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

NO.C.305/98

BETWEEN : PRIMARY PRODUCE EXPORTS LTD - **Plaintiff;**

AND : TITALI 'AHIO - **Defendant.**
[Houma]

Counsel appearing: Mr Appleby for Plaintiff,
Mr Tu'utafaiva for Defendant.

Dates of Hearing : 2, 5 October 1998
Written submissions received: 16 October 1998
Date of Judgment: 4 March 1999

JUDGMENT OF FINNIGAN J

This is a claim by a squash export company against a grower. The claim as pleaded is that in 1996 the parties entered into a credit arrangement by which the plaintiff supplied goods and services to the defendant, and the defendant was to pay for those from money which he received from the plaintiff upon sale, by the plaintiff, of the squash grown in the 1996 season by the defendant. Alternatively, in the arrangement as pleaded, if there was insufficient money as above, then the defendant was to make payment to the plaintiff on the usual terms of trade between them, i.e. payment after 30 days and in any event upon demand.

Pursuant to the arrangement as pleaded, the plaintiff supplied certain goods and services, but the receipts from the defendant's squash were insufficient payment. The plaintiff claims from the defendant a balance due of $5807.05, plus interest at 10% from 1 January 1997.

These claims are denied in pleadings by the defendant, and as a further defence the defendant pleads that some seeds supplied by the plaintiff were bad, the price paid was below the contract price, some items charged to the defendant are outside the arrangement, and the arrangement, being about the use of the defendant's land, was not approved by the Minister of Land and was thus invalid.

THE EVIDENCE

Evidence was given by the plaintiff's company secretary and by its former manager, and by the defendant. There was a document, a written agreement between the parties. It is undated, but both signed it, apparently before the same witness. In its preamble the document says it is a contract between them, "in regards to the planting and exporting of the [defendant's] pumpkin". It refers to sale of the pumpkin by the plaintiff following harvest by the defendant in October and November 1996. It states that the plaintiff provides to the defendant the financial aid and loans needed by the defendant for purchasing seeds and fertiliser as detailed in the document. Finally the preamble notes that the plaintiff and the defendant "mutually agree to engage in planting of

pumpkin.....thereby the pumpkin belonging to both the [plaintiff] and the [defendant]. The [defendant] can only weigh and sell [his] harvested pumpkins to the [plaintiff]. It is the responsibility of the [defendant] to provide the land in which the planting of pumpkin is to take place. However, the pumpkin remains the property of both the [plaintiff] and the [defendant], since they have agreed to the conditions of this contact. Whereby the [plaintiff] finance the project leaving the [defendant] to attend and cultivate the pumpkin, and abiding by section (i) below:

> (i) the [defendant] cannot without consent of the [plaintiff] sell the pumpkin to any other dealer or company."

The document then sets out in 21 clauses the terms of the parties' agreement. It has provision at cll 2 & 3 for a "grower's number" for the defendant and for the acreage to be cultivated but none is supplied. At cl 4 it details the items supplied, arrangements made, and payments paid by the plaintiff. These consisted of a mist blower, some chemicals, some seeds and some fertilisers, all totalling $8250.54. That clause also provides that after supply of the fertilisers and seeds, the defendant bears the cost of ploughing, fertilising and insect treatment. It provides also that the plaintiff has the right, in the process of weighing the defendant's produce, to deduct all costs relating to seeds and fertilisers purchased under the contract, and the clause concludes, "the [plaintiff] cannot incur additional interests". In the document, which is in Tongan, the words are written with their English meaning, as follows, "totongi tupu (interests)", and their clear meaning is that the plaintiff cannot add interest to what it deducts.

Clauses 10, 11, 12 & 13 are the provisions for payment to the defendant. They are difficult to construe, but cl 10 provides that the defendant would supply the plaintiff with 8 crates of pumpkins for each kilogram of seed, and that "therefore the crates of pumpkin will not be permitted to weigh less than 535 kilograms excluding the weight of the empty boxes. Clause 11 is that the plaintiff will "reimburse $250 per every squash box to the [defendant] in accordance with [clause] 10 above, depending on the fluctuating exchange rate of the Yen 79.07 for T$1.00. Therefore the paid value relies on the changes in the value of the Yen."

There are other detailed provisions, particularly at cll 15 to 21, for provision of the produce to the plaintiff by the defendant, and for produce that does not pass quarantine inspection. Clause 21 which empowers the plaintiff to enter on the defendant's land and grow pumpkins if the defendant defaults in delivery of the number of boxes agreed upon, and if the land has been given as security for the credit, was not completed.

Those are the written terms. The defendant said in evidence that the document was not produced to him to read and sign until after most of the seeds and fertiliser had been given to him. He said that the parts where blanks were completed had been written before he saw the document. He said that till then no agreements had been reached between him and the plaintiff. Neither of the plaintiff's witnesses denied those assertions, although the former general manager said that in 1996 there was a meeting of the plaintiff with its growers, and the defendant was there. Perhaps some general agreements were reached at that meeting between the plaintiff and those growers who were, or intended to become, associates of the plaintiff in the 1996 growing season.

My conclusion is that there were, because I accept that the plaintiff began to supply, and the defendant began to accept, seeds and fertilisers at least, because both agreed that occurred, and I accept that it occurred before the written agreement was presented to the defendant. The defendant for his part said, and I accept, that he expects to pay for what was delivered to him. I find therefore that there was either verbal or tacit agreement that at the very least the defendant would grow squash with the assistance of the plaintiff and would pay the plaintiff for whatever was supplied. I find from the evidence that the written agreement was an attempt to formalise

that contract, and establish an exclusive relationship for the plaintiff with the defendant, to exclude the defendant from a similar relationship with any other exporting company in the 1996 season. It seems to me very likely that the written document, which was prepared by the plaintiff, was intended by the plaintiff to protect all agreements which it had reached with the defendant for the 1996 season before supplying him with goods worth $8250.54, and to add some more detail to them. There are however, some notable omissions from the document. There is no provision for what occurred in the present case. The first such occurrence was that some of the seed supplied by the plaintiff to the defendant failed and the defendant had to buy more, later in the season. The second was that, when the defendant received his first pay-out, he decided that the amount paid was paid in breach of the written agreement, and, deeming the plaintiff to be in breach, he sold the rest of his squash elsewhere. The result of these occurrences was that there was insufficient income in the hands of the plaintiff to repay its earlier advances.

Hence the plaintiff's pleaded claim that there was an alternative arrangement, to supply "on the usual terms of trade between the plaintiff and the defendant, being that payment shall be made for all goods on credit [after] 30 days, and in any event on demand". In support of that claim, its company secretary said in evidence that this was normal business practice. Normal business practice might have become a term of the contract if the parties had by their words and/or actions indicated verbal or tacit agreement about that. There is no evidence at all that this was a term of the parties' agreement in the present case. Rather the evidence shows that the defendant and the plaintiff were associated in the growing business the previous year and, there being no evidence of express agreement for 1996, one must reasonably assume that the parties agreed to continue previous arrangements. The evidence of the company secretary is that the previous year the agreement was for payment from proceeds of sale. I reject the claim based on what the plaintiff says is normal business practice.

The claim must be based on the contract. The defendant stated in evidence his understanding of the matter. He said he understood that he has to pay back everything he took on credit, subject to a dispute about some of the plaintiff's claims. That clearly was a term of the contract, the only issue is, pay back on what terms? Nothing in this case is clearer than the fact that payment was to be made from the proceeds of sale of the 1996 harvest, if those proceeds were enough. From their agreements I find that even if the defendant sold to another exporter, that obligation remains. There was however no provision anywhere for terms in default of payment out of the proceeds of sale, so the Court must make a reasonable assessment of the parties' unexpressed intentions. The company secretary's evidence is that in previous years the manager decided the pay-out and if sales fell short it was the plaintiff that carried the shortfall, and in most cases that was until the next season. He said that the defendant had carried forward some credit from the 1995 season into 1996. The bad harvest in 1995 had led to unpaid credit and the plaintiff adopted a policy of "rolling over" the debts of the growers into the 1996 year.

In the light of the evidence, only one conclusion seems possible. The parties must be taken to have agreed that repayment of advances would be from proceeds of the 1996 harvest, if they were sufficient, otherwise the debt would be "rolled over" into the 1997 season. In other words, the debt was not to be repaid to the plaintiff until the harvest (and the plaintiff was to charge no interest). If there was debt unpaid after the harvest, it would have been "rolled over" for the defendant had he remained in a contract relationship with the plaintiff, but that did not alter the plain fact that the debt was due and owing. The only major variations introduced into their 1996 agreement by the breakdown in their relationship is that the plaintiff was unable to reimburse itself fully from sales proceeds, and the plaintiff could no longer carry any shortfall into the following season. The debt was payable at the end of the 1996 season.

I pause at this stage to refer to Mr Tu'utafaiva's submission that only the written contract can be taken into account, pursuant to s 79 of the Evidence act, cap 15. This submission is overwhelmed in the present case by proviso (b) to s 79. The proviso is that evidence may be given about any separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms, if the Court from the circumstances of the case infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. I find that the circumstances in the present case clearly invoke the proviso.

In the course of the evidence, some matters of detail were mentioned, such as the quality of the seed supplied by the plaintiff to the defendant, and the plaintiff's method of calculating the pay-out compared with the provisions in cll 10 to 13 of the written agreement. These are relevant to the defendant's claim to a set-off in the amount of any judgment for the plaintiff. This set-off claim raises three items: (i) the charge for seeds that were bad, (ii) the calculation of the pay-out price, and (iii) the claim for registration and vehicle hireage fees.

Dealing briefly with each of these, there is no evidence about what the parties may have agreed or intended should some of the supplied seed not germinate. There was no evidence of practice in past seasons, or in the industry generally. There was evidence that some seeds from the 1995 season had been kept in a cool room which was allowed to warm up at night, but there was evidence of successful testing of these seeds by the manager. In any event the evidence was that the defendant did not receive any of those seeds. From the evidence I find that he received seeds from the normal stock kept by the plaintiff, and that, there being no arrangement for the event of failures, the risk of germination rested on the defendant, who planted them. There is nothing in this heading that favours the defendant.

The next head is the calculation of the pay out price for the squash which the defendant sold to the plaintiff. I am bound to say that the provisions in the written agreement and the evidence of the plaintiff's witnesses did not enable me to find any clear pay-out principle, other than the fluctuating value of the yen. From the evidence of the plaintiff's witnesses, it seems that the plaintiff did not abide strictly by the term in the agreement in any event, rather paying out what it calculated it could afford, and making adjustments latter. At first it paid to all its growers 40 seniti per kilogram, and both the company secretary and the manager agreed that had the exchange rate been correctly applied, that pay-out would have been at 42 or 43 seniti. The company secretary said that when the 40 seniti pay-out had been decided, the company management had not looked closely at the contract and did not realise that the provisions for payment were in the document.

This was a reprehensible approach to the document which the plaintiff itself had generated. It reinforces the view that the plaintiff's objective in producing the document was to protect its own interests only and not those of the grower party. No evidence was given about the actual exchange rate or whether it was used by the plaintiff in calculating any of its payouts to the defendant. The company secretary said that he was paid at 45 seniti. That is denied by the defendant, and the manager said that the first 2 pay-outs were at 40 seniti, and the 3rd added 3 seniti for all those who had received 40, thereafter the payout was 45, and the defendant had not been receiving the lower rate, meaning presumably 40 seniti. The plaintiff claims that because of the absence of evidence about the exchange rate the court should assume that the pay-out would have been 50 seniti, which is an amount that the defendant heard from other growers.

I find this aspect of the case unsatisfactory in that the plaintiff, when the defendant was selling his squash to it, apparently never employed the contractual principle of calculating the payout by reference to the exchange rate, and was thus apparently in breach of the contract as the defendant claims. On the other hand, the defendant did not bring evidence of what the exchange rate at the

time in question actually was, thus enabling the Court to direct the parties to apply the contract. The equity of the matter however favours the defendant and it seems this is an occasion for the Court to invoke its jurisdiction to make an equitable assessment as best it can of what amount should be allowed to the defendant under this head. In submissions, Mr Tu'utafaiva has suggested $774.95, this being an allowance of an extra 5 seniti per kilogram for the squash which the defendant sold to the plaintiff. If the calculation is accepted, it would raise the $2,220.05 which was actually paid to $3,000. After considering this submission, I accept it as offering a just and reasonable assessment of the set-off under this head that is due to the defendant.

I turn now to the third head, a set-off claim of $231.60. This arises from the defendant's claim that the plaintiff was not entitled to charge him a registration fee of $160, nor vehicle hireage fees for the collection of his squash. These items are certainly not provided for in the written agreement. The plaintiff's witnesses did not give much evidence about this, these charges were not shown to be standard charges that had been levied in previous years. The plaintiff had been supplied by and a supplier to the plaintiff in previous years, so it is difficult without evidence to see why a registration fee was necessary or should have been inferred. By the same token, a hireage charge could have been inferred, but only if it had been previous practice and there is no evidence of that. This head of the defendant's claim to set-off is allowed.

Thus by my findings, the defendant is entitled to a set-off which amounts to ($774.95 plus $231.60, i.e.) $1,006.55, and Mr Tu'utafaiva's submission in that regard is upheld.

THE DEFENDANT'S MAIN DEFENCE

The main defence advanced by the defendant was that the written agreement was illegal by reason of s 13 of the Land Act, because it did not have the written approval of the Minister of Land. I found the arguments advanced by Mr Tu'utafaiva invaluable in this context, and they are worthy of serious consideration in any case where this point is in issue. To claim that a contract between an export company and a squash grower is illegal without the approval of the Minister of Land and thus unenforceable is to make a serious claim. The present case however, is not the opportunity to air that argument. It is not the contract for use of the land that is in issue. The claim is a claim in a simple contract for the supply of goods and for just payment in accordance with agreed terms. That claim is not the same as a claim brought to enforce the agreement for the use of the land, and it is in the latter case that the argument advanced by Mr Tu'utafaiva must be considered. In the present case, I hold that this argument is not available as a defence.

CONCLUSION

For the reasons which I have stated, I give judgment for the plaintiff in the sum of $4800..50, which is the amount claimed ($5807.05) reduced by the amount of the set-off ($1,006.55). Interest is allowed at 10%, to run from the date of judgment.

Since each party has succeeded to a degree, I leave each party to pay its own costs and make no orders.

NUKU'ALOFA, 4th March 1999

SUPREME COURT TONGA

JUDGE