IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.1047/99

BETWEEN : *TOULIKI TRADING ENTERPRISES LIMITED* - **Plaintiff;**

AND : *PROCORP LIMITED* - **Defendants.**

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : Mr. Laki Niu for Plaintiff
Mr Edwards for Defendants

Date of Hearing : 6th & 7th October, 1999.
Date of Ruling : 8th October, 1999.

Ruling

On Friday 1 October, on the ex parte application of the plaintiff company, Touliki Trading Enterprises Limited, I issued an interim injunction against the defendant company, Procorp Limited, returnable on 6 October. The defendant has applied to lift the injunction and to set aside the writ.

Both parties to this action are exporters licensed to export squash in the 1999 season and, as such, both are signatories to an Agreement made on 2 March 1999 with the Ministry of Labour, Commerce and Industries and the exporter. The Agreements were separately made by each company but are in identical terms.

The background and intention of the agreement is clearly set out in the preamble:

"The squash industry continues to be vital for the economic livelihood of the Kingdom. The Ministry therefore considers it necessary to put in place strategies and measures to ensure the continued profitability and sustainability of the squash trade to Japan. An essential ingredient in this effort is the high quality and credibility of Tonga's squash industry particularly

as perceived by the Japanese squash market. Integral also to the Ministry's efforts is the common good for all participants in the squash industry. This Agreement is therefore, aimed at encouraging the Ministry, approved squash exporters, growers and related institutions to work together towards enhancing the efficiency and sustainability of the industry."

The Agreement then states that the Company had been granted a licence and had accepted it subject to the terms of the Agreement. It is not necessary to set out the terms in extenso but, in general, they are an attempt to achieve a standard approach to the conduct of the squash industry in accordance with the aspirations expressed in the preamble. Central to this are the Exporters and the major thrust of the Agreement is to try and achieve some measure of consistency in the manner in which they conduct their business in order to prevent the problems that are likely to arise should the industry be governed only by the desire for immediate and easy profit.

It is not a comprehensive Agreement and neither is it well drafted. Many of the clauses are obscure in their meaning and effect. It requires each Exporter to register the growers that will supply it and to submit a list of such growers to the Ministry no later than the end of August 1999. The Agreement does not specify how the growers are registered to a particular Exporter but it appears the basis is that the Exporters supply them with finance for seed and fertilizer and possibly labour at the beginning of the season in return for the right to purchase any exportable squash they produce.

The Agreement requires each Exporter to enter a written agreement with its respective growers which must incorporate certain specified terms including the requirement that the grower must sell his exportable squash to the Exporter with which he is registered and that the Exporter and the growers shall endeavour to ensure that each grower is registered with only one Exporter. These terms are clearly a vital part of the attempt to ensure the orderly conduct of the industry.

Clause (3) of the Agreement sets out the obligations that apply to the Exporter and paragraph (v) provides for the settling of disputes. It requires the Exporter to;

> "(v) Comply and observe the procedure for settling disputes and squash matters as follows:
> (a) All squash complains and disputes whether it is between exporter and exporter, grower and exporter or between grower and grower that cannot be satisfactorily resolved by relevant parties will be adjudicated by the Minister. The Minister shall for the purpose of resolving the dispute exercise discretion as to the actions done to resolve the dispute or assist with a decision on the dispute. Exporters shall provide all relevant information on the

dispute and to cooperate with the Minister in resolving the dispute."

It is important to note that this clause is clearly expressed as being between the Minister and the exporter only. They are the sole signatories to the Agreement. Despite the inclusion of the growers, their involvement with the procedure for resolution of disputes by the Minister would appear to arise, presumably, only if and when the written agreement between the exporter and the grower includes such a clause. The Minister is defined in clause (1) of the agreement as "the Minister of Labour, Commerce and Industries or his nominee."

The application by the plaintiff for an injunction was based on the suggestion that the defendant was purchasing squash that had not been grown by its registered growers. It alleged that;

> "(1) The defendant has acted with deliberate intention to breach and circumvent a set of rules and procedures, which government has set and upon which the exporters and growers of squash have agreed, for its own selfish and individual gain at the expense and loss of the plaintiff and the rest of the growers registered with it.
> (2) Government has warned and reminded growers and exporters of those rules, and in particular, not to buy squash from other exporters' growers. In the week prior to 21/9/99, that warning and reminder was broadcast on radio A3Z seven times, and a letter was sent by the Ministry to the exporters to further impress upon them the need to abide by the agreement.
> (3) It is desirable and indeed absolutely necessary that the practice which the defendant has begun to perpetrate, be stopped immediately and that it pays the sum for which it is liable into safe custody, until the Minister returns to the Kingdom and/or his nominee hears the dispute and make the appropriate orders...'

The reference to the Minister's return is explained in the affidavit of the Chief Executive of the plaintiff. The Minister is abroad and is not expected to return until the end of this month. There is, as usual, another Minister appointed to act during his absence but only the Minister or his nominee can settle disputes arising out of the Agreement. Despite the length of his absence and the vital part the short and hectic squash exporting season plays in the national economy, it appears from a letter from the Secretary of the Ministry that nobody has been nominated to deal with urgent referrals. The terse letter was the response to a request by the plaintiff and states;

> "I wish to advise that the Hon. Minister for Labour, Commerce and Industries is away overseas, and all matters relating to settlement of squash disputes is vested only in the substantive Minister."

Faced with that, with the urgency of the export timetable and with the extremely perishable nature of the squash, the plaintiff came to the court for an interlocutory order to restrain the alleged breach of the agreement by the defendant. The interim injunction ordered that:

> "the defendant... its employees, agents and any person authorised by it, are forthwith restrained and prohibited from purchasing or offering to purchase and from shipping any squash which it has acquired or has in its possession from any person who was not its registered grower...."

Liberty was given to apply to vary that but no application was made until the return date at which time, the defendant applied to have the writ and statement of claim set aside and the interim injunction lifted.

The order was served on the defendant on 1 October and the plaintiff alleges that the defendant breached it the following day. Application has therefore been made by the plaintiff to have the defendant and its Chief Executive Officer punished for contempt.

I deal first with the application to lift the injunction. Various grounds of objection were raised by counsel for the defence challenging the court's jurisdiction in this matter but they are no longer pursued and I am happy not to deal with them further. They were based, not on any claim that the conduct of the defendant was in accordance with the agreement but on an attempt to impugn the very agreement that the defendant had apparently voluntarily entered. Matters have been raised before the court that reflect poorly on the attitude of the defendant if considered against the stated aims and intentions of the parties to the agreement. At the same time it would appear that others have also breached the agreement and the defendant is not alone in his attempts to go behind it in order to purchase squash from growers registered with other exporters.

The defendant seeks to have the restrictions imposed by the injunction removed on two main grounds.

The first is that, although the defendant has purchased from some growers registered with the plaintiff, the plaintiff has never made written agreements with those growers as required by paragraph (ix) of the Agreement. The growers are therefore not bound to sell to the plaintiff. I have already referred to the fact that this Agreement is between the Minister and the exporter only and the basis upon which the grower is bound is not apparent. However, even proceeding upon the basis that they are so bound, counsel, with respect, misses the point. The injunction he seeks to remove is directed at the exporter and prohibits it from purchasing from growers who are not registered with it.

It has no power over the growers. Mr Edwards takes his submission further however. He points out that the court will not normally grant injunctive relief if the effect is to compel specific performance by others. The effect of the restriction on the defendant company effectively prevents growers not registered with it from selling to it and is thus forcing them to sell in accordance with the Agreement. Ingenious though it is, I do not accept this argument is a valid objection. The order is directed only at the exporter. Whilst I accept it would prevent it taking squash from growers registered with others and thus restrict the growers' choice of outlet for his produce, it does not force them to perform the agreement they should have made with the plaintiff. The application fails on this ground.

The defendant is on much firmer ground in his second submission. He relies on the well established principles as explained by Diplock LJ in American Cyanamid co v Ethicon Ltd; (1975) AC 396.

Those principles require the court to be satisfied the plaintiff has established an arguable claim to the right he is seeking to protect. The court does not have to decide the merits of the claim, only that there is a serious question that might be tried. If the applicant fails to demonstrate that, there can be no injunction. However, I am satisfied about both, subject to the application to set aside the writ with which I shall deal later.

Once the plaintiff has satisfied the court of these matters, the grant or refusal of the injunction depends on the balance of convenience. This is a matter for the exercise of the court's discretion and there are many factors the court may take into account in reaching its decision. In many cases the principal test will be whether damages would be a sufficient remedy. If they would be then the court should not grant the injunction.

The defendant suggests that is the case here. If it should later be demonstrated that the defendant has injured the plaintiff's interests by purchasing and exporting squash from growers registered with the plaintiff, the extent of the damage can be assessed and could be accurately and simply quantified and remedied by a monetary award.

Mr Niu for the plaintiff points out the well established qualifications of that general principle that an injunction will not be granted if damages would be an adequate remedy. The first is that damages will never be an adequate remedy if, once awarded, the other party is unlikely to be able to pay them. He suggests that the defendant is, in effect, gambling on the price of squash in the Japanese market and, should his gamble fail, the consequences could be so profound that the company may have to go into liquidation. I would need substantial evidence to support such an objection and I have nothing beyond counsel's conjecture.

More relevant to this application is his second point that the courts have generally followed the principle that it is usually better to delay a new activity than to risk damaging one that is already established. The principle is that the court can and should consider whether granting the injunction would cause more harm than refusing it. Mr Niu points out that the terms of the injunction do no more than to enjoin the defendant to observe the terms of the agreement he voluntarily entered. If the injunction is lifted, it will been seen by all the exporters as a green light for the general free for all the Agreement was specifically intended to avoid. There is considerable force in that argument.

What then is the proper decision in this case? I am satisfied that damages would be an adequate remedy should it later be decided that the defendant's actions were wrong. I am not willing to take into account the submission that the defendant may not be able to pay them should he be found liable. On the other hand, the defendant by his deliberate action is attempting to avoid the Agreement he entered and possibly to destroy the whole accord that was the stated aim of the various parties to the Agreement.

My decision turns in the end on the Minister. The aim of the Agreement and in particular the requirement that all disputes should be resolved in the first instance by the Minister was to ensure an effective way of settling disputes such as this with the absolute minimum delay. It was intended to allow the short but busy squash season to proceed with as little hindrance as possible. Had it been possible to refer this matter for resolution under the Agreement, there would have been no need for the plaintiff to seek relief from the court.

I asked counsel to confirm that there was indeed no Minister's nominee. I am advised that is the case. I therefore asked that enquiries be made to ascertain how soon the Minister would be able to deal with this dispute and it appears he will not be returning to the Kingdom until 24 October. The squash season is short and the commodity perishable. It is in the national interest that the market in Japan in particular is not prejudiced by any loss of confidence from damage to or failure to supply the squash. As I have pointed out more than once in this judgment, this Agreement grew from the hope that disputes will be settled promptly so as not to prejudice the overseas markets. Unfortunately the absence of the Minister makes that impossible. Already, this action has taken a week to reach this point. A further two weeks must pass before the Minister can resolve it in accordance with the terms of the Agreement.

If it had been possible for the reference to take place within a day or two, I would have had no hesitation in leaving the injunction in place. I accept that the plaintiff is motivated to an extent by a wish to preserve the terms of the Agreement but, from the scant material before me, it appears that his intentions are not shared by all the licensed exporters. Already others not affected by this injunction are apparently going behind the Agreement. Middlemen have also appeared to entice growers from the exporters with whom

they are registered and the produce thus obtained is being purchased by exporters. All this needs resolution under the Agreement without delay if the whole arrangement is not to collapse in a free for all governed solely by the thirst for greater individual profit. However, if this injunction is left as it is against the defendant alone, it will not achieve any check on the industry as a whole. The original application included the suggestion that the imposition of the injunction would warn other exporters who were contemplating similar actions. That is not a ground for continuing this order because it does not bind them. The only effective way in which to warn the others by a complaint against one would be a rapid decision by the Minister and the use if necessary of his power, stated at the end of the Agreement, to cancel the exporter's licence.

I have already commented on the inadequacy of the terms of the Agreement. Many of the clauses are unclear and imprecise. It is silent on the basis upon which the growers are bound to seek the resolution of disputes by the Minister. Registration and the requirement that the growers sell to a particular exporter would appear to be based more on hope than contractual obligation. I am uncertain how the Minister will resolve many of these problems and, in the face of such doubt, this court is reluctant to take any action that may appear to prejudge the interpretation of these provisions. As I have already stated, the motive behind this Agreement was the national interest. That is a matter peculiarly within the judgment of the Minister – not of the court.

In the circumstances, I am driven to the conclusion that the balance of convenience is against the continuation of this injunction and that any breach of the Agreement can be compensated by an award of damages.

However, any purchase of squash by an exporter from a grower who is not registered with him appears prima facie to be a deliberate attempt to go behind the Agreement he has entered with the Minister. In those circumstances, I shall lift the injunction ordered on 1 October on the undertaking by the defendant company that a separate record shall be maintained by it of all purchases it makes from anyone other than its registered growers. It must specify the name of the grower, the date and the amount of squash accepted by the exporter and the price paid to the grower. The name of the grower must be the name used on the national list of growers referred to in paragraph (ix)(c) of the Agreement and the grower must confirm the details by his signature. Where the purchase is from a person other than the grower, that person must also be named. The first such list shall be submitted to the Ministry on 18 October and each fortnight thereafter.

Mr Edwards, on behalf of the defendant, has given that undertaking and so I order that the injunction be cancelled from 3.15pm today.

That leaves three further matters.

First, the plaintiff has sought an order that the defendant should pay a sum into court to cover the alleged loss suffered by the plaintiff from the actions of the defendant. I do not consider that would be appropriate now that the injunction has been removed. The Agreement makes little mention of the specific powers of the Minister short of the cancellation of an offending exporter's licence but I would suggest with respect that he should be supplied with those figures when he is considering any referral for his resolution.

Second is the application by the defendant to set the writ aside. This application was based on a challenge to the court's jurisdiction over such a dispute. I do not need to set it out in detail. The Agreement cannot oust the jurisdiction of the court. There is no clause purporting to do so and, had there been, it would have been void. The Agreement includes an acknowledgment by the parties that it is intended to create a legal binding contract for a period of one year from the date of signing. On the other hand, the court, in its discretion, will normally only try an action arising from the Agreement after the arbitrator has completed his determination even where, as is the case here, there is no specific Scott v Avery clause. The basis on which the writ was filed was not an unwillingness to submit the dispute to arbitration but the fact that such a referral would take too long because of the absence of the Minister. I therefore order that the application to set aside is refused but I order instead that the action be stayed. The defendant does not need to take any further step in his defence until further order of this court.

In light of the views I have expressed of the conduct of the parties and the terms of the agreement itself, I shall make no order for costs until the Minister has completed any consideration of and adjudication on this matter. When that is done counsel may apply to address me further on the question of costs.

Finally there is the application to commit the defendant and its Chief Executive Officer for contempt of the order. I shall hear that matter in open court on 15 October at 10.00am. The parties shall have liberty to file and exchange affidavits by 13 October and to file any in reply prior to the hearing.

NUKU'ALOFA: 8th October, 1999. **CHIEF JUSTICE**