NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-157/1987

BETWEEN	MULTIFOODS CORPORATION LIMITED	PLAINTIFF
A N D	SATISFACTION GARMENT COMPANY LIMITED	DEFENDANT

David Henry and Miss Suzette Moss for Plaintiff.

Mrs. Sandra Phillips and Mrs. S. McGhie-Sang for Defendant.

HEARD: 20th, 21st, 25th, 26th, 27th, September, 1995, 3rd October, 1995 and 25th March, 1996.

SMITH J:

By Amended Writ of Summons dated 24th April, 1987 the plaintiff seeks to recover from the defendant TT$87,516.65 being the amount due and owing by the defendant to the plaintiff in respect of goods sold and delivered to the defendant.

The defendant in its defence admits purchasing certain goods from the plaintiff for the purpose of being sold to consumers in Jamaica at a cost of TT$87,516.65 and admits that the goods were delivered. However it is the defendant's contention that there was a breach of "an express and implied term" in that the goods were not of a "good or sufficient quality or reasonably fit for the said purpose but on the contrary were of bad and inferior quality and unfit for the said purpose and were worthless and useless to the defendant." The defendant also claims that it was a term of the contract that the products were to be distributed as a joint venture between the plaintiff and the defendant.

Mr. Victor Mouttet, a national of Trinidad and Tobago and the Chairman of the plaintiff company was the only witness called on behalf of the plaintiff. He told the court that from 1976 the plaintiff has been processing and packing peanut butter, mayonnaise and mustard among other things in Trinidad.

During 1985 Mr. Mouttet met Miss Sharleen Sleem, a shareholder and Director of the defendant company. He later met her two brothers one of whom is Mr. Patrick Sleem the Managing Director of the defendant company.

Following discussions between Mr. Mouttet for the plaintiff and Mr. and Miss Sleem for the defendant both in Trinidad and Jamaica the parties entered into an arrangement whereby the defendant would distribute the plaintiff's product viz mayonnaise, mustard and peanut butter in Jamaica.

The nature of the contractual arrangement is in dispute. What were the terms and conditions of Delivery and Payment?

Joint Venture

I will first deal with this issue. The defendant in its amended Defence and Counterclaim claims that a term of the said contract was that products were to be distributed as a joint venture between the plaintiff and the defendant. This the plaintiff denies and states in its amended Reply that it agreed with the defendant to pursue a joint venture in relation to the first order for mayonnaise only.

Following upon the meeting of the parties in Jamaica, Mr. Mouttet in a letter dated 30th SEptember, 1985 wrote:

> "Dear Sharleene
>
> I was pleased that you and your two (2) brothers were able with my assistance and advice to put together an initial container load of assorted "Buffet" Mayonnaise, Peanut Butter and Mustard. We have agreed that our quality of Mayonnaise is far superior to that being locally produced though our price is not quite competitive. As a result we have agreed, for this order, to do the mayonnaise on a joint venture to prevent you from sustaining any loss.
>
> As a result of my conversation with Geddes Grant, the agents for "Sunrich," subsequent to meeting with you, I am now convinced that you will have absolutely no problem with the mayonnaise and will in fact make a profit on this item from the very beginning." (Emphasis Supplied)

In his evidence Mr. Mouttet reiterated that "only in respect of mayonnaise and only for that particular order did we agree on a joint venture." He said he understood by joint venture that he would protect the defendant from any price competition from Geddes Grant, the plain-

tiff's agents for its other brand "Sunrich."

This is what he was saying in the third paragraph of his letter dated 30th September, 1985 (supra), he told the court.

There was no agreement for a joint venture in respect of any other item, he asserted. It is his evidence that the plaintiff extended a 45 day credit to the defendant regarding payment. Mr. Patrick Sleem testified that he was "a bit skeptical" about certain aspects of the arrangement and Mr. Mouttet assured him that the plaintiff would take all the risks on the mayonnaise and "everything else would be joint venture." Mr. Sleem stated that it was agreed that this arrangement for distributorship would last for 18 months. When Mr. Sleem was cross-examined on this aspect of the case he did not impress the court as a credible or reliable witness. I will mention one instance - when he was questioned about the marketing strategy developed by the defendant he asserted that the plaintiff gave written assurances with respect to the marketing of the products. These written assurances he said, were given before the first shipment were received. When shown Ex. 20 i.e. the letter dated 30th September, 1985 he said that was the letter to which he referred as containing the written assurances. When the contents of that letter were brought to his attention he reluctantly admitted that there were no such written assurances. His explanation was that he "might have misunderstood the question."

Mrs. Phillips submitted that the term "joint venture" should not be given the restricted meaning contended for by Mr. Mouttet. Rather she argued, it should be interpreted to mean "save and except for mayonnaise in the first shipment (the risk for non-distribution of which was to be borne by Multifoods alone) there was mutual risk of the parties in respect of the other products in that although Satisfaction would bear the responsibility for distribution of those products, Multifoods would not get paid until Satisfaction was paid and would therefore take on to itself the risks associated with payment on that basis (i.e. risk of devaluation of currency, cash flow and creidt risks etc.)."

One might ask if the parties had this in mind why did they not

say so? I agree with Mr. Henry that Ex. 20 (the letter dated 30th September, 1985) does not admit of such an interpretation of the arrangement. Nothing in the defendant's communication with the plaintiff indicates that this was the defendant's understanding of the arrangement.

I am afraid I cannot accept the defendant's interpretation of Ex. 20. I find as a fact that the parties agreed to a joint venture only on one product - mayonnaise and only in respect of the first order as contended by the plaintiff. Accordingly the defendant's contention that it was a term of the contract that all the products were to be distributed as a joint venture is rejected. It should be stated here that all the mayonnaise from the first shipment was sold. Mr. Patrick Sleem testified that he "ultimately sold all the mayonnaise from the first shipment."

Indeed after the first shipment was received by the defendant the defendant company through Miss Sharleene Sleem sent the following telex dated 7th November, 1985 to the plaintiff:

> "Almost half container sold - All items doing well. Doing better with mayonnaise Needs quotes on one gallon mayonnaise N other sizes in mustard. Putting together another order soon.
>
> Sharleene Sleem"

Accordingly in so far as the joint venture in respect of mayonnaise from the first shipment is concerned the defendant can have no complaint against the plaintiff.

I also accept Mr. Mouttet's evidence that the plaintiff extended a 45 day credit faciltiy to the defendant regarding payment. I find it difficult to accept the defendant's contention that there was no limitation as to time within which the defendant was to make payments to the plaintiff. In support of the defendant's contention in this regard Mrs. Phillips referred to the invoices Exhibits 1 and 2 and in particular to the fact that the space provided for "terms and conditions of payment" is blank. She courageously urged the court to accept the defendant's explanation for this - which is that the products were supplied to the

defendant by the plaintiff on 'easy terms' that is to say that the defendant would pay the plaintiff when the defendant was paid by the retailers and others to whom it distributed the products with no limitation as to time.

On this point she submitted that the plaintiff's claim for interest from the 19./3/86 i.e. 90 days from the arrival of the second shipment of products is inconsistent with the 45 day credit facility. However when one examines the correspondence between the parties and the evidence of the parties it is demonstrably clear that the contention fo the defendant is untenable.

Let us look at some of the telex communication between the parties:

Exhibit 5 is a telex dated 19th March addressed to Mr. Patrick Sleem from Mr. Victor Mouttet. It reads:

> "On Friday 14th February, 1986 at our meeting held in your office you advised that you would be visiting Trinidad either during the last week of February or the first week of March. You indicated that during your visit you would pay at least one of the outstanding invoices.
>
> We are now in the middle of the third week of March and there has been no visits or any payments nor any communication whatsoever.
>
> I am more than (sic) disappointed, I am very angry. I can no longer be polite. I want my money. All my money and I want it now. Please advise."

Bearing in mind the contention of the defendnat one would expect the defendant to remind the plaintiff of the terms of the contract. The defendant did no such thing. Instead, the following telex dated March 19, was sent by Patrick Sleem to Victor Mouttet - Ex. 6.

> "Very sorry, I instructed my secretary to telex you on February 28 to advise that I had to rush my father to Miami for emergency surgery N would contact U ASAP. I found T S Telex was never sent. I am NT scheduled to be in Trinidad next week with a view of (sic) making payments. Please bear with me a bit longer. My sincere apologies."

The date of the telexes perhaps supply the basis for charging

interest from the 19th March, 1986.

It can be seen also that the plaintiff was indeed demanding payment from February, 1986 the latest. This would be consistent with the 45 day credit facility of which the plaintiff spoke.

Were the Products of Merchantable Quality?

The defendant in its amended defence avers that it was an express and implied term of the contract that the goods should be reasonably fit for the purpose of being sold to consumers and should be of merchantable quality.

Mr. Mouttet in his evidence said he gave the defendant assurances as to the quality of all the plaintiff's products. However he said he did not give any assurance that they would last in perpetuity. The products had a shelf life of 9 months he testified. He asserted that the goods he shipped to the defendant in October and December, 1985 were of excellent quality.

He said no complaint was made to him concerning the quality of the goods until in November, 1986. In support of its contention the defendant called Mrs. Kirchoff, a retailer, Dr. Michelle Hamilton who holds a Phd. in Bacteriology and Mr. Artman Leveridge, a Public Health Inspector.

Mrs. Kirchoff was the Assistant Manager of the Big J Supermarket in Falmouth. The gist of her evidence is that in September, 1986 a Public Health Inspector seized and condemned 11 jars of 9 ozs. Buffet Peanut Butter on the ground that they were in his opinion unfit for human consumption. She wrote the defendant asking for replacement.

The certificate issued by the Health Inspector does not state the nature of the spoilage, neither did Mrs. Kirchoff in her evidence. It should be noted that the defendant did not replace the 11 jars.

Mr. Leveridge who has been a trained Public Health Inspector since 1976 went to the defendant's premises in response to a call from Mr. Sleem. There, he said, he examined foodstuffs - mayonnaise, peanut butter and mustard. He said the brand was buffet. He kept two boxes for about 3 years, the others were destroyed, he told the court.

Peanut But

Peanut Butter

The Health Inspector said he saw dead weevils on top of the content of the jars (inside the jars). The caps of the peanut butter jars were easily pushed on plastic caps with no sealing material. These caps were easily removed. They were not properly sealed. He said he seized 26 cases of peanut butter - 6 cases of 12 x 9 ozs. and 20 cases of 12 x 14 ozs. see Ex. 21C

In cross-examination he said apart from loose caps no other factors could cause contamination. He did not agree that weevil infestation could have been as a result of poor condition of warehouse. He said that the condition of the warehouse had nothing to do with weevil infestation because no weevil was found in the boxes but only in the jars.

The evidence and the exhibits that 500 cases of 24 x 9 ozs. peanut butter were received in the first shipment. Only 6 of these were seized by Public Health Inspector. Of the 300 cases of 12 x 14 ozs. peanut butter 20 cases were seized. To these should be added the 11 jars in possession of Mrs. Kirchoff which were seized and condemned. In all it is reasonable to say that only a small portion of what was delivered to the defendant was condemned.

According to Dr. Hamilton if the infestation took place after packaging she would expect to find live and dead insects. She opined that if all the insects were dead that would mean that there was infestation of the raw material. She was of the view that if insects were introduced during the packaging process all of them would not be dead. Thus if the evidence of both Dr. Hamilton and Mr. Leveridge is accepted it would mean that there was infestation of the raw material and that the loose caps would have nothing to do with the infestation of the peanut butter condemned by Mr. Leveridge. Accordingly the allegation that the caps were easily removed is only relevant in so far as the 11 jars which Mrs. Kirchoff said had spoilt, are concerned.

However an important question here to my mind is whether or not the peanut butter as well as the mustard and the mayonnaise condemned by Mr. Leveridge were products received from the plaintiff i.e. buffet brand.

I will return to this.

Mustard

The Health Inspector testified that 72 cases of 12 x 13.5 ozs. and 19 cases of 24 x 6 ozs. of mustard were condemned. These he said were at various stages of rancidity. The caps he said were easily removed. They were not properly sealed. The loose caps resulted in leaking of contents when jars were inverted making product subject of possible contamination. The evidence before me is that 135 cases of 24 x 6 ozs. mustard were delivered to the defendant (10 in first shipment and 125 in the second). As said before 19 of these were condemned according to Mr. Leveridge.

Of the 125 cartons of 12 x13.5ozs. mustard, 72 cases were condemned. Dr. Hamilton opined that the shelf life of mustard is about 2 years. If caps are loose it can go rancid before although it is not as susceptible to rancidity as mayonnaise.

Mayonnaise

Mr. Leveridge condemned 730 cases of 12 x 12 ozs. and 282 cases of 12 x 16 ozs. mayonnaise. These too were at various stages of rancidity as a result of loose caps. The condition of this product was the same as that of the mustard.

On the evidence all the mayonnaise on the first shipment was sold - these were 300 cartons of 12 x 375ml., 200 cartons of 12 x 16 ozs. and 10 cartons of 12 x 32 ozs.

The second shipment contained: 800 cartons of 12 x 375ml., 400 cartons of 12 x 16 ozs. and 10 cartons of 4 x 1 gallon.

It is important to note that the 730 cases of 12 x12 ozs. condemned by the Health Inspector are not listed on the invoice of this shipment nor is there any corresponding specification of the product on the invoice in respect of the first shipment. An attempt by the court to convert from fluid ozs. to millilitre did not help.

Of the 400 cartons of 12 x 16 ozs., 282 cartons were, according to Mr. Leveridge, condemned.

Mr. Leveridge stated that the temperature at which mayonnaise is

stored will affect quality of product. He could not say at what temperature they were in fact stored before he went to defendant's warehouse but when he went there it was room temperature.

Dr. Hamilton said if air gets into this product it would take a maximum of three months to go rancid. She stated that the shelf life of this product is about three months.

Mr. Patrick Sleem in evidence said that he had paid money in some cases to retailers who suffered loss of goods. He could not name any of these retailers. He said the defendant company had records of these but he could not say where these records were. It is difficult to believe Mr. Sleem. One would expect that he would have brought this to the attention of Mr. Mouttet. He did not. Even when Mr. Mouttet was pressuring him for payment he did not say a word about the defendant having to pay retailers for spoilage. It may be helpful to refer to some of the correspndence between the parties.

On August 18, 1986 Mr. Mouttet sent the following by telex:

> "Attention Mr. Patrick Sleem and Miss Sharlene Sleem
>
> It is now clearly evident that the promises made during my visit to Jamaica in February of this year, your telexes of 19th and 27th March and again your telexes of April 22 and May 7 culminating in your letter of June 10 are in fact only idle promises.
>
> You would therefore not consider me unreasonable if I state that should I not get full payment by the 30th August I would take the necessary legal action to recover my funds. (Ex. 11)

On the same day Mr. Patrick Sleem sent the following telex in reply:

> "Although I know u are angry, pls. pls. pls. bear with us. Have gone on road personally to sell last CTNR for whatever I can fetch. I will report to you by Friday as to what we are sending this week. This promise I will keep. (Ex. 12)

The following day, the 20th August Mr. Mouttet was still angry and dispatched the following telex:

> "Attention: Mr. Patrick Sleem
>
> I am indeed very angry and your telex of August 19 makes me more angry. I cannot understand and I do not believe that you still have stocks of product. Since last I spoke with you Geddes Grant has taken two (2)

> shipments of Sunrich mayonnaise, mustard and peanut butter and they are not reputed to be the most aggressive distributor. You have had the benefit of the Trinidad devaluation which you are undoubtedly making as an extra profit rather than passing it on to your customers.
>
> I can only once more repeat that if a settlement satisfactory to us is not made by the 29th August, 1986 we will be taking legal action to protect our interest. (Ex. 13).

It would appear that Mr. Mouttet did not believe that the defendant still had stocks of his product in August. He threatened legal action.

Mr. Mouttet in his evidence said he received a payment programme prepared by the defendant. He sent a telex on the 2nd September expressing his willingness to accept this programme, but warned that if defendant failed to adhere to it he would take legal action without further notice. (Ex. 14).

The defendant made some payments but later fell down on its promise. This prompted Mr. Mouttet to send the following telex on the 26th September, 1986:

> "The last payment received from you was on 11th September. You have therefore not kept your promise to make these payments on a weekly basis."
>
> Propose to commence legal proceedings early next week." (Ex. 16).

More promises were made by the defendant and a payment was made on the 8th October but this was not kept up. Mr. Mouttet sent yet another telex dated October 29, 1986 directing it to Mr. Patrick Sleem:

> "Not having had any financial response from you since our last telephone conversation of over one (1) month ago, I wish to advise you that we now propose to take immeidate legal action if we do not get payment in full within 96 hours."

Mr. Mouttet testified that up to the 27th November, 1986 he did not receive any indication from the defendant that his goods were not of merchantable quality. He did not receive any indication that retailers were complaining.

On the 1st December, 1986 he received by courrier a letter dated

27th November, 1986 from the defendant. This was the first time he had said that he was being informed of his goods being condemned. This letter (Ex. 19), referred to a telephone conversation at which time it is alleged that he was advised that products supplied by him to the defendant in October and late December, 1985 had spoilt. Mr. Mouttet denied that there was any such telephone conversation.

Mrs. Phillips submitted on behalf of the defendant that if the court accepts the defendant's contention that it did not loosen the caps of the products and that the loose caps were the fault of the plaintiff it must then go on to ask itself whether these food products which would ordinarily have shelf lives of a minimum of 2 years (peanut butter) 9 months (mayonnaise) and 2 years (mustard) were fit for the purpose for which they were supplied and were of merchantable quality if they:

1. Were at the point of manufacture or packaging, made from raw material infested with weevil or were infested with weevil through the fault of the plaintiff.

2. Were going rancid from the outset so as to be completely spoilt within 3 months.

3. Were going rancid from the outset so as to be completely spoilt within 6 months to a year; respectively.

She submitted that the overwhelming weight of the evidence must lead to the conclusion that the products were not fit for the purpose for which they were supplied and were not of merchantable quality. Accordingly, she argued that the plaintiff was in breach of an express and implied term of its contract with the defendant.

Mr. Henry for the plaintiff submitted inter alia that:

1. It is improbable that weevil infestation of the peanut butter and rancidity in the mustard and mayonnaise would be confined to the defendant's warehouse and not have affected the products distributed throughout the Island.

2. The defendant has failed to prove the allegations that the goods supplied by the plaintiff to the defendant were not fit for the purpose for which they were supplied in that neither the Health Inspector nor Dr. Hamilton is able to speak to the condition of the goods when supplied by the plaintiff.

He argued that the evidence of Mr. Mouttet that the goods when supplied were of excellent quality is uncontroverted.

> 3. That in any event, the defendant undertook the risk for any loss that may have resulted from spoilage of all the products having detained the products in its possession for such a lengthy period - a period in excess of their shelf life.

The defendant in seeking to establish their allegation that the products received from the plaintiff were unfit for the purpose for which they were intended and were also unmerchantable relied substantially on the evidence of Mr. Leveridge.

Mr. Leveridge said that he issued certificates of seizure. On the certificate of seizure in respect of mayonnaise the brand name is omitted. Where this should be stated the following appears:

> 1. seven hundred and thirty (730) cases of mayonnaise (brand) (730 x 12 x 12 ozs.)
>
> 2. two hundred eighty two (282) cases mayonnaise (brand) (282 x 12 x 16 ozs.)

When asked why he omitted to insert the brand name, he said it was left blank "because we try to protect the name of the producer by not writing in the name brand."

One would have thought that this duty was to protect the public!

I am afraid I cannot accept this explanation.

Three certificates of seizure and three notices of seizure were issued. None of these indicates the brand name of the products. In evidence Mr. Leveridge stated that all the products were "buffet" brand. But is this so?

As stated before there is no listing of the 730 cases of 12 x 12 ozs. mayonnaise in any of the invoices.

There is no dispute that all the products supplied by the plaintiff to the defendant are indicated on the Caricom invoices (Exhibits 1 and 2).

There is no evidence that any other shipment of mayonnaise was received by the defendant from the plaintiff. If indeed Mr. Leveridge did seize and condemn 730 cases of 12 x 12 ozs. mayonnaise this certainly

would not be buffet brand, since the evidence is that the defendant is the only one who distributed the plaintiff's buffet brand product in Jamaica.

I agree with Mr. Henry that the Health Inspector's Report which concludes with the plaintiff's ultimatum to the defendant "is at best dubious" and cannot be relied on.

Mr. Patrick Sleem's evidence is that the defendant had to pay money to some retailers who had suffered loss of goods. He could not name any such retailer. He did not know where the records of such transactions were. I find this rather strange. He did not call in the Health Inspector then. No written record of complaint by retailers was sent to the plaintiff.

When the plaintiff was pressuring the defendant for payment no mention of such early complaints was made. It was not until some eleven (11) months after the second shipment and when the plaintiff had given the defendant an ultimatum that the defendant called in the Health Inspector.

In my view this was much too late. I agree with Mr. Henry that the defendant having kept the goods in its possession for such a long time undertook the risks for any loss that may result from spoilage. One must also take into consideration the fact that the plaintiff is saying that the shelf life of his product is 9 months and Dr. Hamilton's evidence that the shelf life of mayonnaise is three (3) months.

It would be unreasonable to allow the defendant to keep the goods for eleven months and then to claim that the goods were not merchantable quality at the time when they were delivered. In my view such a claim must be made timeously.

Bearing in mind Mr. Sleem's evidence that the parties contemplated that there would be five (5) shipments over a period of 18 months and the fact that the defendant company made a second order within one month of the first order and the fact that the shelf life of mayonnaise is 3 months it must have been the understanding of the parties that the defendant would distribute the products within a three month period.

Mr. Mouttet must have had this in mind when in his telex of the 20th August, 1986 he said "I cannot understand and I do not believe that you still have stocks of my product."

It is my firm view that the defendant may not at such a late stage seek to avoid the plaintiff's demand for the amount due and owing by the defendant by claiming that the goods were not of merchantable quality or were not reasonably fit for the purpose.

In sum I have found:

1. That on the balance of probabilities the plaintiff has established that it extended a 45 day credit facility to the defendant regarding payment for goods supplied to the defendant by the plaintiff and that the parties agreed to a joint venture in respect of the mayonnaise supplied in the first shipment.

2. The evidence adduced by the defendant with a view to establishing that the products seized and condemned by the Public Health Inspector were the buffet brand supplied by the plaintiff is unsatisfactory and unreliable; and accordingly;

3. That the defendant has not shown that the products supplied by the plaintiff were not of merchantable quality.

4. That in any event, eleven (11) months having passed since the last shipment, it was too late for the defendant, in the circumstances of this case, to avoid its liability to the plaintiff by claiming that the products supplied by the plaintiff were not of merchantable quality or were not reasonably fit for the purpose for which they were supplied.

Interest

Mr. Mouttet said that over the period of 1986 to the present his company borrowed money to finance its enterprises. He borrowed from what is now the Bank of Commerce (Trinidad and Tobago) Limited. The lowest interest the plaintiff company paid was about 13% and the highest about 16%. At present he said the plaintiff company has loans with the said Bank of Commerce. The rate of interest on the loans is now 14 3/4%. His company has an excellent relationship with the Bank. This favourable interest rate is due, he said, to the excellent relationship the company has with the bank.

In light of the authorities referred to by both Counsel I am of the view that 14% would be an appropriate rate at which to award interest.

Conclusion

The amounts on the invoices are:

1st Invoice - Ex. 1	TT 74,776.28
2nd Invoice - Ex. 2	TT 68,456.78
	TT$143,233.06

The undisputed evidence is that four payments were made as follows:

On 26.5.86	TT 6,545.36
On 25.8.86	TT 16,423.60
On 4.9.86	TT 16,363.39
On 3.10.86	TT 16,394.00
	TT 55,726.35

It follows that the amount owing and due to the plaintiff is TT$87,506.71.

Accordingly judgment is given in favour of the plaintiff on the claim and counterclaim for TT87,506.71, with interest at 14% per annum from the 19th March, 1986 to the present.

Costs to the plaintiff to be taxed if not agreed.