IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1976/J 119

BETWEEN	JAMAICA CITRUS GROWERS LIMITED	PLAINTIFF
A N D	C. LUE AND COMPANY LIMITED	DEFENDANT

David Muirhead Q.C. and Dr. Adolph Edwards for the Plaintiff

Clinton Hines and Mrs. Elizabeth Hines for the Defendant.

Heard on July 23, 24 and 25, 1979, February 4, 5 and 6, June 2, 3, 4, 5 and 6, 1980. March 27, 1981

~~Handed down March 27, 1981.~~

JUDGMENT

MALCOLM J.

The plaintiff company were in 1968, and possibly still are, the manufacturers of an orange drink which goes by the attractive name of "Juciful". In or about October 1968 the plaintiff entered into an agreement with C. Lue (the defendant later became his successor) whereby it would supply him with juices and crates and he would sell the product. This action has its genesis in this agreement.

The claim by the plaintiff is to recover the sum of $49,932.63 being $45,162.63 for goods supplied and $4,770.00 for crates delivered and not returned.

The defendant in its pleadings denied owing the sum claimed or any sum at all. There is a Counter-claim which states in part that:-

> "In or about the year 1968 or 1969 at Bogwalk in the parish of Saint Catherine the plaintiff made an oral agreement with the defendant whereby (inter alia) the defendant was to act as the sole distributor for goods and products of the plaintiff in the parishes of Kingston, St. Andrew, St. Thomas, Portland and St. Mary, and the defendant was not to sell and distribute goods and products of any person other than the plaintiff. The defendant was to use his best endeavours to promote sales of the plaintiff's

> "products and in particular the use of the plaintiff's trade name "Juciful". The plaintiff would remunerate the defendant for his services under the agreement by selling to him goods and products at a discount of 25% of the price at which the defendant would sell the said goods to the public".

The Counter-claim further recites that pursuant to and in reliance upon the terms of the agreement the defendant expended monies by way of capital investment and spent much time and energy so as to perform his obligations. This pleading further alleges that sometime in 1975 the defendant purchased from abroad three chassis and the plaintiff supplied the defendant with refrigerated bodies which were put on the chassis at the defendant's expense. In May 1976, the plaintiff reduced the discount allowed by it to the defendant from 25% of selling price to 12½%. The defendant alleges that this amounted to a determination of the agreement by the plaintiff.

A notice of application to amend Defence and Counter-claim was filed and granted at the commencement of the trial. Special Damages were claimed particulars of which make interesting reading. Paraphrased they are as follows (the numbering is mine):-

(1) Loss of income from July 1976 to March 1977 and continuing.....$40,500;

(2) Loss of income from July 1976 to March 1977 from truck assigned to haul citrus at $400 per week and continuing.....$14,400;

(3) Custom duty paid by the defendant to have three trucks imported, such money being paid owing to the plaintiff's breach of agreement and inspite of approval of the Ministry of Finance that the trucks would be brought into Jamaica Duty free .....$10,000.

(4) Capital outlay undertaken by defendant to purchase refrigerating appliances in connection with the sale of Juciful products.....$15,000.

In passing I might mention that it transpired that the figure at (3) should have read $9,275.

The plaintiff joined issue with the defendant on his Defence and filed a Reply and Defence to Counter-claim. The commencement

reads in part:-

> " The plaintiff denies that it entered into an oral agreement with the defendant but states that in or about October, 1968 it entered into an agreement with one C. Lue as a chilled juice distributor for the parishes alleged....."

Then certain terms are recited including one which read:

> " In the event of non-payment the supply of goods would be suspended or discontinued or limited to cash sales".

The Reply further states that in or about 1973 - 1974 the plaintiff came to know of the existence of the defendant which became the successor of C. Lue, and that the plaintiff conducted the same business with the defendant.

There was the allegation that the defendant was in breach of the agreement in that the account continued in arrears and despite repeated requests for payment the defendant failed, neglected or refused to pay the sums due and owing to the plaintiff for supplies. The plaintiff denied that it terminated the agreement as alleged or at all, denied too the defendant's claim to damages and joined issue thereon.

Arthur Fuller, General Manager of the plaintiff company gave evidence in support of the claim. Before pronouncing on his veracity or the effect of his testimony I express the view that on the subject of the Citrus Industry he was extremely knowledgable. According to his testimony he joined the plaintiff company sometime in 1950 rising through the ranks of Storekeeper, Production Superintendent, Production and Personnel Manager, Factory Manager to the position he now occupies. His occupancy of the witness stand for four days bears testimony to the importance which both sides attached to his evidence.

He dealt first with the claim by his company and in particular with the amount of $4,770 claimed for crates. This was supported by documentary evidence in the form of an account card and three vouchers (Exhibits 2, 2A, 2B & 2C). Although a bundle of agreed correspondence was the first exhibit tendered by consent I have referred to the card and vouchers at this early stage in the interest of clarity. Mr. Fuller stated that his company had supplied juices as well as crates to the defendant and the defendant was still

indebted to the plaintiff for $45,162.63 and an additional sum of $4,770 for crates.

This witness told of the plaintiff's early dealing with C. Lue before the defendant company came into existence. He was to sell their juices in certain defined areas but if the plaintiff found that Mr. Lue was not supplying these areas adequately it would have the right to assign other distributors. The business expanded and in 1970 Mr. Lue requested that he be given 30 days credit facility. This was granted. The witness testified:-

> " After this he got badly in arrears and would not meet his payment schedule - the 30 days credit was withdrawn, he then paid cash".

In late 1973 or early 1974 the plaintiff became aware of C. Lue and Company Limited and thereafter dealt with the defendant company. Ideally, Mr. Fuller stated, juices should be transported under refrigeration because if this was not done the result would be a high percentage of spoilage. Refrigeration was discussed with Mr. Lue who made the point that this would be expensive and he wanted to know what the plaintiff could do to assist him in procuring refrigerated units.

The plaintiff decided to buy some refrigerated bodies and a rental charge would be made which would result in writing off the costs of the bodies over 5 years. The defendant was advised of this and was further told that it would have to provide the chassis on which the bodies would be built.

The witness went on to say that:

> " At that stage we were engaged in trying to get some duty free trucks for use in the Citrus Industry, when Mr. Lue heard of this he asked if he could be brought under this scheme. We pursued this request with the Minstry of Finance and they approved it".

Approval was given in terms of a letter tendered in evidence as Exhibit 1A. It is dated the 5th December, 1974, sent from the office of the Minister of Finance, directed to the Manager of the plaintiff

company and paragraph 2 reads as follows:

> " I am directed to inform you that the Honourable Minister of Finance, by virtue of his powers under Section 10 of the Customs Law, has approved remission of duty on the importation of ten (10) used trucks for use in the Citrus Industry under a scheme which is to be operated by the Jamaica Citrus Growers Limited".

I have quoted specifically from this letter as the gravamen of the defendant's complaint as is stated at item 3 of its Counter-claim is that it expended monies for custom duty on three trucks imported nothwithstanding the remission mentioned above. Mr. Fuller testified that the term "for use in the Citrus Industry" was discussed with Mr. Lue. It was discussed that two trucks should be used for haulage of chilled juice and one for the haulage of Citrus and Ancillary Products. The matter went beyond discussion for a letter dated 21st November 1975 from the plaintiff to "Mr. Lue, C. Lue and Company" stated in part:

> " The two trucks with the converted chassis are to be used for the haulage of chilled juice. The third truck is to be contracted to the company for the haulage of citrus from the field to the factory at a contracted rate of $380 for a 5 day week".

The letter ends with a stirring call for action:

> "
> " I must exhort you now that we are looking for a significant improvement in the distribution of our chilled juice in the areas assigned to you. Hard work and dedication to the cause of the Citrus Industry is what we are looking for".

By the plaintiff's account these words of entreaty fell on barren ground.

The figure at which the third truck should work for a 5 day week was a matter of dispute and a point on which both sides were at variance. The letter of the 21st November 1975 referred to above (Exhibit 1L) refers to $380. One of the letters tendered by consent in the bundle of agreed correspondence was dated 17th June 1975 (Exhibit 1C). It was from the plaintiff company and addressed to the Jamaica Development Bank. It confirmed that the plaintiff had offered

the defendant a contract for the use of one truck and stated that the basic details included a term which read:-

> "During the first year the contractual sum for a 5 day week is $400 per week....."

The letter was signed by a Mr. M. E. Rogers - General Manager. In cross-examination by Mr. Hines, Mr. Fuller when shown (Exhibit 1C) said, inter alia:-

> "I don't gather that contractual rate was $400 per week. Thats what the bank was being told .....$380 is correct, the $400 in (Exhibit 1C) was deliberately done to assist Mr. Lue at the bank".

On the subject of the third truck this witness went on to state that a contract was offered to the defendant which it refused to take up on the ground that the rate was too low. The defendant only made the truck available for a short while despite the plaintiff's insistence. Said Mr. Fuller "we considered his behaviour contrary to the conditions of purchase".

He said the plaintiff company was suffering heavy financial loss from 1973 onwards and the defendant's indebtedness was a source of great concern to them. The defendant was written to and always being pressed for payment. A Committee was appointed to look into sales and the defendant through Mr. Lue was asked to submit figures to show what its operational costs were. The Committee found that 25% discount was excessive and that 12½% was reasonable on the basis of the figures submitted. When informed by letter dated 21st May 1976 (tendered in evidence) of the cut in the rate of discount the defendant through Mr. Lue complained that the figure was too low and also complained that the notice "had taken him suddenly". After negotiation it was agreed to continue the 25% until the 30th June 1976 on condition that 7½% be withheld against the unpaid balance owed.

It seems clear that at this stage matters were fast reaching an impasse. Unlike Juciful the relationship between the parties had turned sour. The witness referred to a letter (Exhibit 1J) from the legal firm of Lake, Nunes, Scholefield and Company written on the

defendant's behalf to the Managing Director of the plaintiff company. The letter can best be described as an admixture of complaints and threats of legal action. Paragraph 3 reads:-

> "Our clients advise us that they find it impossible to operate at what is effectively a 17½% discount, and feel that as a result of the discontinuation of the 25% commission they have no alternative but to cease operating as a distributor".

A subsequent paragraph speaks of the shortness of the notice saying:-

> "There is no express contractual provisions which prescribes a period of notice of a change in the terms of their contract, in particular a change in the rate of discount. Our client's feel that a change of the kind and to the extent proposed is so fundamental as to require longer notice than a month....."

The letter closed by advising that the writer's clients were suspending the purchase of the plaintiff's product as of the 1st July 1976 "until a satisfactory arrangement can be arrived at". The defendant appears to have been in earnest as a question asked of Mr. Fuller in-chief by Mr. Muirhead:-

> "Did Mr. Lue or the defendant company make any purchases of the plaintiff's product after the 30th June, 1976?"

evoked the reply:-

> "Not to my knowledge".

Before passing on I refer to a part of the witness's evidence in-chief in which after referring to discussions between the parties he said:-

> "Written contracts were prepared. The plaintiff's company and Mr. Lue had discussions about them. We did a draft first then discussed them and drew up a written contract. The plaintiff company signed its portion then it was given to Mr. Lue to sign for his company. We never got it back as a signed contract".

The cross-examination of Mr. Fuller by Mr. Hines was lengthy, searching but in the final analysis unrewarding. The witness declared himself familar with Mr. Lue's account with his company and when shown a card with Lue's account frankly and readily admitted that the amount sued for ($45,162.63) was not the highest balance that the defendant had ever owed. In fact the figures show fluctuating balances, at one stage

a low of $4,000 and at another a high of $104,000. I am constrained to make the comment that I see nothing sinister in this. Surely a plaintiff is free to chose the time for litigation. In any event the defendant denies owing the amount claimed or any sum at all.

The witness said there was a situation of confidence between the plaintiff and Mr. Lue over the years but added in reply to a question that followed:

> " My company did not accept a situation where he pays when he likes otherwise we would not have written to him".

On the subject of the ten trucks that were imported for the Citrus Industry he said five trucks went to his company, three to the defendant and two to a Mr. Barker another distributor. No duty was paid in respect of the plaintiff company's trucks. As far as the defendant was concerned "he would not have to pay duty if the trucks were used in the Citrus Industry". There is an area of controversy on the question as to whether the trucks were used in the Citrus Industry. The plaintiff contends that the stake body truck, the third truck was not made available to the plaintiff company. They had work for the defendant but it never took up the offer. As a matter of fact as will be seen later the plaintiff company alleged that the defendant used the truck in the chicken neck and back business and to draw cement.

The suggestions made by Mr. Hines to the witness sought to establish that the plaintiff had other motives for its treatment of the defendant than the fact of the over-due balances. This was emphatically denied. In fact several of the questions asked were designed to show that others e. g. Mr. Kong and, Mr. Noel Silvera of "Silsan" received preferential treatment at the hands of the plaintiff company while on the other hand, the defendant was not only shabbily treated but heartlessly abandoned. The plaintiff's attitude as explained by Mr. Fuller was that they considered 12½% would give the defendant an adequate profit margin and he went on to state:

> " We never refused to supply juice from the 1st July 1976 - he stopped".

Certain questions in cross-examination touched on that area of the defendant's Counter -claim relating to capital expended by it to purchase refrigerating appliances. The witness was unable to say whether the defendant bought any appliances for storage for customers. To the suggestion put that all this capital outlay by the defendant was done to keep pace with an expansion programme the witness replied:

> " I do not agree - improvement but not expansion".

As I understand it, the idea being projected by the defendant company is that the plaintiff by its conduct led the defendant into expending sums which it is now entitled to recover. Mr. Fuller states:

> " The distributors and the plaintiff's company were working hand in hand to improve things but not partners or they would pick up some of the losses".

Mr. Basil Demetrius, Assistant Production Manager also gave evidence on behalf of the plaintiff. He stated that he was the person in charge of transportation of fresh fruits for processing from groves to the factory. As soon as the crop began in November 1975 he had occasion to speak to Mr. Lue regarding the haulage of fruits. He told him that there were many loads of citrus out in the country spoiling and he wished the truck to bring them in as the growers were complaining.

He testified that Mr. Lue first made the truck available on the 9th December. He worked from that date until the 19th December, 1975 when the factory closed for the Christmas holiday. When the factory reopened early in January 1976 the truck was not made available for hauling fruits. He spoke to Mr. Lue on several occasions but he was reluctant saying it did not suit him to work at the rate of $380 per 5 day week. Mr. Demetrius said he suggested to him that as his truck was big it would possibly suit him better to draw by the box rather than by the trip. He told Mr. Lue he could send him to areas where he would get big loads and make more money. He sometimes said alright he would make the truck available but then did

not send it. Said the witness:

> " Until the crop ended in May not once did he make the truck available. I saw the truck after January in the Bogwalk area with cement on several occasions - loads of cement not a few bags ..... since the 19th December 1975 Mr. Lue has not made the truck available to me".

Cross-examined he said he never got the impression that Mr. Lue had a grouse about the rate he was being paid he didn't say he should get $400 instead of $380 per week. Mr. Lue however did say it did not suit him to draw the fruits for $380. He understood him to mean he was not satisfied with the rate. He felt he could have been getting a little more than the other truckers as his truck was bigger.

Mr. Chue Kim Lue was the chief witness for the Defence. He spoke of his discussions in 1968 with Mr. Fuller. Certain parishes were assigned to him and the arrangement was that the plaintiff company would manufacture Juciful and he would go out and sell it. He spoke of subsequent talks with Mr. Rogers and the fixing of the discount at 25%. In its infancy his was a very modest and struggling business but gradually it grew until from a start of one old Bedford Van he had as many as fourteen vehicles. He said he considered it a safe venture and stated that there was a good relationship between the plaintiff company and himself. He testified:

> " As far as I was concerned I had a contract with them, their business was expanding, I was expanding ..... I gathered they wanted me as much as I wanted them".

In the parishes in which he operated there were other companies promoting other products and he found the going very competitive. Other distributors were supplying Deep Freeze and in order to keep pace with them he had to supply his customers with Deep Freeze and cooling appliances. In addition he installed a cold room at Bogwalk to insure that his salesmen could make early departures to the country parishes. He painted a picture of a company performing Herculean tasks: - "we were going into every nook

and cranny of our areas". He recalled the year ending December 1975, for that year his company did about $700,000 sales for the plaintiff. In the face of this came the unkindest cut of all a cut from 25% to 12½%. He said the plaintiff's finding that he could operate at 12½% was not correct - it couldn't work. He said:

> " I never submitted any costings when they were about to promote a new contract".

On this point he is in direct conflict with Mr. Fuller, and on this aspect of the matter I reject the evidence of Mr. Lue.

He said the relationship ceased at the end of June 1976. Thereafter he proceeded to catalogue his woes - earnings cut off, entire staff laid off, redundancy money paid to them.

On the question of the haulage of fruits Mr. Lue's evidence was in direct conflict with Mr. Demetrius' on several aspects. He said it was not true that he had been told to bring in the truck as fruits were spoiling on the farms. He said there was no discussion as to box rates for haulage of the fruits. On these points I accept Mr. Demetrius' version as being the truthful one. Was it $400 per week or $380? I confess I find it difficult to reconcile some of Mr. Lue's utterances and replies on the point with either logic or the truth. He said:

> " I took up the question of rate with Mr. Fuller also. I had in mind to get $400 per week. He said is Mr. Rogers who made the arrangements he was no longer with the company and he was not paying anymore than $380. After I spoke to Mr. Fuller I continued to haul fresh fruits for the company ..... got about 5 - 6 cheques at $380 per week. I did not think he would give me any more. I did not agree to the $380 per week".

In my view he got what he bargained for. After he stopped drawing citrus he found no work for the truck. He drew cement from the Cement Company to Bogwalk about 3 - 4 times. He drew cement for himself, nobody else. "I was building a wall - what was left I sold".

In cross-examination he told of the chicken neck and back business which he started sometime in 1974. It required refrigeration and of two cold-rooms built the one constructed in 1974 was for this

business. There was one built in 1975 but this was for the expansion of Juciful. The driver salesmen for Juciful had nothing to do with the chicken neck and back business. Mr. Lue said he kept two separate sets of accounts in respect of each business. Regarding the third truck the witness had this to say:

> " I drove it sometimes for cement and drove it for chicken neck and back, this was while still doing work for Citrus Growers Limited ..... The understanding was that out of crop I would use that truck to do anything".

Then Mr. Muirhead embarked on a series of suggestions and questions the answers to which were highly significant and did much to enlighten the Court as to Mr. Lue's thinking and the reasons for his behaviour. He said "I never thought I could earn more money with the truck than what Citrus Growers could offer me - not true I deliberately breached my agreement to make the truck available to draw fresh fruits". He went on to say "my memory tells me I drew fruits until January - if the records show you are right I will accept I drew from the 9th December to the 19th December". If the answers seem confusing and inconsistent in fairness to Mr. Lue they must be viewed against the background of an earlier admission, "I would say I have a poor memory".

What were his motives in ceasing to draw fruits for the plaintiff company? Let me continue an examination of some other replies. He stated:

> " I would say I withdrew the truck because I was paid $380 instead of $400 and because I had to pay duty on the truck ..... I have given the two reasons why I withdrew. Differential of $20 makes one of the reasons".

Then follows this question -

> " If you had been paid $400 per week would you have continued to draw fruits?

Answer:

> Maybe I would not have withdrawn truck - maybe I would draw fruits, maybe I wouldn't, depends on what mood I was in".

I can think of other comments but the one most charitable to Mr. Lue is that any business agreement that hinges on the mood of one of the

parties is bound to end in frustration. A letter (Exhibit 1L) dated the 21st November, 1975, already referred to was shown Mr. Lue and he stated that:

> " This is the only directive to me in writing fixing the rate".

Mr. Lue was cross-examined on the aspect of the use of the truck in the Citrus Industry and he had this to say:-

> " I didn't use the truck for any length of time in the Citrus Industry. I agree that the reason for duty free aspect was that the truck should be used in the Citrus Industry. I knew the truck enjoyed duty free status because it should be used in the Citrus Industry".

On the qeustion of the reduction in the rate of discount the witness said he was informed about it about the 11th May, 1976. He complained that the original notice was short and as a result of his complaint the period was extended to the 30th June, 1976. The question arises as to whether in all the circumstances this was reasonable notice. Mr. Lue testified that there was no express provision in writing as to notice and went on to say:-

> " I gave the plaintiff company one month's notice when I withdrew my services, I thought this adequate notice".

He told of his meeting in May with officers of the plaintiff company when they told him the company was suffering losses. They said that 12½% was reasonable on the costs he had submitted, but, said he "they were lying, I did not give them a costing". As I intimated earlier I do not believe him, I find that he did.

The plaintiff's claim for goods supplied was not too strenuously challenged, but Mr. Lue did not admit the indebtedness for crates. He was shown vouchers - Exhibit 2A, 2B and 2C already referred to and said he did not know about the charges for crates. He concluded this portion of his evidence thus:

> " I am not indebted in the sum of $4,770 for crates, I say this irrespective of the documents".

Mr. Douglas Taylor, Accountant gave evidence for the defendant. He commenced working with the company in late 1974 and set up an

acoounting system which he said was confined to the juice business. He spoke of the company's assets which consisted, inter alia, of motor vehicles, cooling equipment, office furniture and fixtures.

From the accounts he prepared he said the defendant company made a profit of $34,000 in 1975. The unaudited accounts for the year ending 31st December, 1976, were tendered in evidence. He was cross-examined particularly on the accounts and denied the suggestion put that they were improperly structured with a view to deceive.

Dealing first with the plaintiff's claim for $45,162.63 there is in fact no real issue joined as to this amount and Mr. Hines in his closing submissions said this claim was not really strenuously denied. In my view the plaintiff company on the evidence adduced is entitled to recover this amount.

Issue is joined as to the amount claimed for crates. Counsel for the defendant company refers to this item as an after thought. I do not agree with him. I find this a genuine claim amply supported by the documentary evidence tendered as Exhibit 2, 2A, 2B and 2C. The sum due is $4,770 and I find that the plaintiff is entitled to recover this amount.

It is on the subject of the Counter-claim that the real dispute lies. The defendant claims substantial sums thereunder and in addition damages for breach of contract. Mr. Hines submitted that for loss of income under item (1) of the Counter-claim a sum of $81,000 would be a proper award . He based his figure on 18 months loss at $4,500 per month.

He cited the case of Decro-wall v. Practitioners in Marketing Limited /1971/ 2 A.E.R. page 216. In fact both sides relied on this case. It dealt inter alia with breach of contract, contracts of indefinite duration and what constituted reasonable notice. At page 223 Salmon L. J. had this to say:

> " Counsel for the plaintiff also sought to rely on a passage in the speech of Lord Reid in White and Carter (Councils) Ltd. v. McGregor in support of the proposition that a contract breaker may in some

> " circumstances by his breach uni-laterally bring the contract to an end in law. I do not think Lord Reid said anything of the kind. Indeed, in that case the majority decision in which he concurred was to the contrary.
> I think that in the passage relied on, Lord Reid was perhaps only restating an argument which had been addressed to the House. In any event the only proposition in which he concurred was that you cannot claim money as payable under a contract if you have not earned it underthe contract. The fact that the contract breaker has prevented you from earning it by his breach cannot entitle you to claim it as due under the contract. All you are entitled to is damages".

Counsel for the defendant also cited the case of Martin - Baker Aircraft Company Limited and Another v. Canadian Flight Equipment Limited [1955] 2 A.E.R. page 722. This case too dealt with contracts which contained no expressed provision in respect of their duration and whether they were determinable by reasonable notice. One of the principles to be gathered from the decision is that the question as to what is a reasonable notice depends on the facts existing at the time when the notice is to be given.

On the peculiar facts of the instant case I find that the notice given by the plaintiff company to the defendant reducing the discount was a reasonable one. In my view the defendant is not entitled to loss of income as claimed at (1). In any event there is an insufficiency of evidence to support this item.

As regards loss of income from the truck. I have already stated that my finding as regards the haulage rate per week was $380 and not $400 as the defendant claimed. It did not draw the fruits as it ought to have done and I find there was no repudiation of the agreement by the plaintiff on this particular segment of the Counter-claim.

I come now to the amount of $9,275 claimed by the defendant which represents Custom duty paid in respect of trucks imported. Section 11 of the Customs Act reads:

> " It shall be competent for the Minister upon application by the importer or exporter to remit or refund in whole or in part any

" customs duty whenever he shall deem it expedient so to do and any such remission or refund may be subject to such special conditions as the Minister may see fit to impose".

I have already referred to the Minister's letter of approval (Exhibit 1A) which clearly recites that the trucks should be "for use in the Citrus Industry under a Scheme which is to be operated by the Jamaica Citrus Growers Limited". I find as a fact that the defendant did not comply with the conditions as required, withdrew the truck making it unavailable for drawing fruits and was in breach of its agreement with the plaintiff company. In my view the sum paid by cheque to the Collector of Customs (cheque Exhibit 9) is not properly recoverable from the plaintiff and this segment of the Counter-claim must fail.

On the subject of Special Damages I turn finally to the defendant's claim to recover the sum of $15,000. The allegation is that the defendant expended this amount by way of capital outlay to purchase refrigerating appliances. Counsel for the defendant submits that these appliances were purchased for the promotion of sales and only one was retrieved. The argument cannot be successfully advanced that the purchases were at the urging or request of the plaintiff. Admittedly it was in the interest of all concerned to see that the Juciful business developed into a healthy, thriving and profitable one but I cannot see the basis for the defendants entitlement to recover from the plaintiff the amount claimed. In any event Special Damages must be strictly proved and in my view this item has not been so proved.

On the subject of General Damages Mr. Hines cited The Heron 11, Czarnikow Limited v. Koufos [1966] 2 A.E.R. page 593. (This case went to the House of Lords: see Koufos v. Czarnikow [1969] 1 A.C. 350). It dealt with the measure of damages and certain principles that apply where there is a breach of contrat. Mr. Muirhead in his reply dealt with this case and also with the various items of Special Damages. He submitted that the question of Special Damages did not arise and that there was no basis for an award of General

Damages as there was no breach on the plaintiff's part.

I agree with him. I have referred to The Heron 11 but in view of the conclusions I have reached that case is of academic interest only.

There will be Judgment for the plaintiff company on the Claim for $49,932.63 with interest at the rate of 14% from the 1st June 1976 to date with costs to be agreed or taxed.

There will also be Judgment for the plaintiff company on the Counter-claim also with costs to be agreed or taxed.