IN THE FIJI COURT OF APPEAL

Civil Appeal No. 82/85

BETWEEN:

MARIAPPAN MUDILIAR

Appellant

A N D

FIJI SUGAR CORPORATION

Respondent

J.R. Reddy for Appellant
B. Sweetman for Respondent

Date of Hearing: 13th March, 1986.

Delivery of Judgment: 21st March, 1986.

JUDGMENT OF THE COURT

O'Regan, J.A.

In April 1983, the appellant commenced an action in the Magistrate's Court claiming a refund of $152 deducted from moneys payable to him by the respondent, for roguing charges in the years 1975 to 1982 inclusive. He averred that there is no provision in the contract current over that period which authorises the respondent to make such deductions. In its defence, the respondent denied that averment and asserted that such authority is given by clauses 4 (c) and 17 (a) (1) of the contract.

In a reserved judgment delivered on 13th October 1983 the learned Magistrate found in favour of the appellant and entered judgment in his favour in respect of the deductions made in some of the years in respect of which the claim was made.

Against that determination the respondent successfully appealed to the Supreme Court. The appellant then appealed to this court.

Before we consider the grounds of appeal we find it necessary to refer to the pleadings. In the Magistrate's Court the respondent set up by way of defence the terms of the contract then subsisting between the parties. In its appeal to the Supreme Court, the respondent claimed that the magistrate had erred in not implying a term in the contract giving effect "to a long standing practice in the sugar industry, established for over 20 years ....that every grower bears a porportionate share of the roguing costs regardless of whether or not his farm is rogued in any particular year".

It so happened that despite the absence of a pleading requiring him so to do, the magistrate fully considered the question of implying such a term but in the end, for the reasons set forth in his judgment, declined to do so. And, indeed the topic was fully convassed in the written submissions made by the appellant. No submissions were made by the respondent. It is manifest from the tenor of the appellant's submission and the judgment of the magistrate that, the state of the pleadings notwithstanding, the topic was a live issue at the trial.

During the hearing of the appeal in the Supreme Court, Mr. Sweetman, no doubt with the objective of regularizing the matters, applied for and was granted leave to amend the respondent's statement of defence. The text of the amendment is not in the record but it is agreed by counsel that it was to the effect that it was an implied term of the contract "that the cost of roguing be apportioned between all growers based on the mill on their approved harvest quotas".

The first ground of the appeal to this court is:

> "that the learned Judge erred in law in holding that a term could be implied by practice or usage to apportion the total cost

> of roguing amongst the cane growers in view of the fact that the respondent neither set up nor relied on such practice before the magistrate".

On its face this ground of appeal is narrowed to the issue as to whether or not the practice had been set up or relied upon by the respondent before the magistrate. We have already expressed the view that it was, and strictly speaking that would be the end of the matter. However, the general issue contained in the ground of appeal was argued before us and we propose to deal with the grounds as if the words "in view.... before the magistrate" were deleted from it. Indeed, we hold ourselves justified in that approach by the tacit and implicit consent of the parties.

Two of the other four grounds relate to alleged errors of law by the magistrate and the remaining two are in reality heads of argument in support of ground 1.

What is involved in roguing was the subject of evidence before the magistrate from Mr. Krishna Murti, Research Manager of the respondent's research department in Lautoka. He had this to say"

> "Roguing is a process whereby employees go into the fields and physically examine the plants. If they find any disease they dig the plants out, practice has been going on since I know. Under normal circumstances, they inspect farms which have a history of diseases. Apart from that we have 3 to 5 year cycles of checking farms. If find no disease for 3 consecutive years, we would leave that farm for 3 to 5 years. Have records about roguing".
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> "We, F.S.C. carry out operation. Have a a team of people called roguers - at present 12 in Lautoka. They go out on assignment. At the end of season, work out cost of roguing. Each farm has farm harvest quota that mills quote. Amount is then calculated by a set formula. Cost is applied to every farm regardless whether roguing or not".

The current contract between the appellant and the respondent came into operation on 21 April 1980 and enures until 31st March 1990, unless earlier determined by means provided therein. Its terms relating to roguing are to be found in clause 4 (c) and 17 (a) (1).

Clause 4 (c) provides:

> "The grower shall:
>
> a) .....
>
> b) .....
>
> c) co-operate with F.S.C. in finding, removing and destroying diseased cane (roguing) and unapproved varieties".

Clause 17 (a) (1) provides:

> "the F.S.C. shall be entitled to deduct from any payment:-
>
> 1) all deductions for burnt cane and the costs of removal and destruction of cane under clause 4 (c)".

The learned magistrate found that these provisions did not authorize deduction from the payments due to the appellant when in fact no roguing had been done on his land and they did not make provision whereby appellant could be charged any proportion of the costs or roguing on all the farms rogued in the mill area. Dealing with these matters, the learned Judge said:

> "a very strict interpretation of these two provisions, as with the Denning contract, would perhaps lead to the conclusion reached by the learned magistrate that deductions should be only in respect of work done on the farm itself".

We agree with the learned magistrate. In our view, taking the words of the clauses in their ordinary meaning, they admit of no other construction.

The contract which preceded the current contract was what is known as the "Denning Contract". It was in force from 22nd April 1970 to 31st March 1980.

The Denning contract was preceded by the"Eve Contract". The record does not disclose the beginning of the period it was in operation. A signed specimen of that contract dated 23rd February 1962 was exhibited. It accordingly was in existence on that date. Its operation ceased on 31st March 1970.

It is convenient for us to deal first with the provisions of the Eve Contract as to roguing. By clause 4 (b) (ii) of that contract it was provided:

> "The millers shall:
>
> i) .....
>
> ii) organise and control the removal and destruction of diseased cane (roguing). The cost of finding, removing and destroying shall be apportioned between all growers based on the mill on their approved farm harvest quotas. All other costs relative to control of cane disease shall be borne by the millers. The millers shall publish annually a statement of their roguing operations and of the roguing costs".

This provision clearly imposed an obligation on each grower to pay a proportion of the total cost of the roguing operations controlled by the millers, and liability attached whether or not his crop had been inspected and treated or inspected only.

The "Eve" provision was not included in the Denning contract. The relevant clauses in that contract are clauses 4 (c) and 18 (c). Clause 4 (c) provides:

> "The grower shall:
>
> a) .....
>
> b) .....

c) co-operate with the millers in finding, removing and destroying diseased cane (roguing)".

and Clause 18, so far as it is relevant, provides:

"The millers shall be entitled to deduct from any payment:-

a) all deductions for burnt cane;

b) the amount of any advances under clause 13 hereof;

c) any other debts due and payable by the grower to the miller.

The term which, by the amended pleading allowed during the hearing of the appeal in the Supreme Court, the respondent sought to have implied in the existing contract accords with the relevant provisions of the Eve contract. The defendant did not adduce any evidence as to the situation as to roguing in operation prior to the commencement of the Eve contract, accordingly neither of the courts below nor this court has any information as to whether the rights and duties of the growers and the millers were then governed by contract or by custom. And more importantly, as far as the present case is concerned there was no evidence that custom either wholly or partly governed such rights and duties.

It follows that for present purposes it must be taken that such rights and duties during the currency of the Eve contract were governed solely by contract.

Mr. Reddy submitted that neither the Denning contract nor the current agreements leave any room for the implication of a term based on custom or usage. Dealing with the same submission in the Supreme Court the learned Judge said:

"what is clear from the authorities which the magistrate considered, is that an implied term will not be incorporated into a contract where it would be contrary to the express terms

> of the contract. Similarly where an alleged custom is contrary to the express terms of a contract, then the express terms will not permit the inclusion of the custom or usage of an implied term. Express terms will always prevail".

and later in the judgment:

> "perhaps it could be argued that because the express terms of the Eve contract recognising the apportionment of roguing charges were dropped in the Denning Contract, that indicates an intention to exclude with apportionment".

The Judge then turned to the Denning report which preceded the adoption of the Denning contract. The report was not in evidence at the trial of the action and neither counsel had at any stage of proceedings sought to have it read as an aid to construction of the contract.

The Judge said:

> "That there was no such intention can be seen from a perusal of the Denning report. Lord Denning clearly recognised Central Control of roguing and in paragraph 166 he refers to millers and growers continuing to bear the costs that they had hitherto borne. That the final contract did not spell out in detail the apportionment of costs can only be because it was considered an integral part of the recognised practice or custom. To have altered or ousted the practice and custom would have required clear terms expressing or implying a contrary intention much more contrary than those used in the Denning Contract".

Mr. Reddy submitted to us that recourse to the report was not, in the circumstances permissible. Mr. Sweetman advanced the contrary submission but was unable to refer us to an authority which authorised the course taken. The Evidence Act and the Interpretation Act are silent on the topic and we

ourselves have not, in the time available to us been able to find any authority which allows such a course.

If resort could be had to the report it would have been only for the purpose of assisting in the interpretation of it. Here the learned Judge has in effect extracted a passage and used it to vary or supplement the existing terms of the contract. Clearly, public documents cannot be used for such a purpose. And we think he erred in concluding that what was stated in the report and omitted from the contract was so omitted "because it was considered an integral part of the recognised practice and custom". At the time the report was written and at the time the contract was made, there was, as far as the evidence in this case discloses, no recognised practice and custom. What is now sought to be made a term by virtue of inveterate custom was at that time no more than a specific term of the Eve Contract. In our view the only construction open on the facts is that the omission of the term as to the sharing of costs and as to the method of computation of them was done either intentionally or by mistake.

During the currency of the Denning Contract and of that part of the term of the current contract which has elapsed, the growers have continued to acquiesce in the payment of their shares of the costs of roguing as ordained in the Eve Contract and this, notwithstanding the clear terms of the two contracts in force during those periods. In our view this could well indicate a course of dealing over the period of some 13 years which has for the generality of growers legal consequences. In Amalgamated Investments & Property Co. Ltd. v. Texas Commerce International Bank Ltd.(1981) 3 ALL ER 577 Lord Denning M.R. said:

> "although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations".

And after citing examples, His Lordship went on to say:

> "If parties to a contract by their course of dealing, put a particular interpretation

> on terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it to say that they have by their course of dealing, put their own interpretation on their contract and cannot be allowed to go back on it.
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> To use the phrase of Lantham C.J. and Dixon J. in the Australian High Court in Grundt v. Great Boulder Pty Gold Mines Ltd. (1937) 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them and are bound by it. I care not whether this put as an agreed variation of the contract or as species of estoppee. They are bound by the convention on which they conducted their affairs".

We have said that the foregoing could well apply to the generality of growers. But what of the appellant? He testified that he had been objecting to the method of levying and calculating the roguing expenses since the Eve inquiry and has since complained to agents of the respondent about the deductions being made. Whilst he is obviously bound by his contract, he did not enjoy the usual freedom of the citizen in entering into it. It is "a contract of general application" within the meaning of S. 2(2) of the Sugar Industry Act, Cap 206 which provides:

> "where the millers and at least two thirds of the growers have entered into contracts, in the same terms but for the amount of cane specified, and the method of delivery to the millers for the cultivation sale and delivery and manufacture and sale of sugar by the millers, such a contract shall be of general application".

As to his position, the learned magistrate said:

> "It can not be seriously disputed that if Mr. Mudaliar wanted to continue as a cane farmer, he had to sign this contract. He had no choice. To this extent the ordinary laws of contract can not apply in this case. It is clear that he took no part in negotiating the cane contract. It is equally clear that for a number of years now, he has not been happy about one aspect of the cane contract, namely; roguing".

In all these circumstances we are not disposed to conclude that the appellant by his acts and conduct in the matter has brought himself within the prescription of the passsage we have just cited. And, accordingly, we allow his appeal. The respondent is ordered to pay the appellant's costs which, if not agreed upon, are to be taxed.

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Judge of Appeal

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Judge of Appeal

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