IN THE SUPREME COURT OF TONGA NO. C. 318/98
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : PRIMARY PRODUCE EXPORT LIMITED : *Plaintiff:*

AND : FINEASI 'ALANI : *Defendant:*

BEFORE HON. JUSTICE FINNIGAN

Counsel appearing : Mr John Appleby for the Plaintiff
: Mr Laki Niu for the Defendant

Dates of Hearing: 19, 22 March 1999
Date of Judgment: 22 March, 1999

ORAL JUDGMENT OF FINNIGAN, J

This is s simple debt claim. the plaintiff alleges that it advanced goods and services to the defendant in 1995 and 1996 for production of squash, on the basis that payment would be made from the sale of the squash. It pleads that in the alternative, there was an agreed term that if the proceeds of the sale of the squash were insufficient, then payment would be due on demand.

THE FACTS

The facts of the case are not unusual in the context of the squash industry. Since 1991, and particularly in 1995 and 1996 the defendant was a grower registered with the plaintiff. As usual, he took seeds chemicals and fertilizers from the plaintiff on credit in 1995, and both parties expected that payment would be deducted by the plaintiff from the proceeds of the sale of the squash by the plaintiff at the end of the season. It was accepted and agreed that if the proceeds were insufficient, the debt would be carried by the plaintiff into the next season and added to any further advances made to the plaintiff at the beginning of the 1996 season.

By the end of the 1995 season the sales were insufficient and the balance due from the plaintiff was $2,502.13. In accordance with the agreement this debit balance was "rolled over" into the next season. In 1996 the plaintiff invited the defendant to grow an early season as well as the main one. Both seasons were unsuccessful, and at the end of the year, after credit for sales of the defendant's squash, the defendant's debit balance stood at $10,868.92.

THE PLEADINGS

This is the sum that the plaintiff now claims. The defendant declines to pay, on the pleaded basis (at paragraph 3 (a) (vi) of the statement of defence) that the agreement since 1991 had been for a debt at the end of any season to be held over to the following year. On that basis he admits liability for the 1995 debt, but denies liability for the 1996 debt. He pleads, at paragraph 4 (b), that in 1996, with two growing seasons and bad yields because of excessive rains, aphids and rats, the harvests failed for reasons beyond the control of either party. This he says absolves him from liability to pay the defendant for what it supplied him.

In any event, he pleads further, at paragraph 4 (b), that the agreement for the two growing seasons of 1996 was for any 1996 debt to be carried over into 1997, and for the plaintiff to register him as a grower in 1997, supply him with more seeds etc on credit, and pay itself from the proceeds of his 1997 harvest. The plaintiff however, he pleads, failed to register any growers in 1997 and did not ship any squash that year. He pleads, (at 4(c)), that the demand of the plaintiff for payment is therefore in breach of its established practice and in breach of their agreement.

The defendant also pleads, at paragraph 3(a)(v), that it was part of the agreement that he was free to accept the price dictated to him by the plaintiff or to sell his squash elsewhere provided that if he did so he would pay for the credit extended by the plaintiff within a reasonable time of delivery elsewhere, and if he did so he would not be eligible for registration with the plaintiff thereafter.

THE SUBMISSIONS

I have heard and taken account of the concise and helpful submissions from both counsel. For brevity I shall not refer to them in detail, but I shall summarise briefly the defence as now advanced. The defendant now admits paragraph 3 (a) of the statement of claim, i.e. that there was a contract for supply on credit, with payment due from the sale of the resultant crops. As to the alternative term pleaded in paragraph 3(b), i.e. payment on demand, the statement of defence admits this too, in paragraph 3(a)(v), but only in the circumstance that the defendant should sell his produce elsewhere. The contest is whether there can be a valid demand for payment in the circumstances of this case, where the plaintiff elected not to continue trading, and thus elected not to continue offering the defendant the opportunity of paying by deduction from the sale of his produce. In Mr. Niu's submission, the demand for payment is not valid, because the plaintiff breached the contract by unilaterally not trading in 1997. He submits that there was a contractual obligation on the plaintiff to consult and negotiate a further agreement with the defendant (and the other growers) about when the debt from 1996 would be due for payment.

For the plaintiff, Mr Appleby submits that the defence, and the defendant's evidence, amounts to a contest only over timing, and that despite the pleading, does not deny liability. In his submission, the defence fuses the two, claiming there is no liability to pay because there is no agreement about when to pay. He submits that the law implies a term into the contract in the present situation for liability to crystallise upon demand.

DECISION

The defendant took supplies on credit from the plaintiff with a view to repayment from sale proceeds. There was a contract, the goods were advanced in consideration of a promise to repay, and the repayment was due from the resultant harvest, with provision that if the profit from the resultant harvest was insufficient, then the debtor was not liable to repay until the next succeeding harvest.

I am bound to accept the submission of Mr Appleby, that all that this contract lacked in the circumstances of 1997 was an agreed event which would crystallise the time for payment. I am quite unable to contemplate that the parties intended, should the plaintiff decide not to trade in 1997, the debt would simply drift on until something was negotiated. That is not in the nature of a debt, unless the creditor is sleeping on his rights or forgiving the debt. From the submissions made to me, I have no difficulty in assessing the facts of this case, and the law, in the following way. Because the contract is a contract for debt, and the parties made arrangements for repayment but did not make alternative arrangements in the event of a change in circumstances, there must in the nature of that contract be a term implied, i.e. a term which the parties must be presumed to have intended, for the change in circumstances. In implying terms the court looks to see what is reasonable in the circumstances. The defendant says the reasonable implication is that the parties agreed they would meet and negotiate a new term for repayment. The plaintiff submits that the reasonable implied term of their agreement is that, since the parties no longer had a continuing relationship, the plaintiff could call up the debt. The plaintiff points to the defendant's pleading and admissions that, had he sold his squash to another exporter, then payment in a reasonable time is what was agreed. I accept the plaintiff's submission. It seems clear to me that, having made that arrangement for one eventuality (withdrawal by the defendant), the parties would have made the same arrangement for the other (withdrawal by the plaintiff). There has to be taken to be an implied term that, if the continuing seasonal roll-over did not continue, then the debtor would become liable for payment only when, not before but when, demand for payment was made.

It is worthy of note that the parties agreed upon repayment from the proceeds of the 1996 harvest and if that was not possible, then from the next (1997) harvest. The defendant gave evidence that he harvested 19 bins in 1996 and sold them to another exporter named Malt. It can be argued that in not using the proceeds of that sale to reduce his debt to the plaintiff, he himself was in breach of his contract. His own pleading, at paragraph 3(a)(v), is that if he were to sell his squash elsewhere he was required to pay for the credit extended within a reasonable time. Further to that, he continued to grow squash in 1997 as before, this time borrowing from FIMCO. It is difficult to see how he can escape liability to pay the plaintiff if he made profits from the sale of that 1997 harvest, since payment from that harvest is what was contemplated in his contract with the plaintiff.

In advancing a defence that the time for payment is not yet fixed, the defendant is attempting to evade his liability in debt, and his defence has no justification in the facts or in law.

Judgment is entered for the plaintiff. Interest is sought on the judgment at 10% per annum. Interest is allowed at that rate, from today, the date of the judgment. Costs will be subject to further argument, and I shall issue a separate judgment upon consideration of written submissions.

SUPREME COURT SEAL

NUKU'ALOFA: 22nd March, 1999

JUDGE