IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: 68 of 2017

BETWEEN : **FIJI FISH MARKETING GROUP LIMITED** a duly incorporated Company having its registered office at Suva in Fiji.

PLAINTIFF

AND : **PACIFIC CEMENT LIMITED** of Queens Road, Lami c/-P O Box 1165, Suva in Fiji

FIRST DEFENDANT

AND : **TENGY CEMENT (FIJI) LTD** a duly incorporated company having its registered office at Lot 1, Nakavu, Vesari, Lami, Suva in Fiji

SECOND DEFENDANT

AND : **RPA GROUP (FIJI) LIMITED** a duly incorporated Company having its registered office at Shop 3, Fiji Muslim League, Lakeba Street, Samabula, Suva in Fiji.

THIRD DEFENDANT

Counsel: **Plaintiff: Ms. Low. P and Taki. C**
Defendants: Mr. Haniff. F

Date of Hearing: **14, 15 and 18 September, 2019 and 14th and 15th November, 2019.**
Date of Judgment: **18th April, 2023**

Catch Words

Nuisance – Air Pollution – Clinker Dust – Negligence – Independent Contractor – Hazardous Substance – Non Delegable Duty of Care – Relationship – 'Right to Environment' – Sections 7(1), 7(4), 40(1) Constitution of The Republic of Fiji- Rio Declaration – Principle 4, and 16- Polluter Pays Principle – Sustainable Development – International Law – Assessment of damages – Proof of damage – Economic Loss- Developing Common Law- Bill of Rights.

JUDGMENT

INTRODUCTION

1. Plaintiff is a company which engages in the business of fishing and exporting them. Plaintiff's claim is based on damage due to Cement Clinker Dust (Clinker Dust) emission by third Defendant during two specific Clinker Dust, consignments imported by two Defendants, being offloaded and transported. Clinker is an intermediary product in cement production. First and second Defendants were engaged in the business of Cement manufacturing and third Defendant was engaged for the transportation of imported Clinker Dust, to the factory from ship using a barge and trucks. On or around months of December 2016 and February, 2017 Clinker Dust, was offloaded from ships to a barge outside Port Area, inside harbour at sea, and said barge was unloaded to open trucks using a 'digger' emitting a large amount of Clinker Dust to air. Apart from that the mode and or method of transportation of Clinker Dust in open trucks had also emitted Clinker Dust to the environment. Said 'Clinker Operation' was conducted by third Defendant, with the concurrence of first and second Defendants. Plaintiff allege that this Clinker Operation had resulted a large quantity of Clinker emission to the environment and polluting air surrounding the premises and its fishing vessels anchored near said jetty causing nuisance. It is claiming for damages to its business operations and also plant and equipment. Plaintiff had obtained an interim injunction restraining 'Clinker operation' from the location near their fish processing factory. This injunction was opposed by all the Defendants, indicating approval of method of operation and also pollution of air by Defendants.

   Plaintiff's claim against third Defendant is negligence and nuisance in "Clinker Operations" in December and February. Plaintiff pleaded that it was done as servant or agent of first and second Defendants. Plaintiff had alternatively sought damages from first and second Defendants based on "contractual relationship" and "nature of the services provided" by third Defendant. Alternate claim is accepted. First and Second Defendant were informed of the excessive emission and its disruption to Plaintiff's business and also damage to its plants and equipment other than additional cleaning required, but did not take steps to eliminate nuisance caused by Clinker Dust. So all the Defendants are liable for damages caused by Clinker Dust irrespective of third Defendant being an independent contractor, or not.

FACTS

2. According to Statement of claim Clinker Dust is hazardous substance

   "a) if it comes into contact with a person;

i. causes severe skin burns;
ii. causes serious eye damage;
iii. may cause damage to the respiratory system whether through one off exposure or prolonged or repeated exposure;

b) if it comes into contact with any metallic or glass surface and mixes with moisture:
i. corrodes the surface;
ii. solidifies on the surface and may form heavy clumps of a cement like substance;

c) infiltrates air conditioning and refrigeration systems and plant and machinery damaging them or rendering them inoperable and irreparable;

d) is dangerous to the environment;

e) must be handled and stored in a manner that prevents the discharge of dust; and

f) must be transported using a method that does not cause dust."

3. Plaintiff claimed that third Defendant owed a duty of care to the Plaintiff and other people in the vicinity of the Offloading Point by reason of, its nature and also proximity.

4. The Delivery of Clinker during December 2016 and February, 2017, was carried out in a manner that polluted environment and this had caused third Defendant while offloading and transporting Clinker Dust to first and second Defendants.

5. According to statement of claim the nuisance is caused due to the manner of Clinker Operation , such as,

"a) It offloaded the Clinker from the barge onto the truck using an excavator and bucket with no regard to safety and care resulting in the wrongful discharge from the Offloading Point of a significant amount of the noxious and offensive Clinker dust during offloading operation; and

b) It overloaded the trucks at the Offloading Point so that the trucks wrongfully discharged a significant amount of the noxious and offensive Clinker dust as they transported the Clinker to the premises of the First Defendant and the Second Defendant;

c) It deposited the Clinker in a careless manner at the premises of the First Defendant and Second Defendant so as to discharge a large amount of the noxious and offensive Clinker Dust into the atmosphere;

d) In carrying out the aforementioned described activity, it handled and transported the Clinker in a manner that was in breach of the Clinker manufacturer's recommendations;

e) It knew, should have known and/or was not concerned that the Clinker dust generated by the acts described above may and did in fact blow on and into the Premises causing damage and loss to the Plaintiff particularized below."

6. Further or alternatively, the Plaintiff claims, that Clinker Dust from the said Offloading Point, trucks and premises of the First Defendant and Second Defendant aforementioned **constituted a nuisance** and caused damage and loss to the Plaintiff.

7. Plaintiff is claiming special and general damages to its business from the said Clinker Dust emissions that caused damage to plant and equipment and cleaning for special and general damages for loss of income to business due to interruptions and other adverse effects.

Particulars of Special Damage

(i)	Cost of repainting topside MV Captain Morgan (approximate cost of materials and labor)	**$18,000**
(ii)	Cleaning of Clinker dust from Premises, plant equipment, vessels (approx. cost of materials and labour)	**$30,000**
(iii)	Replacement of 12 refrigeration and condenser units (approx. FJD$61,000 each)	**$732,000**
(iv)	Replacement of 18 damage air conditioning units (FJD$3,500 each)	

8. The Plaintiff also claims General Damages for loss of business, loss of income, future earnings, costs of cleaning, etc

9. According to Plaintiff the Third Defendant was and agent or servant of first and or second Defendants.

10. Further or alternatively, it pleaded that the first Defendant and Second Defendant are by **virtue of their contractual relationship with the third Defendant and the nature of the services provided by the third Defendant to them**, jointly and/or severally liable to the Plaintiff for the Third Defendant's aforementioned acts and omissions.

11. Plaintiff claims that in or about the month of December 2016 for a period of approximately 14 days and the months of mid-January and early February 2017 for approximately 20 days third Defendant caused Clinker to be offloaded from a barge and on to trucks at a location near the Plaintiff's factory and transported them to Defendants

12. Seven witnesses (PW1- PW7) gave evidence for Plaintiff. Plaintiffs witness stated as follow;

PW1 – <u>Mr Grahame Bruce Southwick</u>

The business was started in 1979, now Plaintiff owns 11 vessels and serviced around 55 Taiwanese/Chinese vessels annually. Fiji Fish employed more than three hundred workforce, with direct employment and large number indirectly.

Plaintiff is a Company that deals with catching fish, processing fish in its plants and owns fishing vessels.

Plaintiff's ice plants and ice machines produces ice for their vessels and it exports fish to markets including US, EU, Japan and Thailand. It is a 100% export oriented entry. Their own fishing vessels used only ice to preserve fish, as there are no freezers on board of such vessels.

Plaintiff's factory premises is near to a jetty where fishing vessels operate. They are berthed at or around jetty. In December 2016 and January, 2017, third Defendant carried out Clinker Operation, from the same jetty that Plaintiff and its suppliers berthed the vessels engaged in fishing.

Clinker Dust was unloaded to a barge at sea and this barge was brought to the jetty near Plaintiff's premises and unloading was done using a 'digger' to open trucks by third Defendant. After filled the same were transported along the boundary of Plaintiff's factory premises.

He tendered as PE1 a sketch plan drawn to show the location of offload and transport of Clinker Dust. At the time of the clinker operations in December, and January he was abroad but he was informed of the damage and pollution or emission of clinker dust. He pointed out in P1 both the offloading site and the location of the Barge at the time of unloading Clinker to the Third Defendants buckets and trucks. He confirmed that it was 100 meters from the offloading site to the Plaintiff's Complex. He also confirmed that it was a distance of 10 meters form the Plaintiff's factory Complex to fence line. Outside along the fence line Clinker Dust were transported in open trucks exposing clinker to wind.

While Clinker Operations were carried out in December 2016 and February 2017, PW 1 was abroad but he was told by CEO of Plaintiff, Darryl that its factory, needed to shut down its operation (factory processing plant) because of the effect of the clinker dust. He told Darryl that he would cut short his trip and immediately return to Fiji and came to Fiji.

He said that at that time e shutdown had cost was around FJ$30,000.00 a day. When requested to explain how Fiji Fish would lose FJ$30,000.00 per day when their operation was shut down, he stated it would be a result of a number of factors such as,

a. They were unable to unload the boats at the dock and unable to process/pack fish coming off from Fiji Fish boats at the factory. The fish on the boats needs to be transported from the boat to the factory and it will be damaged when exposed to these clinker dusts as the dusts were all over the its complex .
b. The fish they export has a short shelf life as it is kept fresh using ice to chill during airfreight, and cannot be left on boats but needs to be unloaded and shipped immediately.
c. Their fish has a seven days shelf life and it should arrive at the market within four to five days.
d. If the fish are not delivered to their markets on time, the orders are cancelled, and the catch becomes suitable for the local market only at a fraction of the price and at an economic loss.
e. Its fish exports to US is governed by the US Food and Drug Administration and cannot permit any contamination as it will result in having their export permits cancelled if Clinker Dust were found in the packaging. This dust cannot be washed away by water as when it gets wet it solidifies like cement.
f. Not only their own fish were affected but also the other operations of their company such as engine repairs, boat repairs as maintenance workshops needs to be cleaned because clinker dusts was falling over their workshops and they had to shut down for about a week as the dusts were getting into their machines.
g. The contract boats were also affected as they had to suspend their unloading and all boats were delayed for several days
h. Factory and ice machine compressors were shut down for 2-3 days and all their cooling condensers were clogged up by the hardened clinker dusts.
i. The clinker dusts blocked the radiators of the ice machines and they had to shut them down. He explained further that the condensers for the ice machines are comparable to car radiators and they require high airflows to cool the machines but with hardened clinker dust clogging the machines, it was unable to produce ice or the quantity and quality of ice expected of the machines. Due to the lack and bad quality of ice Fiji Fish was unable to send out their vessels to fish. Their fish is only kept in ice and not refrigerated to keep the freshness and if a boat was unable to sail out and missed a fishing day, the loss would approximately be FJ$7,000.00 per boat.

j. At the time of clinker offloading, they had 8 fully operational boats, but the clinker damage caused them to shut down the machines totally, to try and clear the condensers as best they could. This resulted in the entire I boats being held in port initially, whilst the refrigeration engineers attempted to get some minimum production out of the machines.
k. The technicians eventually managed to get the machines to produce 50% of their normal production.
l. The clinker dust was building up across the compound, processing rooms, floor, ceilings and their ice pants, fan belts, fans etc.

Clinker Dust was unloaded by a 'digger' from the Barge and dumped into open buckets. The Clinker Dust polluted air causing nuisance to Plaintiff and nearby residents.

Clinker Dust was transported continuously in the mornings and afternoons except for the peak hours of traffic on the Queens Road. Plaintiff had attempted through several emails and meetings with all the Defendants to control the unloading/offloading and transportation of the Clinker so that all operation/businesses can continue but to no avail. Plaintiff had finally informed that it will seek injunctive relief, and the Injunction was granted in March. He tendered to Court **P2** as the email explaining the effects of the clinker offloading to Plaintiff.

According to PW1, the loss was around $3.5 million due to general disruptions to every aspect of their operations in addition to the approximately F$1.5m damage to the machinery.

PW1 explained, that given the circumstances and the losses, Fiji Fish was not in a position to find and outlay $1.5m for new ice plants at the time, and was relying on the Defendants admit some liability in the early days and arrive at some agreement to repair the ice plants before they were damaged beyond repair but this mitigation of early repair was turned down by Defendants.

Plaintiff is a company engages in the business of fishing and exporting them. Plaintiff's claim is based on damage due to Cement Clinker Dust (Clinker) by third Defendant during two specific Clinker consignments imported by two Defendants. Clinker is an intermediary product in cement production which is the business of first and second Defendants. First and second Defendants were engaged in the business of cement manufacturing and third Defendant was engaged in the transportation of imported clinker to the factory from ship using a barge and trucks. On or around months of December 2016 and January, and February, 2017 clinker was offloaded from ships to a barge outside Port Area, inside harbour at sea, and transported to a jetty near Plaintiff's factory. It was off loaded from the barge to open tippers using a 'digger' and transported close to

Plaintiff's factory. Said 'Clinker Operation' was conducted by third Defendant, with the concurrence of first and second Defendants. Plaintiff allege that this Clinker Operation had resulted a large quantity of Clinker emission to the environment and landed on the premises and its fishing vessels anchored near said jetty damaging its business operations and also equipment's due to the proximity to said Clinker Operation, in an unsafe manner causing nuisance . Plaintiff had obtained an interim injunction restraining 'Clinker operation' from the location near their fish processing factory. This injunction was opposed by all the Defendants, indicating approval of method of operation by first and second Defendants. This action is the claim for damages caused prior to obtaining injunction from said 'Clinker operation'.

PW2 – <u>Mr Abdul Azim Khan</u>

Plaintiff's Chief Engineer Technical and is qualified refrigeration engineer. He was a person who witnessed the damage from the two Clinker Operations happened in December 2016 and February 2017. His evidence was similar to PW 1. He explained how difficult for the factory to work when clinker operations were conducted during December, 2016 and also February 2017.

He said how clinker dust affects his workshop at the time and the devastation done. He explained that extra cleaning needed to have the factory and how badly clinker dust got in to machine parts including to fans and condensers of refrigeration equipment. So it is clear any device that can absorb air would have got severely affected including ice machines and refrigeration equipment and also compressors in air-conditioning units.

He stated that the ice plants and their refrigeration equipment's were affected by the clogging of clinker dusts into their radiators and condensers and due to this, their machines were used outside parameters as their business relied on them. He said that clinker dust pollution to the factory and around that premises was excessive.

PW3 – <u>Mr Patrick Todd</u>

He is a resident at Lami and confirmed the pollution by clinker.

PE4 – <u>Ms Ana Coogan Whippy</u>

She is the Business Development Manager of Pacific Building Solutions (PBS) Lami. PBS was requested by Plaintiff to provide quotes for the replacement of its, existing roof structures. PE 7 is for FJ$380,000.

PW5 – <u>Mr Darryl Hodson</u>

He was the CEO of Plaintiff during the Clinker Operation and had evidenced the pollution and explained efforts taken by Plaintiff to stop pollution by informing all Defendants. He explained photographic evidence and documentary evidence in support of the claim. He stated the damages caused to Plaintiff, due to the effect of the clinker operations by the Defendants.

He said apart from damage to premises and equipment they were loosing about 5000-$7,000 per day from one boat for delays unable to berth when Clinker offloading happens.

He stated that when the ice plants were affected, the ice quality deteriorated thus it melts faster than normal hence affects the quality of fish and they had to lose days at sea.

Their condensers were blocked and the only way to remove the Clinker was using acid, but the acid would badly damage the condensers thus this was not a viable solution.

PW6 – <u>Ms Anabel Ali</u>

She is the Group Financial Controller of Fiji Fish and is a certified practicing Accountant (CPA Australia).She informed the Court that from the annual reports Plaintiff was recording profits prior to the clinker incident, but was losing heavily since 2017. She stated that the loss accumulated is around $2.5 million and details as,

2017: $444,000 loss
2018: $884,000 loss
2019 to July 2019 (up until she gave evidence – 7 months) $1.058 million.

PW7 – <u>Mr Bob Taylor</u>

The Company Manager and owner of Taylor Refrigeration Australia He is the owner of Taylor Refrigeration for 50 years and 15 years for the latter company. He is Refrigeration Engineer and designed a lot of refrigeration's machines for countries in the pacific like Fiji, Samoa, Tonga, Tuvalu, Nauru and PNG. He told the Court that his company is the supplier and manufacturer of the refrigeration equipment and ice machines and condensers used by Plaintiff for more than 20 years.

He produced report prepared on 23.11. 2018 showed that the Cost of replacement of items damaged through clinker dust amount to be AUD$741,000.00. He stated that at the moment the machines he recommended are running beyond parameters and that has serious consequences. He also said that he had examined the items via photographs provided by Plaintiff.

THE DEFENDANTS' Evidence

13. First and second Defendants did not give evidence at the hearing, both of them participated at the hearing of injunction and opposed it and produced some documentary

evidence that were not disputed or denied at the hearing. So both of the Defendants are estopped from denying clinker is hazardous substance and that clinker dust needs special care in handling and or transportation.

14. Third Defendant called one witness who is the Managing Director of third Defendant and stated that, third Defendant was contracted to transport clinker dust to the Defendants.

15. There was no dispute as to two Clinker Operations in December 2016, and February 2017 and also emission of clinker dust to Plaintiff's factory premises due to proximity. He was fully aware of the complaints of Plaintiff and emission or pollution of clinker dust to Plaintiffs premises. He had attended to the meeting, when shown PE9 and a representative of third Defendant had attended to meeting held subsequently as the pollution was causing damage (PE10). He said that first Defendant also attended to one meeting.

16. Third Defendant confirmed sending P11 to Plaintiff 'recommending' some 'solutions' to 'Minimize Discharge' such as

    a. Larger bucket to be used for digger with sides covered with only 75% load
    b. Water trucks to make three runs from "discharging areas towards the factory and control road dusts and clinker dust from escaping".
    c. Stop the operations when wind directions change.

17. He also admitted that that P11 was after second meeting held on 16.2.2017 but Plaintiff had complained even after this. He said, discharged using 20 tonne digger and was dropped into open buckets and the trucks had to carry them to the Cement Factory. He confirmed that when Clinker was dumped/dropped into the buckets the clinker dusts were airborne and polluted air.

18. He also admitted that clinker solidifies when mixed with water it is hard to remove unless through acids. He did not produce any terms of contract of engagement with the clinker operation

ANALYSIS

19. Clinker is an ingredient that is essential for the manufacture of cements and this is imported to Fiji in bulk by ships. Clinker that was imported in December and February, were in dust form and easily emitted to the environment if no proper care is taken. This is known to all the parties as any substance in dust form which is dry can cause pollution of the environment if not properly handled.

20. First and Second Defendants were aware of the dust form of the consignment as they were the consignees of the two Clinker Dust consignments. They were aware of the nature of the substance. In this action at the commencement interim injunction was sought by Plaintiff to stop offloading of clinker from the jetty close to Plaintiff's HACCP (Hazard Analysis Critical Control Point) certified fish processing factory. This is a high quality safety certification for hygiene of the products.

21. This is an internationally recognized ' management system in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards from raw material production, procurement and handling, to manufacturing, distribution and consumption of the finished product.'[1] Accordingly the food safety is paramount consideration of Plaintiff as it is exclusively involved in export of fish to high end markets such as EU, US and Japan.

22. From that high standard of hygiene required it is not a in dispute that contamination of clinker in the factory and containing the same even in trace amounts can lead to loss of business as well as reputation. On this basis Plaintiff sought an injunction and this was granted to curtail the clinker operations from March 2017.

23. Plaintiff is using vessels to catch fish for export. The turnaround of one such fishing vessel is about three days and for that time the vessel is needed to be berthed on the jetty or near to that for offloading of captured fish from vessel to the factory near the jetty.

24. The vessels do not have refrigeration facility, and preservation of fish is done using ice produced by Plaintiff's ice plants. So the quality of the ice used depend on the time of the vessel can stay in sea before returning to jetty and fish is off loaded.

25. Hence clean environment at the jetty during offload and also inside the factory is an essential requirement for Plaintiff's business. This process was seriously hampered by clinker dust.

26. All the three Defendants were represented by the same counsel for this action at the time of hearing of interim injunction and thereafter till conclusion of the trial. At the hearing of interim injunction first and second Defendants opposed the interim injunction and sailed along with third Defendant, when there were undisputed evidence of pollution of clinker dust in the process of offloading and also transportation of that from jetty close to Plaintiff's factory. First Defendant in affidavit in opposition to injunction annexed ST6 a document to show the nature of Clinker. It stated it as 'Hazardous'.

Is Clinker Dust Hazardous Substance

[1] https://safefoodalliance.com/food-safety-resources/haccp-overview/(6.4.2023)

27. First and second Defendants filed an affidavit in opposition to injunction with 'safety data sheet' which clearly stated that clinker is a Hazardous Substance and accordingly I held (in my interlocutory decision 22.3.2017) that there were admissions as to Clinker Dust.

"Human health hazards
Skin corrosion property
Serious eye damage
Specific target organ toxicity.(Single exposure)
Specific target organ toxicity (Repetitive exposure)
Signal word 'Danger'

'Causes severe skin burns
Causes serious eye damage
May cause damage to organ (respiratory system)
May cause damage to organ (respiratory system) through prolonged or repeated exposure'

28. Defendants are estopped from denying that Clinker Dust is Hazardous Substance from their own admission with their own documentary evidence in this action. They had not produced any evidence to contrary.

29. Even if I am wrong on the above there were undisputed evidence from witnesses for the Plaintiff that Clinker Dust is corrosive to Aluminium Blades of the fans and Clinker dust cannot be washed from water as it get hardened with water. This is sufficient to consider Clinker as hazardous material.

30. The technical Chief Engineer on refrigeration (PW2) also gave evidence, and stated from his practical experience that Clinker dust were corrosive and be removed once they get deposited in the fans and other interior machine parts such as condensers. He also explained how difficult to clean or adjust them for their optimal efficiency, after clinker dust had absorbed to parts of the machines. So there were evidence from people who had experienced the pollution of clinker dust that it was Hazardous.

31. Third Defendant in his evidence admitted the adverse effects of it and had even suggested methods to minimize, indicating there was excessive pollution. At the hearing third defendant admitted clinker dust emission, but stated it was exaggerated. This cannot be accepted on their own documentary evidence, "Proposed Solution to Minimize Discharge of Clinker Dust – FHL Jetty". This indicated excessive discharge of Clinker Dust.

32. First and Second Defendants who produced documentary proof that clinker is Hazardous Substance never contradicted this position by producing fresh evidence either through

expert evidence or otherwise to deny this fact. Instead in the written submission state Plaintiff had not proved that Clinker is Hazardous Substance. I reject this contention.

33. First and second Defendants, did not produce any evidence to contrary to their admitted position that Clinker Dust is Hazardous at the hearing. They opted not to give evidence at hearing and only witness who gave evidence at the hearing admitted that the Clinker is a hazardous substance and needs to be handled with special care. If not, there was potential for it to pollute the environment with adverse effects.

34. There is no dispute as to the consignee of two Clinker consignments arrived in December 2016, and February 2017. They were for the use of cement manufacture in two factories belonging to first and second Defendants. So even before Clinker Dust arrived first and Second Defendants were aware of the nature of the substance that was imported and its potential to create pollution of environment including and not limiting to air, when using open trucks and also in unloading from barge.

Pollution from Clinker Dusts

35. There is no dispute that , when Clinker Dust were discharged at Suva port area, they were offloaded in Suva Port wharf to vehicles , from the 'grappers' in those ships which are specifically designed to offload without spillage or minimum spillage, with substance with small particles such as Clinker Dust.

36. Apart from that a "Hopper" is used to get the dry Clinker Dust collected from the discharge by 'grappers' to vehicles which decrease the emission to environment significantly as 'grapper' unload to 'hopper' which is covered from sides so that affect from wind is reduced. So emission of Clinker Dust to environment reduced.

37. So Clinker is loaded from the ship to vehicles inside the port premises and then the vehicles travelled on the main road across the bridge to the respective factory premises owned by first and second Defendants. This process was not followed.

38. There were two reasons for deviation of said method of offload and they are

    a. Weight restrictions over the bridge that needs to be crossed before reaching silos of first and second Defendants' factories.
    b. Clinker Ships do not get priority in berthing at Suva Port, hence longer period of waiting to be berthed to wharf.

39. Both above reasons are economic reasons for first and second Defendants to reduce the cost of transportation of Clinker Dust, at the expense of, cost to the environment.

40. Above mentioned reasons had shifted offload of clinker from inside the port to a jetty near the premises of Plaintiff's fish processing factory. Plaintiff used the same jetty for their fishing. It may be a reason to locate its fish processing factory close to said jetty. PW1 and also CEO of Plaintiff explained that they export fresh fish adding only ice to preserve which required a short lag time due to its perishability.

41. But when the unloading was shifted outside the port first the unloading was from the ship to a barge and this barge was taken to the jetty and unloaded from the barge using a digger which is more suited for wet substance such as soil as opposed to highly airborne dry clinker dust.

42. So the method of offloading from barge to open trucks at jetty was not a suitable method as the method itself could pollute the air surrounding offloading and also air along the track of transport of dry clinker dust in open trucks. First and second Defendants were aware of the dangers of the Hazardous Substance such as Clinker being offloaded and also mode of transport from ship to factories.

43. This process had emitted an enormous amount of clinker dust and these dust were visible in all over the factory premises of Plaintiff and also anchored fishing vessels or boats anchored near the jetty at the time of offloading of clinker to vehicles. At the hearing PW 1 explained all the photographic evidence and they show an excessive amount of clinker dust during the clinker operations. This had continued for nearly one month during clinker operations as emitted dust particles deposited in the surroundings including ground had polluted environment around Plaintiff's factory premises for a time longer than actual clinker operation.

44. It is proved that Plaintiff's factory premises, and environment around it including air pollution from Clinker Dust.

Nuisance

45. According to Halsbury's Laws of England, (2018) (Vol 78) 'Private Nuisance under common law', state,

> "At common law, private nuisance is a tort that allows a person to sue if his use or enjoyment of land or of some right connected with land has been affected by another person's acts or omissions."[2]

[2]Halsbury's Laws of England, Nuisance (Volume 78 (2018)) > 1. Scope of Nuisance (2) Nuisances between Neighbouring Properties 579. Private nuisance at common law

> "Every person is required by law to exercise his rights, whether over his own or over public property, with due regard to the co-existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance."[3]

46. Clinker operation carried out, by above mentioned method, had emitted a large quantity of Clinker Dust to air surrounding offloading near jetty. This was clear from oral evidence supported by photographic evidence that showed nearby boats being covered with clinker dust. PW2 (engineer of Plaintiff) and PW5 (CEO) explained in detail excessive pollution of Clinker Dust and its impact on Plaintiff. They were eye witnesses and documentary evidence substantiate pollution from Clinker Dust.

47. Apart from that when transporting due to the negligent manner of transporting as well as inadequate method of transportation made excessive Clinker Dust to be airborne.

48. An independent witness from residential community, who gave evidence (PW3) explained the emission of Clinker Dust and how it had created a nuisance to them. He also said how Clinker Dust emission was aggravated by loosely tied covering (trampoline) which acted like a 'fan' dispersing more dust on its way, causing nuisance to neighbourhood.

49. Though there is no claim for the damage to neighbours this evidence proved on the balance of probability that the emission of clinker dust had caused even public nuisance. So the contention that PW1 had exaggerated cannot be accepted. There were photographic evidence to support massive pollution at the offload and also in transportation. Both these actions had cumulative effect of creating a nuisance from Clinker Dust, to Plaintiff.

50. Plaintiff's factory and its plants and machines including cooling, ice plants condensers were all covered with excessive amount of clinker and these could not be cleaned from water and they were affected by continuous nuisance from clinker operation conducted by third Plaintiff with the concurrence of first and second Defendants.

Negligence

51. The counsel for Defendants state that third Defendant is an independent contractor hence first and second Defendants are not liable for damages due to clinker dust from clinker operations.

[3] Halsbury's Laws of England , Nuisance (Volume 78 (2018)) > 1. Scope of Nuisance (2) Nuisances between Neighbouring Properties (i) Injury to Property

52. There is no proof by Plaintiff that third Defendant was an agent or servant of first and second Defendant.

53. First and second Defendants were the consignees of Hazardous Substance to Fiji by ships. Both of them had a duty of care not only to safely offload clinker dust without polluting the environment and also transporting it without polluting the environment. This 'duty of care' cannot be 'outsourced' or delegated to third Defendant under the guise of an independent contractor. This issue is dealt later in this judgment.

54. Neither third Defendant nor first and second Defendants produced any terms of independent contract, in written or in oral form. So the terms of engagement is not clear.

55. First and second Defendants had engaged third Defendant in a manner inherently causing nuisance in the offload of clinker using a digger which emits excessive amount of clinker dust.

56. The method of transporting clinker in open trucks also created nuisance to all persons around the area including and not limiting Plaintiff due to dusty particles are airborne when taken in open trucks.

57. First and second Defendants as consignees had the ultimate authority to select the mode of transportation and both had allowed open trucks and barge and a 'digger' for the purpose.

58. In my mind all Defendants were negligent for excessive emission of Clinker Dust. First and Second Defendants were informed by Plaintiff of the pollution but allowed pollution to continue. This is negligent act.

Liability of Defendants

59. Counsel for Defendants' contend that third Defendant is an independent contractor and not an agent or servant of first and second Defendants hence, there is no liability for consignees of the Hazardous Substance.

60. This is a flawed argument in many aspects. A person who employs an independent contractor is not fully exonerated from all liabilities. Hence Defendant's contention as contained in the written submission cannot be accepted.

61. The liability of independent contractor depends on the nature of the work which mainly depend on type of substance dealt. In this case Clinker is hazardous substance and since its nature, which was dry and dusty makes it highly vulnerable to cause pollution to environment causing nuisance. These were facts known to consignees as well as to third Defendant.

62. Cement manufacturers have a non delegable duty not to cause nuisance from Clinker Dust.

Independent Contractor's Liability

63. Halsbury's Laws of England under Nuisance "183. Nuisance created by independent contractor"[4] states

> "Where a principal employs an independent contractor to execute work for him, he may, in certain circumstances, still be liable for injury arising from a nuisance caused by the independent contractor. A person who orders work to be executed on his own premises, lawful in itself but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to take all reasonable measures to prevent the mischief; and he cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."(footnotes deleted)

64. Due to the type of clinker imported by first and second Defendants (the consignees), which was dust in this case, had the potential to create nuisance if not handled with care. This was mainly due to type of offloading from barge using 'digger' which is suited for wet heavy substance such as soil but not suitable for highly airborne fine particles such as Clinker Dust.

65. Next issue that contributed massive pollution of air was the use of open trucks as opposed to closed container such as bulk cement transport vehicles. A fine particle such as clinker dust cannot be transported in open trucks without polluting the air and environment around. It is clear that consignees had the authority to decide how its consignment to be transported to its final destination which is clinker silos at the factory premises. By allowing the methods of transportation first and second Defendants were negligent.

66. This is the reason that clinker is stored in silos which are closed from all sides and wind will not have an effect on the stock. Similar measures should be taken by first and second Defendants, with proper investments, to transport Clinker Dust without polluting the environment. Failure to do so was a negligent act.

[4] Halsbury's Laws of England Nuisance (Volume 78 (2018)) . Legal Proceedings and Defences (2) Action for Private Nuisance

67. First and second Defendants as consignees cannot absolve themselves of the liability from pollution of their clinker dust consignment, unless they show they have taken all the measures to minimize such pollution.

68. In this action as first and second Defendants did not give evidence there was no such evidence as to the measures taken by them regarding Hazardous Substance polluting the environment during offload and transport.

69. From the evidence provided at the hearing first and second Defendants had not taken steps even when they were informed about the serious pollution while offloading and also transporting them from jetty near Plaintiff's food processing factory. This shows on balance of probability that cement manufacturers did not care about the damage to Plaintiff's factory and this had resulted massive damage to valuable machines apart from pollution within in the factory premises and surroundings. Plaintiff had cleaned factory premises. This could not be done to plants and equipment, due to nature of Clinker Dust. Clinker dust is corrosive and cannot be cleaned using water.

70. Pollution caused release of dust particles of Clinker to environment causing damage to Plaintiff's factory premises, equipment and also operations of the factory. This had affected the profits of the Plaintiff, apart from the physical loss. Plaintiff could not offload their fish or berth fishing vessels due to heavy pollution of clinker dust from

71. Plaintiff's action is claim for damage to their property and business through dust particles emitted caused by Defendant's 'Clinker operation' during December, 2016 and early part of 2017.

72. From the analysis of evidence it is proved on balance of probability that airborne clinker dust particles had got deposited in ice plants, condensers, compressors and other expensive equipment including air conditioning units due to its hazardous nature and dusty particles.

73. Deposited clinker dust inside the plants, could not be cleaned except with acids which invariably would cause more damage. Acids will react with metal parts which decays the metal parts. So the deposited clinker had destroyed or made the said equipment redundant or decrease its efficiency to a level that replacement was the only option available.

74. Without prejudice to above consignees have a non-delegable duty towards public including and not limiting to Plaintiff, not to cause nuisance from clinker dust irrespective of whether it is hazardous or not . This is a non-delegable duty, hence even if third Defendant was an independent contractor the duty of care not to pollute the environment was with first and second Defendants.

Non Delegable Duties

75. *Woodland v Essex County Council* [2013] UKSC 66

> "[6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. There are, however, two broad categories of case in which such a duty has been held to arise. The first is a large, varied and anomalous class of cases in which the **Defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work**. The early cases are concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance: see *Pickard v Smith* (1861) 10 CB (NS) 470 (which appears to be the first reported case of a non-delegable duty), *Penny v Wimbledon Urban District Council* [1898] 2 QB 212, 62 JP 582, 67 LJQB 754, 78 LT 748 and *Holliday v National Telephone Co* [1899] 2 QB 392, 68 LJQB 1016, 47 WR 658. In *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191, 103 LJKB 74, [1933] All ER Rep 77, the principle was applied more broadly to "extra-hazardous" operations generally. Many of these decisions are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination. Their justification, if there is one, should probably be found in a special public policy for operations involving exceptional danger to the public. But their difficulties do not need to be considered further on these appeals, because teaching children to swim, while it unquestionably involves risks and calls for precautions, is not is not on any view an "extra-hazardous" activity. It can be perfectly satisfactorily analysed by reference to ordinary standards of care."(emphasis is mine)

76. So non delegable duty of care can be imposed on hazardous substance, such as finely particle clinker dust and consignees has a duty to take care that it is transported to respective factories safely with proper precaution.

77. Alternately, without considering hazardous nature the emphasis is on the relationship between first and Second Defendants towards not to pollute the environment and make sufficient investments to eliminate or minimize pollution of environment from clinker dust.

Special Relationship of Plaintiff with Defendants.

78. Such non delegable duty of care is recognized when there is special relationship between the parties. This is a common law principle that is flexible and, can be applied to environmental damages considering the circumstances.

79. Plaintiff is operating a business of food processing factory. When Plaintiff informed of massive pollution to first and second Defendants, they had carried out the operation till this court granted injunction, showing lack of concern for nuisance created by the consignment which is inherently hazardous. Special relationship between Polluters and Plaintiff created from "Right to Environment".

80. There is an obligation on the part of Defendants not to pollute air , which affects the right to 'clean air' an essential component of ' Right to Environment' recognized in the Bill of Rights of Constitution of Republic of Fiji. In Fiji Constitution of Republic of Fiji, obligate court to apply Common law and where 'necessary develop' it to a 'manner that respect' such rights enshrined in Bill of Rights. This is a 'must' for all judicial officers.

81. Section 7 of Constitution of Republic of Fiji states,

> "(4) When deciding any matter according to common law, a **court must apply** and, where necessary, **develop common law in a manner that respects the rights and freedoms recognized in this Chapter.**"(emphasis is mine)

82. Section 7(4) contained in Bill of Rights chapter of Constitution of the Republic of Fiji, applies to "any matter" irrespective of whether constitutional redress is sought or such a claim is made under the constitution. So these provisions are applicable, in any civil action to interpret common law irrespective of the matter is constitutional redress matter or a civil action. There is mandatory duty of the court to develop common law that respects 'Right to Environment', of all including Plaintiff.

83. The requirement to apply the above provision of the Constitution is mandatory to the courts as it stated "**court must apply**". This is irrespective of such an argument is made by either party. Development of common law to give effect to Bill of Rights Chapter in Constitution of the Republic of Fiji is paramount consideration, of courts.

84. This is an obligation fairly and squarely on the courts of Fiji to 'develop common law in a manner that respects the rights and freedoms recognized' in the Chapter 2 of the Constitution that deals with Bill of Rights.

85. Section 40 of Constitution of the Republic of Fiji recognises 'Environmental Right' under Bill of Rights (Chapter 2), and states

> "40.—(1) **Every person has the right to a clean and healthy environment**, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures.

(2) To the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section."(emphasis added)

86. First and second Defendants as consignees of extremely airborne fine dusty particles of Hazardous matter such as clinker was fully aware of its potential to be emitted to the environment if not handled properly in the offload at the jetty and also when transporting. Allowing third Defendant to use open trucks for transportation and unloading using a 'digger' to unload from barge to vehicles was inherently allowing emission of clinker dust to environment in massive quantities. This is aggravated due to the wind and other factors.

87. Section 7(1) applies to the interpretation of Chapter on Bill of Rights in the Constitution of Fiji and 'if relevant' the courts can consider international law, applicable for the protection of right under said Chapter and it states,

"7(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—
(a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and
(b) may, if relevant, consider **international law**, applicable to the protection of the rights and freedoms in this Chapter."(emphasis added)

88. As Environment Right is a recognized right in the constitution of Republic of Fiji, widely accepted international instruments such as Stockholm Declaration 1972 and Rio Declaration 1992 and the concepts recognized can be considered.

89. Stockholm Declaration recognized the initial Environmental Concepts that had developed over the years and has a wide acceptance around the world. 1992 Rio Declaration is widely applied instrument in recognition of Environmental Right.

90. Rio Declaration Principle 4 recognized Sustainable Development and it stated,

'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'[5]

91. Accordingly cement which is a vital component of development, needs to be manufactured and transported including materials uses such as Clinker Dust, for

[5] https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

manufacture of cement in sustainable manner without polluting the environment. The obligation was with the manufacturers to invest in such methods to minimize emissions and pollution in general. In this instance first and second Defendants must take necessary steps to eliminate emission of 'Clinker Operation'. It is fairly and squarely on the consignees, who are also manufacturers of cement, and cannot exenorate themselves claiming they had engaged 'independent contractor' to deal with hazardous material.

92. It is clear that there are special vehicles made to transport airborne dusty substance in closed compartment (eg cement, clinker dust, etc) or any other suitable method that prevents emission of hazardous material causing nuisance, other than using open trucks.

93. It was also proved in this hearing that using a trampoline to cover clinker dust on trucks , was counterproductive as it may act like a 'fan' due to obvious logistical reasons such as wind, improper tying etc.

94. First and second Defendant had the duty to engage a method that is suitable to transport Clinker Dust as its consignee. No such method was used even when informed of massive pollution and nuisance to Plaintiff.

95. Rio Declaration Principle 16 states

> "National authorities should endeavour to promote the **internalization of environmental costs and the use of economic instruments,** taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment"

96. The above Principle 16 of Rio Declaration was the basis of Polluter Pays Principle (PPP) which was already applied in this action in granting injunction. Common Law can be developed to encapsulate PPP. Hence consignees are not a in a position to seek refuge under independent contractor's liability considering the nature of the pollutant and what were the measures done by consignees to address to prevent pollution.

97. In this instance PPP applies to all three Defendants jointly and severally and they have a duty of care towards not to create nuisance to Plaintiff and also to others around from Clinker Dust. Hence special relationship was created between Plaintiff and Defendants not to pollute environment in 'Clinker Operation', by third Defendant.

98. In this instance Polluter are not only third Defendant but also consignees of this Clinker Dust who did not take adequate measures to prevent nuisance to Plaintiff's fish processing factory despite number of requests to stop the clinker operation. Consignees had given priority to economic reasons, and disregarded pollution of 'Clinker Dust'.

99. First and second Defendants had continuously encouraged or approved the nuisance of emission of clinker dust in 'Clinker Operation' including at the stage of injunction where all three Defendants sailed together.

100. First and second Defendants as entities engaged in manufacture of cement, have non delegable duty of care regarding the materials used for production of Cement, and their transportation and handling to be conducted in environmental friendly manner. This cannot be delegated to third party in the guise of verbal agreement as independent contractor. There is also special relationship between Plaintiff and Defendants due to above reasons in the development of law to safeguard a right contained in Chapter 2 of Constitution of the Republic of Fiji.

101. Common law liability in tort is interpreted considering Section 40 and 7 of Constitution of Fiji. In the said interpretation of common law as regards to damage done through environment Polluter Pays Principle 'must' be applied. First and second Defendants had the authority and also power to decide the manner of transportation of clinker dust consignment from ships to its factory. It had decided to transport by road using open trucks and also using a barge and transporting them to a jetty near Plaintiff's factory where fishing vessels operate. When they were aware of the nuisance they had not stopped the nuisance but continued with the operations by third Defendant despite repeated requests by Plaintiff to stop the nuisance.

102. There were no evidence that first and second Defendants claiming that they cannot stop nuisance or they had engaged an independent contractor for clinker operation hence not in a position to take measures to stop nuisance. In contrary they had through inaction approved the third Defendant's pollution and causing nuisance through pollution of Clinker Dust.

103. First and second Defendants knowingly allowed nuisance through Clinker Dust. They objected to injunction sought in this action. So the conduct shows they approved pollution from Clinker Dust by third Defendant.

104. First and second Defendants, as the consignee of the Clinker Dust should produce evidence as to measures taken by them in the handling of such a hazardous substance.

105. Accordingly all the defendants are liable jointly and or severally for the nuisance from emission of clinker dust and damage from that to Plaintiff including plants and equipment. This liability is duet to non-delegable duty cast on the consignees due to special relationship first and Second Defendants had not to pollute the environment and cause nuisance to residents including Plaintiff. Alternatively, the hazardous nature of the

Clinker Dust creates a non-delegable duty to the consignees of that substance to transport it from ships to factory without polluting air.

Assessment of damages

106. Plaintiff had submitted an assessment of damages decision of Master, which had applied general principles in assessment of damages. Defendants in the written submissions had relied on Court of Appeal decisions in *Nasese But Co Ltd V Chand* ABU 40 of 2011 but in that case special damages were awarded without proof considering circumstances of the case. This does not help Defendants. *Fiji Forest Industries Vs Rajendra Mani* Civil Appeal No 19 of 2014 was also relied but this can clearly distinguished as the constitutional provisions were not considered as in this case for assessment .

107. Halsbury's Laws of England – Damages (Vol 29) (2019) state,

> 408. The compensatory function of damages in tort
> "Damages in tort are in general **compensatory**: they aim (subject to the rules of remoteness and mitigation) to make the claimant whole, but no more[6]. This applies not only to negligence and similar torts, but also to torts such as conversion[7] and deceit3. In all cases the aim is to put the claimant in the position he would have occupied had the tort not been committed"
> . 318. Compensatory damages.
> "The majority of damage awards are compensatory, aimed at making good losses and putting the claimant in the position he would have occupied but for the defendant's tort or breach assuming he had complied with the contract"(emphasis added)

108. As I have stated earlier in this decision assessment of damages such as damage due to nuisance from pollution of air from clinker dust, 'must' be developed in terms of Section 7(4) of Constitution of the Republic of Fiji, considering international law as 'Right to Environment' contained in Section 40 of Constitution of the Republic of Fiji and also right to clean air is recognized right under Constitution of the Republic of Fiji. This was dealt earlier in this judgment. This is applicable to assessment as well as to liability for damage from pollution of air.

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[6] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL, per Lord Blackburn; *Admiralty Comrs v SS Valeria* [1922] 2 AC 242, HL, per Lord Dunedin; *Liesbosch Dredger (Owner) v SS Edison (Owners)* [1933] AC 449, HL, per Lord Wright; *British Transport Commission v Gourley* [1956] AC 185, HL, per Earl Jowitt; *The Argonaftis* [1989] 2 Lloyd's Rep 487 at 491–492 per Sheen J; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA, per Megaw LJ; *Dimond v Lovell* [2002] 1 AC 384, [2000] 2 All ER 897–915, HL, per Lord Hobhouse.

[7] *OBG Ltd v Allan* [2007] UKHL 21 at [314], [2008] 2 AC 1, [2007] 4 All ER 545 per Baroness Hale; *Kuwait Airways v Iraqi Airways Co* [2002] UKHL 19 at [67], [2002] 2 AC 883, [2002] 3 All ER 209 per Lord Nicholls. See also *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28–32, CA, per Brandon LJ. As to the tort of conversion see **TORT** VOL 97A (2021) **PARA** 202 et seq.

109. *Story Parchment Company v. Paterson Parchment Paper Company* (1931), 210 U.S. 555[8]

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Eastman Co. v. Southern Photo Co*., 273 U. S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684. Compare The Seven Brothers (D. C.) 170 F. 126, 128; Pacific, etc., *Co. v. Packers' Ass'n*, 138 Cal. 632, 638, 72 P. 161. As the Supreme Court of Michign has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. *Allison v. Chandler*, 11 Mich. 542, 550-556. That was a case sounding in tort, and at page 555 the court, speaking through Christiancy, J., said:
>
> 'But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice'…."

110. Above rationale was applied in early environmental case of *Trail Smelter Case*[9] between USA and Canada in one of the earliest Air Pollution cases between two neighbouring states. So it is internationally recognized principle when in a tort of nuisance or pollution of air such as pollution of clinker dust to Plaintiff the exact assessment of damages is not required but court needs to assess the damages from available evidence.

111. In my mind the decisions submitted by Defendants in the written submission can be clearly distinguished as none had considered constitutional provisions and Bill of Rights and its application to Right to Environment recognized in Chapter 2 of Constitution of the Republic of Fiji, in assessment of damages.

[8] https://www.law.cornell.edu/supremecourt/text/282/555

[9] https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf

This was an early interstate dispute regarding air pollution between smelter (Canadian) and US, where Polluter Pays Principle was adopted. Damages included actual, observable and economic loss.

112. There is evidence that ice plants of the Plaintiff got badly affected due to fans and internal parts of it absorbing clinker dust which was a fine particle that was be airborne and caused nuisance due to negligence and or lack of duty of care.

113. So it is proved on balance of probability all air absorbing machine parts got Clinker Dust clogged in due to pollution of Clinker Dust. This was informed to Defendants but they had continued with the method of offloading, causing further damage to Plaintiff.

114. Document marked P19 estimated the replacement cost at AUD $741,000. Ice Plants and Ice machines Compressor overhaul etc P 19 AUD 741,000. From the Plaintiff's PW 2's evidence the massive damage to these equipment is clear.

115. According to PW1 ice machine compressors were shut down for about three days and all their cooling condensers were clogged up by the hardened clinker dusts. PW 2 and PW 5 were eye witnesses to the pollution and damage due to Clinker Dust clogging inside. They stated on evidence how air absorbing parts got Clinker Dust and they got deposited permanently.

116. Clinker dusts blocked the radiators of the ice machines and they were shut down. Hardened Clinker dust had a long term effect on the performance and the quality of the ice produced. The efficiency of the ice machines decreased by 50% and this was proportional to the ice that was produced.

117. P13 contained a letter to all the three Defendants to stop clinker operation indicating nuisance and pollution and the damage to their business including 'damaging the surrounding', 'damaging equipment and machinery and assets' and ' causing loss as a result of operations having to cease while dust is in the air and resulting clean-up and repair costs'

118. So Plaintiff through their solicitors and warned the damages due to pollution but they had not taken heed of the warning till injunctive order is granted thus making them liable, for loss to 'machinery' and 'clean up' and 'business operations'.

119. According to PW1 as Clinker dust had polluted surroundings the pollution did not stop when Clinker operations stopped and it continued for about six months. This is accepted on balance of probability considering nature of the fine dry particles of the pollutant material and surrounding environment including wind. So the pollution has the potential to continue for some time after complete stop of Clinker Operation at reduce levels and gradually decreased.

120. Evidence of PW2 and PW5 (CEO of Plaintiff) were eyewitness to both Clinker Operations and pollution as they were working during office hours every working day

inside the Plaintiff's factory complex. On the balance of probability the damage to plant and equipment and loss of business is proved.

121. The technical engineer (PW2) of the Plaintiff's factory and confirmed the damage to refrigeration equipments including ice machines and Ice plants. According to his evidence there were eight ice machines and out of that already five had completely damaged and only two are operational making six ice machines to be replaced at the time of action and the type of corrosion was continuing and this will make even rest of the machines to corrode with clinker dust. So there were extensive damage to at least six ice machines on the evidence presented at hearing. This position was corroborated by PW7 , the supplier of refrigeration machines who examined photographic evidence to provide a quotation for the replacement of 6 ice machine at AUD 396,455 and shipping cost of AUD 14,853.00 the installation cost 20,424.(contained in P19).

122. PW7's evidence is that he was refrigeration engineer and designer of refrigeration machines for industrial usage. He is the owner of his namesake company and it had supplied ice machines and condensers used by Plaintiff. So he had thorough knowledge of type of refrigeration equipment that that got damaged including ice machines and condensers. He said that the cost of replacement of refrigeration equipment due to damages from clinker was clear from the photographic evidence supplied to him. He proved quotation of AUD 741,000 for the replacement of ice machines, including 6 three tone and two ten tonne ice machines, compressor overhaul replacement of condensers, including three air conditioners. These are type of equipment that can easily get clinker dust absorbed hence it is proved that as at 2018 the cost of damage remained at AUD 741,000.

123. Apart from nuisance due to clinker dust from two clinker operations in December and January Plaintiff's factory premises was badly affected from clinker dust. As the food processing facility needed to be without hazardous substance such as Clinker Dust. Thorough cleaning of the entire factory premises and tools etc were needed for more than fifteen days each consignment, if one consider only the time period of offloading of each clinker consignment. There were two clinker operations, and there were at least 30 days where complete an thorough cleaning needed including factory premises vessels berthed or arrived during this time. Again on the minimum the cost of cleaning including extra labour needed, and special chemicals etc cost about $1,000 per day and this is for thirty days cost $30,000.

124. Considering massive pollution that was inflicted cleaning of the premises should have taken more than thirty days considering the evidence that clinker dust pollution did not stop immediately after the operations were stopped due to already emitted and deposited dust can pollute due to natural causes such as wind, as the time period is not certain fifteen days for each operation taken as assessment.

125. In my mind there is no need to prove each item for cleaning in a pollution such as this. These were items used for cleaning and considering extensive pollution during Clinker Operations should cost at least $1,000 considering material used and labour and other expenses. I have confined the cost for thirty days considering that each time in December 2016 and also in February, 2017 the minimum time period for Clinker operation was 15 days for each consignment. I am mindful that cleaning would have continued even after operation ceased for some time but had granted only for 30 days in total.
Cleaning of premises for the time period for 30 days @ a cost of 1,000 per day total cost FJD30, 000 (15 days for each operation in December, and February).

General Damages (Economic Loss)

126. Plaintiff is entitled to economic loss from damage to their machinery and premises from pollution (see *Hedley Byrne & Co Ltd v Heller Partners Ltd* (1964) AC 465). Accordingly, even in the absence of physical damage, economic loss can be awarded for environment pollution from substance such as Clinker Dust.

127. Plaintiff stated that their profitability had affected since 2017 due to damage by clinker operations this is no able to be calculated precisely. There is evidence that Plaintiff could not unload fish from their vessels arrived during the time of clinker operations , the turnaround time for a vessel is 3 days it was impossible to have 3 days without clinker dust during 'Clinker Operations'. Apart from that there were efficiency issues with the quality of the ice produced that had resulted short time for vessels at sea as their cooling was through use of ice. Apart from that Plaintiff's operations got drastically reduced to low quality of ice produced and amount of ice produced as the number of days the vessels could stay got reduced.

128. Plaintiff needed extra time and labour for cleaning everyday to HACCP standards.

129. Considering these factors which are not measureable in exact amount a general damage of is assessed at $200,000. Economic loss was granted 'as matter of policy'. Per Lord Denning MR *Steel Alloys Ltd v Martin & Co* (1973) 1QB 27

130. Cost of this action is summarily assessed tat $10,000 considering that the trial lasted five days with Plaintiff is entitled to 6% interest for both general and special damages from the date of trial to date of judgment.

CONCLUSION

131. First and second Defendants are the consignees of the two Clinker Dust consignments that arrived on or around in the months of December, 2016 and February, 2017. Due to

economic reasons offloading of clinker dust using 'grappers' and 'hopper' at port are was abandoned so 'Clinker Operation' shifted to a jetty near Plaintiff's factory. Unloading was done by 'digger' without a 'hopper' to open trucks with emission of Clinker Dust causing air pollution and nuisance to Plaintiff.

132. Plaintiff had informed all the Defendants regarding emission of Clinker Dusts to its factory and had meetings with them, but emissions the nuisance continued. First and Second Defendants as the consignees of Clinker Dust and also as manufacturers of cement have a non-delegable duty care towards the environment, to take safe method to transport its consignment without causing a nuisance to occupants in the vicinity of said 'clinker operation, including Plaintiff . Defendants are liable jointly and or severally for nuisance caused through emission of Clinker Dusts during of December 2016 and also February, 2017. So Defendants are liable jointly and severally for damages to the Plaintiff. Damage is assessed at FJ $30,000 for cleaning and AUD 741,000 for replacement cost of equipment damages. A general damage for other losses to Plaintiff's business is assessed at $200,000.

Both general and special damages will accrue an interest of 6% from the date of hearing (15.11.2020) to 17.4.2023. Cost of this action is summarily assessed at $10,000 considering number of days taken and evidence produced at hearing.

FINAL ODERS

a. Judgment against Defendants jointly and or severally for special damage of AUD 741,000 and FJ$30,000.
b. Judgment against Defendants for general damages for FJ$200,000.
c. Interest at 6% from the date of hearing to date of judgment for both general and special damages.
d. Cost of this action is summarily assessed at $10,000 to be paid by Defendants to Plaintiff within 28 days.

DATED this 18th day April, 2023.

HIGH COURT OF FIJI
SUVA

.....
Justice Deepthi Amaratunga
Judge High Court, Suva