IN THE HIGH COURT OF AUSTRALIA

CHARLES DAVID PTY. LIMITED

V.

SCRIVENER HOLDING PTY. LIMITED

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 7th November, 1968

A. C. Brooks, Government Printer, Melbourne

C.5072/66

CHARLES DAVID PTY. LIMITED

v.

SCRIVENER HOLDINGS PTY. LIMITED

ORDER

Appeal dismissed with costs.

CHARLES DAVID PTY. LIMITED

v.

SCRIVENER HOLDINGS PTY. LIMITED

JUDGMENT

BARWICK C.J.
KITTO J.
MENZIES J.

CHARLES DAVID PTY. LIMITED

v.

SCRIVENER HOLDINGS PTY. LIMITED

In an action in the Supreme Court of New South Wales tried as a commercial cause by a Judge without a jury, in which the respondent was the plaintiff and the appellant was the defendant, judgment was given for the plaintiff for damages for breaches of several contracts by which the defendant had engaged to supply frozen meat to the plaintiff by consignment by ship to Greece. The plaintiff's purpose, as the defendant was always aware, was to resell the meat to persons in Greece.

The contracts were made, pursuant to a general agreement or arrangement between the parties, by the giving and acceptance of written orders. Some of the orders were given by the plaintiff itself and some by another company, called S. Hutchison & Co. Pty. Ltd., which the parties have joined in treating for the purposes of these proceedings as having been at all material times the plaintiff's agent acting within the scope of its authority. Each of the orders required that a specified tonnage of the meat, which in some instances was to be frozen boneless full carcass mutton and in others was to be frozen boneless cow crops, should be "90% lean visually". Each order for mutton required that the meat should be packed in polythene lined cartons and weigh 60 lbs. net; and each order for cow crops provided that the meat should be in 2 lb. to 5 lb. pieces, individually wrapped and packed in standard export cartons. On the face of each order there was a note reading: "Please take special care to ensure that this parcel is a minimum of 90% lean visually, and that no more than the contracted weight is shipped". It is common ground between the parties that the expression "90% lean visually" referred to the minimum

proportion which lean should bear to the whole as estimated upon visual inspection, that is to say without dissection or chemical analysis. But arguments submitted on the appeal differed as to what was the whole of which 90% should appear upon visual inspection to be lean. The defendant contended that the intention disclosed by the orders was that the meat consigned in fulfilment of any one order was to be considered as a whole, so that if visual inspection of the whole as one mass, or alternatively of the six surfaces of each carton-full of meat, showed that not more than 10% was fat the plaintiff would be getting what was ordered, and this even if, to take an extreme illustration, some cartons might be seen to contain nothing but fat. This is an impossible construction to adopt. Quite obviously the expression "90% visually lean" is a stipulation as to the quality which all the meat ordered must possess. It is not directed to averaging the quality over the whole quantity ordered or even over the whole quantity in each carton: the only sensible meaning to give to it is that no piece of meat shall qualify to be packed in a carton in fulfilment of the order if an experienced person can tell by looking at its surfaces that it contains more fat than 10% of its bulk. It was certainly so understood by a technical officer of the Australian Meat Board who gave evidence, a Mr. Wilson. He was asked: "When you say there is a range that the inspectors apply to visually lean tests I take it you mean, looking at a particular piece of meat one inspector might say that in his opinion it was 92 per cent but another might say it was 88 per cent?" He replied: "I meant that sort of thing but not necessarily those figures." As both parties knew at the time when the orders were given and accepted, the process of preparing meat for packing included a stage at which trimmers removed from each piece of meat that emerged from the operations of boning

and slicing what the defendant's principal witness described as "superfluous" fat; and the stipulation in the orders that the whole tonnage ordered should be "90% lean visually" was obviously directed to the determination at that stage of the amount of visible fat that should be treated as superfluous and removed. It is true that upon arrival at its Greek destination the meat in each carton would necessarily be in the form of a solid frozen lump from which the individual pieces could not be separated unless the lump were thawed and thus rendered less valuable if not actually unsaleable, but it is nothing to the point that for that reason any inspection of a carton for the purpose of determining whether the pieces in the carton were all "90% lean visually" would necessarily entail cutting the frozen lump into two or more parts and examining the surfaces thus exposed. Of course these would not be the surfaces which the orders contemplated should reveal upon inspection no more than 10% fat, for they would be not the surfaces of the individual pieces but cross-sections of all the pieces as they lay frozen together. The stipulation in the orders, however, was directed to the quality of the meat to be packed and despatched, and the "visually" therefore referred to what was visible before packing. In the argument the mistake was made more than once of confusing the subject of the visual inspection which the orders contemplated as the test of the required quality with the subject of the only visual inspection that could be made if and when the due performance of the contract was to be checked in Greece. The only relevant purpose which could be served by examining the surfaces exposed by cutting a cartoned block of frozen meat into sections would be to draw an inference from the appearance of those surfaces as to what would be seen if the pieces of meat in the block were separated out - just as the only purpose of a chemical test would be to draw an inference as to the same matter by applying the accepted formula that 90% visually lean was

equivalent to about 84% lean by analysis.

All the meat supplied under the orders was delivered to the plaintiff's agent in Greece, and some if not all of it was resold there. Before long, complaints from the Greek sub-purchasers began to reach the plaintiff and were made known to the defendant. The complaints were mainly that some of the mutton and some of the cow crops were not of the description "90% lean visually"; but there were also complaints that some of the mutton was not "full carcass" but was only trunk mutton, there being no leg meat amongst it; that some of the pieces of cow crop meat were not individually wrapped but were bulk meat in slabs larger than the orders stipulated for; and that some of the cartons were branded with the name "Midco" instead of the defendant's brand. The complaints as to the brand had nothing to do with the requirements of the contracts between the plaintiff and the defendant, but they may be ignored because in respect of them the learned trial Judge has made no allowance in the damages he has awarded. The other complaints were inquired into in Greece at the instance of the plaintiff, and claims against the plaintiff arising out of them were settled. The judgment under appeal awards to the plaintiff the total of the amounts paid under the settlements, and the defendant appeals on the grounds, first, that there was no satisfactory proof that all the meat to which the settlements related fell short of the stipulations in the orders, and, secondly, that there was no sufficient proof that the amounts paid were reasonable if regarded as relating only to the meat which was proved to have fallen short of those stipulations.

The inquiries which the plaintiff caused to be made included inspections in Greece by three persons, a Mr. Triantafyllakis who had acted as the plaintiff's agent for the resale of the meat ordered from the defendant, a Mr. Comber who was the plaintiff's managing director, and a

Mr. Longhurst who was the European Marketing Officer employed by the Australian Meat Board in London and who made his inspections for the purpose of reporting to his Board. The complaints related to some of the meat in each of the consignments which the defendant had made under the relevant orders. The method of inspection in each instance was by removing the carton and cutting the meat into two or more blocks. The consignments comprised in all 10,023 cartons, and of these the number inspected by one or more of the three gentlemen named was less than one per cent. Mr. Longhurst said in his evidence that the normal procedure for inspection is to sample 10 per cent of a shipment or, if the shipment be very big, 5 per cent; and he made it clear that practical considerations led to his inspections - and presumably the same applies to the others - being more limited in number than he would have wished. Among these considerations were the time available, the inaccessibility of many cartons in heavily stocked cold stores, and particularly the fact that the Greeks do not like many cartons opened as the suspiciousness of purchasers makes opened cartons hard to sell. These considerations explain the fewness of the cartons inspected; they may be accepted as showing that the plaintiff acted in good faith in the matter of the inspections and used all reasonably available means of checking the complaints before negotiating for the compromises it eventually made; but the fact remains, and the defendant relies heavily upon it, that the inspections were of too small a proportion of the whole quantity in each shipment to be confidently treated as a representative sampling of the whole. The decision of the learned Judge, however, was based upon an impression he formed that more probably than not the samples which were inspected reflected the quality of the bulk, and consequently that the bulk did not in substance comply with the quality which was required by the contract. On this basis he took

the view that the plaintiff was justified as against the defendant in effecting reasonable settlements of the claims of purchasers; and finding that the settlements were in fact reasonable he gave the judgment for the plaintiff which is now under appeal. The two questions which the appeal raises are whether it was right for his Honour to conclude that the plaintiff was justified on the evidence in settling the claims on the footing that they were all substantiated, and whether he was right, in view of circumstances to which reference has yet to be made, in holding that the plaintiff was entitled to recover from the defendant the amounts which it paid thereunder.

On the first of these questions it is a fact to be borne in mind that all the meat in question was prepared and packed by the defendant's staff, in its premises, specially for the filling of the relevant orders, and according to a system which theoretically should have ensured substantial uniformity of quality throughout the whole quantity; and we were pressed to hold that for this reason it was a proper inference, from the fact that the inspections that took place revealed in nearly every instance a falling short of the contract requirements, that substantially the same would have been revealed however many cartons had been examined. There are, however, two difficulties to be faced. One is the logical difficulty arising from the fact that the system in the defendant's premises - which were premises the defendant held under lease at various abattoirs - was far from being mechanical: every piece of meat had to be dealt with by one of a number of employees of necessarily varying degrees of experience and efficiency, and not only was there room for error of individual judgment as to the percentage of fat visible and other characteristics of the meat but there was ample opportunity for an employee to depart from the standard that

was set him, even if only from carelessness or laziness. There was room, too, for much variation in supervision as between the plaintiff's various factories, which were as far apart as Newcastle, Toowoomba, Murray Bridge, Blayney and Berrima. The truth that uniform observance of requirements was not to be confidently assumed is demonstrated by the fact that the Meat Board at one time, in 1966, suspended the defendant's export licence on the ground of its having packed meat which the regulations forbade to be packed. As the trial Judge has pointed out, none of the foremen-boners or other supervisors, indeed none of the defendant's factory workers at all, was called to give evidence in this case, nor was their absence from the witness-box explained. Then, too, there is the factual difficulty that even the limited number of inspections that were made in Greece revealed that some, though not much, of the meat supplied was 90 per cent visually lean: see the evidence of Mr. Comber, the plaintiff's managing director (p. 61) and Mr. Longhurst (pp. 179, 180, 205). In the light of these considerations it seems to be going too far to infer that the whole or even substantially the whole of the meat supplied fell short of being 90 per cent visually lean or was otherwise not in conformity with the contracts. Probably the most that can be concluded with comfortable satisfaction is that a large, though undefinable, part of each consignment fell short of the agreed standards.

It was submitted on behalf of the defendant that if that is all that can properly be found on the evidence the plaintiff has failed to prove the extent of the breaches of contract, that therefore it has failed to provide a basis for an assessment of damages, and that in particular it has failed to prove that the settlements which it made with the various purchasers were all made in respect of meat as to which the defendant had made default in one way or another under the

contracts. But this leaves out of account some important facts. The orders required that the meat be delivered by the defendant f.o.b. nominated ships scheduled to sail from Australian ports for Greece. This and the fact that the meat was to be in large cartons and would necessarily have to be kept in freezers until resold must have made it obvious that there would be very limited opportunity for inspection before delivery out of store to the ultimate buyers. Not only was congestion in the cold stores likely to make inspection of more than comparatively few cartons difficult, but every carton opened and tested would be likely to present an appearance of reduced attractiveness to a buyer, even if he were not one who shared the suspiciousness which the evidence in this case attributes to Greek buyers in general. It is with these facts in mind that we must turn to consider what may reasonably be supposed, as at the time the orders were given and accepted, to have been in the contemplation of both parties as the probable result of such breaches of contract as have now been proved; for it is upon the answer to that question that the plaintiff's right to damages depends under the second branch of the rule in Hadley v. Baxendale (1854) 9 Ex. 341, 156 E.R. 145.

At the time of the orders it must have been obvious to a reasonable person in the position of either of the parties, had he given the matter a thought, that if excessively fat meat were put into the cartons, and the mutton in some cartons were only trunk mutton, and some of the cow crops were not individually wrapped and some were in excessively large slabs - if, that is to say, all this were to happen to the extent that it did happen so far as is to be inferred from the results of the inspections - the plaintiff would be in no position to fight out claims by persons to whom it had resold the meat on the terms of the orders it had given to the defendant. It would be under a

practical necessity of endeavouring to settle such claims, not of course on the basis that there had been a breach of contract by the defendant in respect of every piece of meat or even every carton, but on the basis that its case was as bad as the ascertained breaches should suggest; and that would mean that though the extent of the actual breaches might not be fully known rebates or allowances would have to be negotiated to cover whatever breaches might have occurred.

The settlements were in fact agreed to by the plaintiff upon the basis which, speaking in reference to one particular claim, Mr. Comber described as "the basis of what I thought was a fair understanding of the situation at the time"; and of course the chief factor in that situation was the weakness of the plaintiff's case vis-à-vis its sub-purchasers as shown by the inspections that had been carried out, few though they were, but comparatively and alarmingly consistent as their results had turned out to be.

Two questions have now to be decided and both are questions of fact. It seems as well to keep them separate as Lord Coleridge C.J. kept the corresponding questions in Fisher v. Val de Travers (1876) 45 L.J. (C.P.) 479, rather than to combine them, as Somervell L.J. preferred to do in Biggin & Co. Ltd. v. Permanite Ltd. (1951) 2 K.B. 314 at p. 321, in the one question whether the settlements were reasonable. The questions are first whether the plaintiff acted reasonably in settling the claims, and secondly whether the sums paid under the settlements were reasonable.

That the first question should be answered in favour of the plaintiff can hardly be doubted. The only practical alternative to settlement would be, as Mr. Comber pointed out in his evidence, to take the meat back and try to unload it on to the open market; and that course Mr. Comber considered - and the Judge accepted him as a reliable witness - would have been very much worse financially than agreeing to

[illegible] complaint which the plaintiff

received it referred to the defendant, either orally or by letter. The defendant took no step to investigate any of the claims for itself, but left the plaintiff to do what it could about them. Some few were settled by Mr. Triantafyllakis, but as more were flowing in the plaintiff sent Mr. Comber himself to Greece. Before going he discussed the complaints on at least eight or ten occasions with Mr. M. C. Throsby, the defendant's director who was in control of the quality of shipments, and on his own admission in court Mr. Throsby realized that the purpose was to indicate that the plaintiff would hold the defendant responsible if the claims should be established. Mr. Comber assured Mr. Throsby that the plaintiff would do "everything possible to protect everyone's interests", and with that assurance the defendant contented itself. Mr. Comber told Mr. Throsby he was going to Greece, saying that he would do his best to make reasonable settlements and see for himself whether all the claims were "sound and genuine". The only reply he received was, "Well, let us see what happens when you get over there", or words to that effect. As Mr. Throsby admitted in giving evidence, there was no difficulty in the way of the defendant's investigating the claims if it had desired to do so. It might have engaged agents for the purpose in Greece, and it might even have had chemical tests performed for a small sum of money. But it did nothing. Its attitude is reflected in an answer Mr. Throsby gave to a question in cross-examination. Asked whether he relied on Mr. Comber's being able to negotiate the claims to a settlement or reject those that were not substantiated, he replied: "We were waiting for them to be substantiated". It was arranged that he and Mr. Comber should discuss the matter when the latter got back to Australia; and in relation to this arrangement Mr. Comber in giving his evidence made the significant remark that "customarily our two companies had done business this way for many years".

It seems to us impossible in these circumstances to doubt that it was reasonable for the plaintiff to proceed to negotiate for settlements without further reference to the defendant. As Mr. Comber said, "the buyers had waited a long time to settle and they were out of pocket". That the negotiations were conducted reasonably, after reasonable investigations had been made to find the strength or weakness of the plaintiff's position, is equally free from doubt. There remains only the question whether the settlements were reasonable in amount.

As to this, a misunderstanding seems to have arisen at the trial. The learned Judge gained the impression from a statement which counsel for the defendant made during argument that the defendant conceded the reasonableness of the amounts for which the settlements were made. The concession, however, was only that the amounts were reasonable if the relevant consignments of meat as a whole departed from the stipulated standards. It is not a concession which goes as far as his Honour thought, or far enough for the plaintiff's purpose, and we must put it aside. But on the plaintiff's evidence a strong case was made that the amounts of the settlements were arrived at as a result of businesslike negotiations and were as satisfactory as could fairly be expected. The evidence reinforces the general prima facie probability to which Owen J. referred in a passage in his judgment in Wong v. Hutchinson (1950) 68 W.N. 55 at p. 58 which the trial Judge in the present case quoted with approval. Mr. Comber in his evidence described the manner in which the settlements which he negotiated were arrived at, and his cross-examination neither shook his general credit nor raised any cause for doubt as to the reasonableness of his conduct in handling the claims. Mr. Triantafyllakis, whom the Judge evidently regarded as a reliable witness, verified the reasonableness of the amounts for which he had effected settlements, and his cross-examination was directed to the

inspections he had made and not to any separate question as to amount. On the evidence which the trial Judge accepted we conclude without hesitation that the settlements were reasonable in amount.

In our opinion the judgment of the Supreme Court should be affirmed and the appeal dismissed.