full bins for calculation and if any of the bins is half, [full the Respondent] put it half." The invoices were not based on estimates but "actual measurement."

Although the Respondent repeatedly sought information from the cargo manifests, these were not supplied, and no evidence was led for the Appellant at the hearing to show the Respondent's charges were wrongly calculated. There being evidence to support them, the Appellant's unexplained failure to adduce its own evidence enables the Court more readily to accept the Respondent's evidence: Jones-v-Dunkel [1959] 101 CLR 298 at 308, 317.

In our opinion, the trial judge was entitled to accept the evidence called for the Respondent, and on that evidence to award it judgment for T$85,382.53 plus costs. The appeal should be dismissed with costs.

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Burchett J

COURT OF APPEAL TONGA

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Salmon J

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Moore J