IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - ACCRA

CORAM - ARYEETEY, JA [PRESIDING]
ABBAN [MRS], JA
QUAYE, JA

H1/146/05
24TH MARCH, 2006

BOOMTRADE COMPANY LTD. …. PLAINTIFF/RESPONDENT

V E R S U S

MESSRS COTECNA & ANOR. …. DEFENDANTS/APPELLANTS

J U D G M E N T

QUAYE, JA - The respondents herein, in their role as plaintiffs in the trial court, on 9th November 1999, filed a writ of summons, indorsed with reliefs against the defendants jointly and severally, for

(a) the sum of US$ 22.092.00 being the cost of one 20 foot container of canned tomato paste purchased by the plaintiff company from the 2nd defendant which was found on delivery to be unfit for consumption.

(b) interest from 24th March 1998 incurred by plaintiff in respect of the letter of credit that was granted plaintiffs by their bank to purchase the tomato as above,

(c) cost for clearing, transportation, warehousing, stated to be ¢11.280.000.00 as at 31st October 1999.

(d) interest on the said sum as in (c)

(e) damages for breach of contract and

(f) costs

To the said writ only the 1st defendant responded by filing the requisite statutory processes. The 2nd defendant neither filed an appearance nor defended the action. In consequence thereof, the action against the 2nd defendants terminated on 5th February 2001 when the trial court entered default judgment against them and made an order

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against them for the full satisfaction of the relief indorsed by the plaintiffs in the action. The entry of judgment against the 2nd defendants in favour of the plaintiffs for the recovery of the entire claim in this action did not however terminate the action, nor granted relief from the action, in favour of the 1st defendant.

The case against the 1st defendant was that, they, being an international inspection agency, holding license to carry on the business of pre-shipment inspection of goods imported into this country, Ghana, did, in fact on 16th May 1998 carry out, or purported to have carried out, the physical pre shipment inspection of the consignment of canned tomato paste as to the physical content as well as the packaging and marking of the said goods which the plaintiffs were importing from the 2nd defendant. The said action of the 1st defendant was confirmed and evidenced by the issuance by them on 20th May 1998 of a document, known and called a clean report at findings (CRF) relating to the said consignment of goods and furthermore acknowledged receipt of the sum of US$180.00 paid by the plaintiffs to the 1st defendants as consideration for the inspection.

The cause of action for the plaintiff/respondents herein arose when, according to their pleadings and indorsement of relief, the goods were found on delivery to be unfit for consumption, a fact which runs contrariwise to the statement of the 1st defendant/appellant as contained in the CRF.

The trial court found for the plaintiff/respondents and upheld their relief in its entirety and held the 1st dependant liable upon satisfaction on the strength of evidence led in the trial, that the 1st defendant indeed carried out a pre-ship inspection of the goods imported and issued a clear report of findings, on which the plaintiffs relied to their detriment. The judgment of the trial court from which the herein appeal was filed made a few salient findings of fact on the strength of which she held the appellants liable. These include the fact that the 1st defendant/appellant issued to the plaintiffs/respondents an Import Declaration Form (IDF) and a Health Certificate for which plaintiffs paid US$180 to the 1 defendants, to enable plaintiffs import the goods. When the goods arrived at the Tema Port they were duly cleared into a Bonded Warehouse. Some of the imported tomato paste were later discovered to be unwholesome and unfit for consumption. Further to this the court found that the batch number on the cans of the goods showed conclusively that the goods were produced, not in April or May 1998, but

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earlier than September 1997, a fact which confirms that the CRF (exhibit F) did not indicate the true state of the goods to the plaintiffs. The court therefore concluded that "…….the 1st defendant should have known in its course of business that a clean report of findings is a pre-condition for obtaining Letter of Credit and raising funds for import; and that a clean report of findings is for the importer and seller and not only for the Government of Ghana to rely on. "I further hold that the 1st Defendant relied on Exhibit 2 a report generated by 2nd Defendant, and declared the consignment of goods to be wholesome whereas it was not so. It is my considered opinion that if the 1st Defendant had not issued a clean report of findings the seller would not have been paid because no Letter of Credit would have been issued by the plaintiff's Bankers."

The findings above vindicated the plaintiffs' averments contained in their statement of claim. The relevant paragraphs are herein reproduced for effect.

"(7) in consideration of payment of the sum of US$180.00 (One hundred and eighty UD dollars) paid by the Plaintiff to the 1st Defendant on 16th May 1998 the 1st Defendant carried out an inspection of the said consignment of canned tomato paste This inspection was of the physical content was well as the packaging and marking of the consignment of canned tomato paste.

(8) On or about 20th May 1998 the 1st Defendant delivered to the Plaintiff a clean report of findings relating to the said consignment and acknowledged receipt of the said payment of US$180.00.

(9) Plaintiff avers that at the time of issuing the clean report of findings relating to the said consignment……the 1st Defendant intended and well knew or might have known that the Plaintiff would rely on the representations made therein to purchase the said consignment of canned tomato paste.

(10) Plaintiff avers that in the premises, the 1st Defendant was under a duty to take due care in the making of the said representations to the Plaintiff……..

(11) Plaintiff avers that acting on the faith of the representations contained in the clean report of findings, Plaintiff's bankers consequently honoured the said Letter of Credit referred to above and 2nd Defendant was duly paid the sums stated in paragraph 5 above.

(12) Plaintiff avers that after delivery of the said consignment of canned tomato

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paste in Ghana on or about 12th June 1998 the Plaintiff became aware of the unwholesome nature of the said canned tomato paste.

(15) Plaintiff avers that the 1st Defendants were therefore guilty of a breach of duty to carry out a comprehensive inspection of the quality and packaging of the consignment in that they caused to be represented in the clean report of findings that the said consignment of canned tomato paste was of wholesome nature when in fact the test carried out by the Ghana Standards Board revealed that the said canned tomato paste showed severe detinning and chemical deterioration."

The above pleading, in so far as the averments related to the 1st defendants provided the spring board upon which the plaintiffs armed themselves and lodged the attack against the 1st defendants; they also provided the justification for the trial court's judgment of 10th March 2003.

The herein appeal was filed by the 1st defendant, now appellant, on 30th May 2003. Centrally, the grounds of appeal question the holding of the trial court that the appellants owe a duty of care to the respondent, and should have known that the respondent would rely on the CRF notwithstanding the disclaimer of liability by the appellants. Counsel for appellants maintains that there was no contract between the parties herein.

In this judgment we must consider whether there was a duty or proximate relationship between the respondent and the appellant. Counsel for appellants has sought by reference to a few decided cases to demonstrate that the evidence did not establish the existence of a duty of care owed to the respondent by the appellant. I have carefully studied the references made. My conclusions are that the appellants knew that the report they issued, that is the CRF Exhibit G, and the inspection report, Exhibit 2, and particularly information contained in them were not only for the use of the Government of Ghana officials but also and principally for the use of the respondent. Exhibit G specifically mentions the respondent as the importer of the goods. Cross-examination of the defendant suggested that the appellants might have even addressed the CRF to the importer or to both the importer and the Government. In any case it is clear from the totality of evidence before us that the appellant knew that the respondent, most likely, would rely on the report albeit, there was no direct contract between the two. I accept the

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fact as true that the money for the pre-shipment inspection of the imported goods was paid by the respondent to the Government of Ghana, and the latter then paid it to the appellant. The evidence does not establish anything to the contrary, what this fact proves is that the contract was between the Government of Ghana and the appellant; not between the respondent and the appellant. The authorities however, are of the firm position that a duty might exist between parties in the absence of a contract.

See Denning LJ in **CANDLER VRS. CRANE, CHRISTMAS & CO. C.A. [1951] 2 KB 164; [1951] 1 All ER 426; [1951] 1 TLR 371.** Where he stated in reference to the decision in **DONOGHUE VRS. STEVENSON HL. [1932] AC 562;** that the presence of a contract did not defeat an action for negligence by a third person, provided that the circumstances disclosed a duty to be careful. Lord Denning in the **CANDLER** case identified the class of persons who might owe a duty in the performance of their profession.

These include those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things and to make reports on which other people – other than their clients – rely in the ordinary course of business. Their duty is not limited merely to exercising care in their reports, but also extends to the use of care in their work which results in their work. The learned Lord Justice further identified those to whom the duty is generally owed. These include their employers – in the instant appeal, the appellants owed duty of care to the Government of Ghana, and also "to any third person to whom they themselves show the report or to whom they know that their employer is going to show the report so as to induce that third person to take some action. The test of proximity is, did the appellants know that the report was required for submission to the respondent and for use by them. The fact in this appeal is beyond conjecture that the appellant, at all times material, knew the identity of the importer ie. the respondent, and further, that the Government's position vis a vis the report was one of relative indifference, whilst the respondent stood in a more direct relationship as the person actually interested in the report, and for whose purpose the report was required.

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The identification or categorization offered by Lord Denning aptly fits the appellants, who are professional or occupational inspectors, and they owe a duty to produce a report that can be relied upon as genuine and accurate of facts.

I will now shift to take a closer look at the CRF and the circumstances surrounding its coming into effect. In paragraph 7 of the respondent's statement of claim, it was said that the inspection was made of the physical content as well as the packaging and marking of the consignment. Paragraph 15 thereof indicts the appellants and fixes them with breach of duty to carry out a comprehensive inspection. I have, earlier in this judgment, stated that the contract was between the Government of Ghana and the appellants, even though the respondents are a known third party to whom duty owed to the Government might be extended. I have not found anywhere in the evidence, the terms that the Government specifically imposed on the appellants in respect of the inspection. The Government of Ghana has not complained that their employee, the appellants, did a shoddy or unsatisfactory work. The respondents' evidence does not suggest that they made any specific requirements of the appellants as to what they must look for in the inspection and report on. This sort of relationship was the subject of comment in **SMITH VRS. ERIC BUSH, HARRIS & ANOR. VRS WYRE FOREST DISTRICT COUNCIL & ANORT. [1989] 2 All ER 614.** In those two cases which were heard on appeal together, it was clearly stated that both purchasers failed to engage or employ their own independent surveyors but relied on survey, or valuation reports conducted upon orders of the mortgagees in both actions.

In this way, they, as well as the respondent in the present appeal, denied themselves the opportunity of specifically instructing the valuer or surveyor, or the inspector as to what was required of them. It is on this basis of failure to issue specific instructions that I must express my discomfiture at the averment in paragraph 15 of the statement of claim that the appellants failed to carry out a comprehensive inspection. What the respondent needed to see in the report might not be the same as what the contracting parties ie. the Government of Ghana and the appellants agreed to do. In the absence of evidence as to the definite terms of the contract, I have my strong reservations about the finding on that issue, by the trial court.

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Another issue that arises in this appeal springs from the finding of the trial court that the appellant declared the consignment of goods to be wholesome whereas it was not so. The question which immediately arises from this conclusion relates to the time when the inspection was conducted and the condition of the goods then. The CRF Exhibit G was issued on 20th May 1998. Exhibit 1 gives the inspection date to be 6th May 1998. Both Exhibit G and Exhibit 1 passed the imported goods as satisfactory.

Indeed, the fact that the imported tomato paste was wholesome for human consumption was confirmed by the respondent's managing director in her evidence to the trial court on 6th November 2002.

When counsel for the appellants sought to know whether the tomato paste was discovered to be unwholesome at the time few cartons were taken from the warehouse, she answered with appreciable degree of honesty that "A. Not immediately. Some months after when my customers came back to me." The truthfulness of the respondents' representative came into focus much earlier in her evidence in chief when she said that at the time the consignment arrived in Ghana on or between 23rd and 25th June [1998] she had to keep them in a bonded warehouse for sometime because she did not have money to pay for customs duties on them. It was therefore several months after the goods had arrived and been warehoused that deterioration was discovered. There is more than a fair degree of doubt as to whether the goods were unwholesome at the time the appellants conducted their inspection in Italy or that deterioration set in after their arrived in Ghana, and during warehousing. That doubt in the evidence, in the absence of evidence to the contrary, must be resolved to the benefit of the appellants, the more so, since the respondents have stated that at the time 50 cartons were taken out of the warehouse, they were not found to be unwholesome. Upon the basis of this clear evidence, the finding of the trial court that the appellant declared the items to be wholesome when they were not, cannot be supported particularly as the laboratory examination of the goods by the Ghana Standards Board which formally declared them to be unwholesome for consumption was not conducted until November 1999; that is to say, more than one and a half years after their arrival and warehousing. When dealing with perishable goods of the nature of canned tomato paste, it might certainly defy simple logic to expect that an inspection of them that was carried out in May 1998 would produce the same result as a chemical or biological

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laboratory examination of the same goods in November 1999. Much more concrete evidence was needed to impugn the sincerity and industry that went into the inspection of 1998, and to attach negligence to the inspectors. The respondents clearly misrepresented the state of affairs to the court when they indorsed a claim on the basis that the goods were "found on delivery to be unfit for consumption." The evidence did not lend support to that contention. The phrase "on delivery" would necessarily introduce and limit consideration to a specific time frame. My simple understanding of "on delivery" is that when the goods were cleared, or when the importer took possession of them at the time the ship carrying them arrived in the Tema Port, they were found to be unfit for consumption. Obviously this is contrary to evidence. It is merely crying wolf and presenting a case before the court knowing honestly that the assertion was not correct.

Before I hang up on this ground of appeal, I will simply say that in view of the stand that I have taken in this matter, as shown above, the submissions in respect of the disclaimer of liability, which in this case was not as clearly stated as to be properly appreciated, would appear to be not very relevant to the determination of the appeal. Suffice it nonetheless to say that where there is a clear disclaimer of liability by the inspector, the legal position is that, that condition ought to be accepted. Thus in **SMITH VRS. ERIC BUSH; HARRIS & ANOR. VRS. WYRE FOREST DISTRICT COUNCIL & ANOR.,** (supra) the principle was applied. See also the leading authority of **HEDLEY BYRNE & CO. LTD. VRS. HELLER & PARTNERS LTD. HL 1964 AL 465** where Lord Morns of Borth-y-Gest made that famous speech that "……it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise ….It does not seem to me that (the defendants) undertook before answering an inquiry to expend time or trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced report….the bank in the present case, by the words which they employed effectively disclaimed any assumption of duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and

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then reject the stipulation." In the herein appeal the disclaimer is not total. Upon a careful reading, the inference is that under the contract per se between the Republic of Ghana and Cotecna, there is no disclaimer of liability. It is only on respect of the sellers and buyers that an exclusion has been made to regulate their conduct. In effect a caveat has been placed to the effect that neither the seller nor buyer can use the report as basis for resiling from the contract of sale between them. In any case, they would be deemed to take or reject in whole, including the clause of limitation. To the extent that, that limitation does not entitle the buyer to resile, I will, in similar spirit as that exercised by Lord Morris of Borth-y-Gest say that the respondent is prevented from using the CRF as basis for action on the contract against the sellers.

I find as established, and wholly agree with counsel for the appellant, that the respondent did not rely on exhibit G and, or exhibit 1 to order for the goods, or decide to import them. The evidence lends much credence to that. The order to buy or import was made upon the basis of pro-forma invoice issued on 18th December 1997; the bill of lading was made on 9th May 1998; the irrevocable letter of credit was issued by the First Atlantic Merchant Bank Limited in favour of Frida S.R.I. on 23rd March 1998; The goods were ordered before the inspection was conducted on 6th May 1998 and the CRF was not issued until 20th May 1998. It really begs the issue therefore, for the respondents to seek to suggest that they relied on the CRF for the letter of credit. The finding of the trial court that "the 1st Defendant should have known in its course of business that a clean report of findings is a pre condition for obtaining Letters of Credit and raising funds for import." has no factual or evidential leg to properly stand on. The Ghana Export and Import Law has been amended and the emphasis has now been shifted from pre shipment inspection of goods to destination inspection. It appears to me that the significance of the CRF under the old law was not essentially for use of the importer.

It was one of the documents that the sellers must show to the bank upon the arrival of the imported goods before they are paid for the goods in accordance with the irrevocable Letters of Credit. More importantly, once the importer had succeeded in opening the letters of credit in favour of the seller, the question about payment for the goods then shifted to the issuing bank and the seller. With due deference, the evidence before us does not suppose that the respondents applied for and were issued the LC.

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based upon the CRF. The preceding factors which appear from the facts, the law and the circumstances, have informed my decision to cast my vote in favour of allowing the appeal and overturning the decision and orders of the court below. I must say however, that the culpability and roles played by the two original defendants should be distinguished. While I might decide that the 2nd defendant, ie+. the seller, might have a few questions to answer concerning the date of manufacture of the goods, their quality and issues of that nature, the same may not apply to the appellant in this case.

In this judgment, I have been conscious of limitations upon an appellate court in considering an appeal, more particularly, that the appellate court may not set aside findings of fact of the trial court unless those findings are clearly erroneous. We owe a duty to decide whether the trial court applied proper legal standards and whether there was reasonable support for its evaluation of factual questions. To this extent, the trial court's legal conclusions become subject to broad review, and will, in this appeal, be reversed as they are found to be incorrect. Appeal will accordingly be allowed.

G.M. QUAYE
JUSTICE OF APPEAL

I agree.

B.T. ARYEETEY
JUSTICE OF APPEAL

I also agree.

H. ABBAN [MRS.]
JUSTICE OF APPEAL

COUNSE - MR. K.K. SEY FOR THE PLAINTIFF/RESPONDENT [PRESENT]
MR. DABI FOR THE 1ST DEFENDANT/APPELLANT [PRESENT]

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