Tenefufu & others v Squash Export Co Ltd & others

Supreme Court, Nuku'alofa
Dalgety J
Civil Case C.718/92

14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 September & 3 December, 1993

Company - non members - no duty to account to
Contract - liquidated damages - only if provided in contract
Evidence - hearsay - documents - s.89(n) Evidence Act

The Plaintiff, squash growers, sued the Defendant with whom they were in contract, squash exporters, for moneys allegedly wrongfully deducted by the First Defendant from their 1991 earnings for an acounting by the First Defendant and for damages for the alleged "unlawful actions" of both Defendants in refusing to register them as squash growers with the Defendants in 1992.

In 1991 much Tongan squash, exported to Japan, was not of acceptable size and/or quality. The Plaintiff knew that a condition that their squash would be up to standard was part of their contracts with the First Defendant. The First Defendant deducted sums from the moneys otherwise payable to the Plaintiffs, in effect as liquidated damages for their squash which was not up to standard in 1991..

Held:-

1. Liquidated damages were enforceable only when such a provision was part of the contract.
2. Here there was none such in these contracts.
3. The First Defendant wrongfully deducted such moneys.
4. The First Defendant, however were correct in declining to pay any price at all to the Plaintiffs for their squash rejected in Japan (relying on inter alia, certain hearsay evidence received under s.89(n) Evidence Act).
5. No damages were payable in relation to the failure of the both Defendants to register the Plaintiffs for the 1992 because there was no entitlement to such registration as of right, and, in any event general damages could only be for actual loss and none had been shown.
6. The First Defendant was a company; the Plaintiffs were not members of it and were not entitled to any such accounting as sought.

Cases considered : Dunlop Tyre Co. v New Garage [1914-15] All ER Rep.739
Steward v Carapanayoti [1962] All ER 418
Robophone Facilities v Blank [1960] 3 All ER 128

Counsel for Plaintiffs : Mr Niu & Mr Fakahua
Counsel for Defendants : Mr Stevenson & Miss Van Bebber

Judgment

The Plaintiffs Sione Tenefufu, Sunia Silakivai, Faliu Fine, Sione Latu and Mesui 'Akau'ola are five growers of squash pumkins ("squash") who exported their produce during the 1991 squash season with the First Defendants, the Squash Export Company Limited ("SEC"). The Second Defendants Dr. Feleti Sevele and Mr. Kesomi Siale are said to be two individuals engaged in business, trading in 1991 under the name of Touliki Trading Enterprises ("Touliki"). There is now a company of that name but it is with the former business that the Plaintiffs are in dispute and whom they have called as Second Defendants. Both SEC and Touliki are in the business of exporting squash from the Kingdom of Tonga to the Empire of Japan, SEC since 1990 and Touliki since 1991. Apart from the usual order as to Costs what the Plaintiffs seek against both Defedants is -

(a) payment of a specified sum of money to each Plaintiff, being money wrongfully deducted they say from earnings due to each of them;

(b) interest on each of these sums from 20th December 1991, the due payment date;

(c) general damages of 50,000 pa'anga to be shared equally amongst them for inconvenience, embarrassment and financial loss suffered as a result of the allegedly "unlawful actions" of the Defendants in refusing to register the Plaintiffs as squash growers with either SEC or Touliki in 1992; and

(d) an accounting, namely the delivery to them of the full audited accounts of SEC and Touliki for the 1991 squash season.

In 1991 almost 22,000 tonnes of squash was exported from Tonga to Japan resulting in a net gain to the Tongan economy of nearly eight million pa'anga. Some 1500 farmers were engaged that year in the growing of squash. Tonga's 1991 squash export season was almost its last largely due to (i) a high percentage of low quality fruits, due to decay and disease, as ascertained on arrival in Japan and (ii) the inclusion of undersize fruits packed in the middle of many bins. An official government report in January 1992 (Document D.9) concluded, as to Low Quality that -

"An unacceptable percentage, deemed high by importers, of the squash shipments were decayed or diseased - an estimated 15 per centum of total shipments. The causes are varied but interconnected ranging from the time of planting, time of harvesting, inadequate storage facilities, bins packed too closely without ventilation, fruits left too long in the sun or in the rain or at the wharf awaiting shipment, rough handling, quarantine and quality control problems, deficient local transportation and shipments of the squash abroad, and unco-ordinated control of the project. Suffice to say, decayed and diseased fruits had to be dumped by the Japanese importers incurring high expenses in the process. While the importers will sustain losses this year they will, in one form or another, recover their losses from the Tongan exporting companies (and indirectly from) the gowers. Normally, these are by way of claims and (deductions from the) proceeds from future exports" : and as to Undersize Fruit that -

"The presence of undersize squash, intentionally packed in (the) middle of many bins, was an odious surprise to the importers used to the precise and uniform character of Hokkaido and Kyushu produce ..... It was estimated that 15 per centum of total shipments were udersize, which are generally unacceptable, very difficult to sell to the wholesalers and depresses prices (including good to high quality

squash) in the process. Here too the importers will sustain losses which they shall recover from exporting companies and growers. Undersize or decaying fruits must never be exported to a market (renowned) for a requirement of prefect appearance and high presentation of produce . . . . ."

Thus a total of almost one-third of Tonga's export of squash that year was unacceptable due to low quality or for being undersize. On both counts SEC performed significantly better than the national average, only about 4 per centum of the squash exported by them being of low quality, and a like amount under size. Even that total created ructions in Japan and led to financial penalties being applied to SEC by their Japanese importers. That is the background against which this case is set.

In 1991 the procedure adopted by SEC was to invite the growers to register with them. This invitation was made by radio announcement. Growers who wished to register then attended a public meeting and signed a registration form. SEC then considered these applications, decided who to accept, allocated an average to each and then transmitted this data to the Tonga Development Bank (TDB) for consideration by them, SEC having arranged with TDB that they would co-ordinate loans to growers and that no grower would be accepted for registration unless he was also an acceptable loan risk to TDB. Thereafter SEC registered as growers only those applicants who were also acceptable to TDB. Upon registration being accepted, a registration fee (based on average) became due and payable. Registration committed the grower to sell his squash to SEC and they in turn undertook to buy a registered grower's squash. There were however various conditions attached to these arrangements. The export company did not guarantee a price, but merely undertook that the payment would not be less than a minimum price to be announced during the growing season. In addition the price payable was subject to a condition as to quality, namely that it had to be acceptable to the Japanese importers upon its arrival in Japan. If it was not, then no payment would be due. This was the evidence of the Defendants' witnesses and it was amply confirmed by the testimony for the Plaintiffs. The First Plaintiff, Sione Tenefufu agreed that his contract with SEC was upon these terms. As to quality he stated that the squash had to be of a certain quality, namely squash which was good, not sunburned or rotten or small. He also went on to say that the minimum price which had been offered (in this case 50 seniti per kilo) was payable subject to acceptance of the squash in Japan. The Third Plaintiff, Faliu Fine, gave evidence along similar lines In particular he stated in cross examination that he knew only good squash was acceptable under his agreement with SEC and that the Japanese would not accept bad squash. The Fourth Plaintiff Sione Latu expressly conceded that it was an express condition of his contract with SEC that only good squash would be accepted by the Japanese. Mesui 'Akau'ola, the Fifth Plaintiff, says he knew before harvest that the minimum price offered would be paid only if the squash was acceptable to the Japanese. Even the Second Plaintiff, Sunia Silakivai, remembered that there was a condition as to quality, namely that only good squash would be accepted.

On the evidence I am satisfied that acceptance meant acceptance by the Japanese of the squash upon its arrival in Japan. And there is no reason why squash exported from Tonga in good condition should not retain that quality upon its arrival in Japan some three weeks later. The cargo was exported in refrigerated conditions ; after delivery to the exporter it was stored awaiting shipment under cover and in conditions where a free circulation of air was possible (such as in an open-sided packing shed or transit shed) ; and

I accept the evidence of Dr. Sevele that his experiments had shown that good squash properly stored and transported had a shelf life of some three months before it began to deteriorate. There had been a problem with some squash stored at the wharf but SEC had accepted responsibility for that and recompensed the growers involved. I am not persuaded on the evidence that any of the Plaintiffs' squash fell into that exceptional category.

According to paragraph 6 of the Plaintiffs' Statement of Claim it was not until 19th December 1991 that SEC informed their growers that they intended to penalise any of them who exported bad or undersize squash, the costs involved in exporting such squash to Japan. With an exception which is not relevant for present pruposes the terms of paragraph 6 were admitted by the Defendants. In previous years all growers had suffered this loss equally by reduction in the price paid. The 1991 penalty proposed by SEC though novel, was a well intentioned scheme to penalise offenders only, thus avoiding a reduction in the price payable to growers who had played by the rules and exported good squash of proper size. Matters might well have been different had this intention been expressed at the outset when growers were invited to register. Then it would have been part of the arrangements made between SEC and their growers. I have no difficulty accepting that this provision is of the nature of liquidated damges, not a penalty properly so called, given that its intention was to maintain standards, maintain a good price for growers who exported squash of the required quality and size, and that the amount involved was neither extravagent nor excessive but a genuine pre-estimate of the loss likely to ensue from the export of squash unacceptable to Japan in terms of quality or weight. The penalty proposed by SEC was 185 pa'anga per bin (500 kilos), a sum consistent with the actual costs involved. I accept that this was a genuine quantification of their loss. Payment of liquidated damages is enforceable but only where such a provision is part of the contractual arrangements between the parties : Dunlop Pneumatic Tyre Co. Ltd -v- New Garage and Motor Co. Ltd. [1914-15] All E.R. Rep.739 (House of Lords) ; Robert Steward & Sons Ltd -v- Carapanayoti & Co. Ltd. [1962] All E.R. 418 ; Robophone Facilities Ltd. -v- Blank [1966] 3 All E.R. 128 (Court of Appeal). I am not persuaded that such a provision was ever part of the contractual arrangements made by the parties. It was not consensual. It was announced to growers at various public meetings as a fact, an ex-cathedra - like pronouncement, and not unsurprisingly provoked little negative "feedback", for what grower was likely to announce in advance that he could not supply good quality squash of the appropriate size. It cannot therefore be enforced against the Plaintiffs and, to that extent at least, the deduction of 185 pa'anga per bin made from the monies due to them by SEC has no basis in contract. It should not have been made. The Plaintiffs should now be paid there sums amounting in all to some 14,060 pa'anga, being -

First Plaintiff	-	6,660 pa'anga.
Second Plaintiff	-	1,665 pa'anga
Third Plaintiff	-	1,110 pa'anga
Fourth Plaintiff	-	3,330 pa'anga
Fifth Plaintiff	-	1,295 pa'anga

Interest thereon will run from 20th December 1991 when these sums should have been paid, until actual payment to follow hereon.

These Plaintiffs had part of their squash consignments rejected in Japan either for quality or size reasons, it is not too clear which. Each Plaintiff had a number of bins

rejected and was not paid therefor at the payment price of 290 pa'anga per bin (58 seniti per kilo , some eight seniti more than the guaranteed kilo price of 50 seniti), namely -

	No of Bins	Value (pa'anga)
First Plaintiff	36	10,440
Second Plaintiff	9	2,610
Third Plaintiff	6	1,740
Fourth Plaintiff	18	5,220
Fifth Plaintiff	7	2,030
	76	22,040

The Plaintiffs (paragraph 8) plead that their squash was not bad, that it was good squash, and that any deterioration from the moment of delivery to SEC in Tonga until inspection (and rejection) in Japan, was due to failure on the part of SEC to -

> "arrange proper housing, storage, cover, ventilation, refrigeration or prompt shipment."

The onus lies upon the Plaintiffs to prove that and, in my opinion, they have failed to do so : see also paragraph 4 hereof. So far as the Plaintiffs' squash is concerned I find in fact that SEC arranged proper housing, storage, cover, ventilation, refridgeration and prompt shipment.

In the same paragraph of their pleadings the Plaintiffs aver that if their squash was not of the required quality or undersize when it reached Japan, they were never told this and, in any event, the total contents of each rejected bin was not unacceptable. In December 1991 they certainly were told the number of their bins which had been rejected but that is all. With this particular part of the case I had the greatest difficulty. The contract with the growers was that they would not be paid unless upon arrival in Japan the produce was acceptable to the Japanese in terms of quality and size. This was a decision to be made in Japan by the Japanese importers, not by SEC. The evidence of their decision is somewhat less than ideal. What is undisputed is that each bin exported had the grower's personal number, and an identifying code for the exporting company, clearly marked upon it. It was therefore readily distinguishable in Japan whose squash it was that was being rejected. The exporting companies had each appointed a commodity broker who was their exclusive link with the Japanese importers. Touliki appointed a Mr Bernie Snalam of Snalam Trading Company Limited and SEC, a Mr Murphy of S.C. Murphy & Co. Ltd. On or about 18th December 1991 these companies reported to Touliki and SEC respectively complaints from Japan about poor quality, and undersize squash being concealed in the middle of bins. The First Plaintiff, grower number 89, was reported as having 51 bins at fault ; the Second Plaintiff, grower number 125, 9 bins at fault ; the Third Plaintiff, grower number 007, 6 bins at fault ; the Fourth Plaintiff, grower number 074, 18 bins at fault ; and the Fifth Plaintiff, grower number 263, 7 bins at fault. Both of these brokerage companies co-operated with each other and shared the same office facilities at Auckland. Each sent a report on the same "fax" machine, bearing the same date. Mr. Snalam gave evidence that Document D.27(v) was his report to Touliki and identified the signature on D.27(vi) as that of the company's principal, Mr Murphy. These were reports transmitting on to Tonga information received from the importers in Japan. SEC and Touliki had no further information. The Japanese importers were so incensed with the overall quality of Tongan squash in 1991 that they refused to provide any further information. I accept that any attempt to co-erce them into doing so, such as by recourse

to the Japanese Courts would have been the death-knell for any export company so bold (as also possibly for the whole Tongan export of squash to Japan) for that is just not how the Japanese expect business to be conducted. For sound commercial reasons exporters such as SEC or Touliki were unable to press for further details. Had they done so not only they but also growers and the Tongan economy would have suffered. SEC therefore had no further information available and accepted these two faxed reports as accurate. There was no evidence from Japan as to precisely how the information in these Reports was arrived at. Nor was Mr. Murphy called upon to prove his report. The general tenor of these reports as to the extent of the problem is convassed in the Government Report already referred to and was witnessed by several of the witnesses who visited Japan and observed squash being unpacked there, credible and reliable witnesses such as the Secretary for Foreign Affairs, Mr. Tu'a Taumoepeau, and SEC's director Mr Minolu Nishi. Nor can I ignore the current commercial practice which was that only the brokers dealt with the importers and that the standard operations procedure of the Japanese in the 12 years that Mr Snalam had done business with them was to telephone to him information as to rejected bins giving grower number and bins rejected by grower number. They did not give any further information. Mr. Snalam gave evidence that the Japanese long standing operating procedure with Mr Murphy was exactly the same as with him. SEC had no way of confirming or otherwise the report from Japan relayed to them from their brokers. They accepted this information proveritate and did not pay their growers for the number of bins rejected (subject to a revision downward in the case of the First Plaintiff from 51 to 36 bins). There was nothing else they could have done in the circumstances. The growers had accepted that payment was conditional upon acceptance in Japan ; certain of the Plaintiffs' bins were rejected in Japan ; the right to payment failed to crystalise in such circumstances; and the rejection details provided was consistent with the practice of the trade. In the whole circumstances I do not consider that the Plaintiffs have any entitlement to be paid for the bins rejected by the Japanese.

Obviously this decision turns upon my acceptance of Documents D.27(v) and (vi). Mr Snalam's evidence as to which bins were rejected is clearly hearsay evidence but is admissable having regard to the provisions of Section 39 (n) of the Evidence Act (cap.15) which allows hearsay evidence to be admitted in certain circumstances, namely -

> "(n) where direct oral evidence of a fact would be admissable, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissable as evidence of that fact if :
>
> (i) the document is, or forms part of, a record relating to any trade or business .... compiled in the course of that trade or business ..... from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply ; and
>
> (ii) the person who supplied the information recorded in the statement in question is ..... beyond the seas ....."

These provisions could have been designed precisely for this case. Proviso (B) to that subsection allows the Court in deciding what weight to attach to such evidence to have regard -

> - "to all the circumstances from which any inference can reasonbly be drawn as to the accuracy or otherwise of the statement"

- to the question whether or not the "information recorded in the statement" was supplied "contemporaneously" : and
- to the question "whether or not (the person who supplied the information) or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts" :

On the evidence I have absolutely no reason to doubt the accuracy of the facts contained in Documents D.27(v) and (vi). The Japanese importers telephoned this information to the brokers who I am satisfied accurately recorded it and passed it on the SEC and Touliki. All this was done contemporaneously with the arrival of the Plaintiffs' squash in Japan. I am not persuaded that the Japanese Importers or either firm of brokers had any incentive to conceal or misrepresent the facts. The details of the number of bins rejected per grower I accept as accurate. Each broker's report had attached to it a Schedule listing grower numbers and alongside each grower number the total number of bins rejected. Murphy's report is stated to be "estimated damage to the nearest bin equivalent" whereas Snalam's wording is that the list contains details of the "approximate number of bins affected". In evidence however Mr Snalam made it clear that the numbers he wrote down were of rejected bins reported to him by the Japanese importers. His use of the word "approximate" is therefore misleading and inaccurate. This list accurately reflects what the importers told him. In the case of Murphy the designation "bin equivalents" is presumably what the Japanese told him: again presumably it gives the equivalent in bins of the Plaintiffs' squash rejected in Japan and amply meets the Plaintiffs' case that not the total contents of each rejected bin was unacceptable. It is a great pity that Murphy was not called as a witness. However proceeding to make the best of what is available I have no reason to doubt that the information communication to SEC from Japan via the New Zealand commodities brokers was anything other than truthful and reliable.

The General Damages which the Plaintiffs seek is for being excluded from registration with SEC or Touliki for the 1992 squash season. Mr Niu for the Plaintiffs very properly conceded that this case was founded upon breach of contract. In that case the measure of general damages recoverable by them is limited to the loss which they have actually suffered. But there is no acceptable evidence which would enable me to quantify that loss, hence this claim must be refused. The Plaintiffs certainly spoke in general terms to the relevant averments at paragraphs 12 and 13 of the Statement of Claim, namely that they lost expected revenue by being denied grower status with SEC or Touliki in 1992. But they never proved what they had lost and without such quantification of actual loss there can be no award. In any event the Plaintiffs were not entitled to registration as of right in 1992, it being entirely a matter for SEC or Touliki to accept as growers whoever this wished that year. This particular issue is closely allied with the Plaintiffs' claim that they are members of SEC and therefore entitled to an accounting. That is the matter I now turn to consider.

Prior to 1991 export of squash to Japan was organised by a group under the effective control of H.R.H. Prince Mailefihi. It had a monopoly of this trade. There was much discontent with the workings of this group - whether justified or not is not my concern and I make no comment thereon - and this led to a number of growers defecting from H.R.H. Mailefihi in 1991 and organising their own export business. A company SEC was formed for that purpose with a limited number or members : not one of the Plaintiffs was a member. None of them hold any shares in the company nor invested any money with the

company or its promoters for the purchase of shares therein. They are no more than customers of the company : their status has never been anything but that. SEC was formed as a private company with seven members (and a maximum of ten members) and a share capital of five thousand shares divided into five thousand shares each with a value of one pa'anga. The Directors of the company resolved on 4th June 1992 to increase the authorised capital of the company to 100,000 shares. There was no firm evidence that this increase had been voted for by the company in general meeting or approved by the Privy Council. Nevertheless the additional shares have been allotted and the capital paid therefor invested in the company. The Plaintiffs did not participate in that allotment of shares. I am unable to discern from the evidence anything which elevates the Plaintiffs, or any one or more of them, to the status of member. Nor, before the formation of the company, do I believe that the promoters ever promised them shares in the company. If such a promise had been made it could of course be enforced, at very least by an award of damages as an alternative to the issue of shares. But there was no such promise. There is therefore no legal basis for the claim for an accounting against SEC or Touliki for that matter. The concept of a company was perhaps not appreciated by the Plaintiffs. They do seem to believe that they were part of SEC but did not realise that their participation was merely as growers, not owners. What may have assisted in their misunderstanding was (1) the sound management practise of SEC in appointing a growers' committee to represent the interests of growersto the company and (2) the wide circulation to growers and Government, but for public relations reasons only, of an abriged Statement of Affairs at the end of the 1991 season. Growers with SEC have no right to such information unless the Company has agreed to supply it as part of their contract with the growers. There was no such obligation on the company in 1991. As against SEC the Plaintiffs are not entitled to the accounting saught. In his closing speech Mr Niu argued that the members of the company held the shares ex facie absolutely in their names, but actually in trust for all growers. Such a claim for breach of trust was never pled. Anyhow on the evidence I am well satisfied that the growers role was no more than that of supplier of goods for a price to SEC : they had no beneficial role in that company and had never been promised such status.

There still remains what to the Plaintiffs is the vexed question of Touliki. Dr Sevele is not and never has been a partner in Touliki, nor a shareholder in the company of that name. Nor is he the brother-in-law of Kesomi Siale, Touliki's founder. Dr. Sevele was however in 1991 a Consultant to Touliki, with the unanimous consent and concurrence of the directors of that Company. This relationship emerged because SEC had contracted only two Japanese importers and Touliki five, and SEC were concerned that they might not be able to sell to their two importers all the squash they had contracted to purchase from their growers whereas Touliki had insufficient capacity. SEC acquired this surplus capacity from Touliki in the best interests of the growers of SEC. Packing and shipping was conjoined but separate records were kept of what belonged to each grower. But for Touliki's formation in 1991 the price paid that year to SEC growers would probably have been less than it was. Touliki shipped 1,200 tons of SEC squash, took their normal expenses and paid over the balance of the price paid by Japanese importers to SEC. The Plaintiffs were not contracted to Touliki in 1991 nor were they owners, members or partners in that enterprise (before or after it acquired corporate status). Touliki was under no legal obligation to register any of the Plaintiffs as growers with them in 1992 or

thereafter, nor did they have any hand in the penalties imposed upon growers by SEC in 1991 or the Japanese decision to reject the Plaintiffs squash. No basis in law has been made out by the Defendants for any Order to be made against Touliki in this action. Accordingly I shall dismiss their claim insofar as brought against the Second Defendants.

In the whole circumstances I shall pronounce an ORDER in the following terms - IT IS ORDERED AND ADJUDGED THAT [1] the action insofar as directed against the Second Defendants be dismissed ; [2] the First Defendants do pay (a) to the First Plaintiff the sum of 6,660 pa'anga, (b) to the Second Plaintiff
420 the sum of 1,665 pa'anga, (c) to the Third Plaintiff the sum of 1,110 pa'anga, (d) to the Fourth Plaintiff the sum of 3,330 pa'anga, (e) to the Fifth Plaintiff the sum of 1,295 pa'anga, with interest on each of these sums at the rate of 10 per centum per annum from 20th December 1991 until payment to follow hereon; [3] quoad ultra the Plaintiffs' case against the First Defendants be dismissed; and [4] Hearing on Costs be fixed for 3rd December 1993.