

IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0003 OF 1994S
(High Court Civil Appeal No. 6 of 1993)

BETWEEN

THE FIJI SUGAR CORPORATION LIMITED

APPELLANT

-and-

SOHAN LAL

RESPONDENT

Mr. B. N. Sweetman for the Appellant
Mr. D. Thorley and Mr. J. Prakash for the Respondent

Date and Place of Hearing : 18th November, 1994, Suva
Date of Delivery of Judgment : 25th November, 1994

JUDGMENT OF THE COURT

This is an appeal from the decision of Scott J. who upheld an award of the Sugar Industry Tribunal of 6 May 1993.

In the High Court there was an agreed statement of facts and it is convenient to set out here the Judge's summary of those facts:

"On 10 September 1992 at about 1pm some 60 tons of sugar cane were burnt on the Respondent's farm. On the morning of 17 September 1992 the last load of the burnt cane arrived by lorry at the Rarawai Mill. At 11.05am the Mill Chemist advised the lorry driver that the cane was approved for weighing and unloading; this was to begin shortly after midday just before the resumption of crushing at 1pm. At about midday there was an electrical power failure and the weighbridge was put out of action. By the time the weighbridge had been repaired 1pm had passed. An official of the Appellant advised the driver of the lorry

that 7 days having now elapsed since the cane was burnt it would be rejected."

The rejection of the cane became the subject of a dispute which was referred to the Tribunal under the terms of the Sugar Industry Master Award 1989 (GN 1920/89) as amended by the Sugar Industry Master Award (Amendment) Regulations 1990 (GN 1080/90).

The Tribunal found that the Appellant had a duty to exercise a discretion under Regulation 15.7 of the Master Award as to whether the cane should be rejected or not, but had failed to exercise that discretion. It accordingly held that the Respondent should be compensated for the cane rejected.

On appeal from that decision Scott J. held that the matter required to be determined not under Regulation 15.7 but under Regulations 6.2 and 10.4. He then arrived at the same conclusion as the Tribunal but for different reasons, and dismissed the appeal.

The Notice of Appeal sets out 4 grounds of appeal, namely:

1. *The learned Judge should have held that the Tribunal erred in law in holding that the Appellant breached Regulation 15.7 of the Master Award.*
2. *The learned Judge should have held that the Tribunal erred in law in ordering the Appellant to compensate the Respondent for the rejection of 15 tons of burnt cane pursuant to Regulations 15.5 and 15.6 of the Master Award.*

3. The learned Judge erred in fact and in law in holding that the cane in question was delivered to the Appellant within seven days of burning as required by Regulation 6.2 of the Master Award.
4. The learned Judge erred in law in holding that delivery of road cane in terms of Regulations 6.2 and 10.4 of the Master Award was complete prior to delivery of cane into the cane carrier at the Mill."

It is first necessary to set out the provisions of the Master Award (as amended) which may have relevance for the purposes of this Judgment:

- "6.2. A gang shall not deliver to the Corporation cane from a farm which -
- (iii) was burnt more than seven days previously.
- 6.5. Notwithstanding the fact that the Corporation may have accepted cane, or that the ownership thereof has passed to the Corporation, it may reject it -
- (a) if it subsequently discovers that the cane -
 - (i) was delivered to the Corporation contrary to Regulation 6.1 or 6.2; or
 - (ii) has a juice purity of less than 70%.
- 10.4. Each gang shall -
- (b) deliver cane to the mill on the day programmed; and
 - (c) deliver cane into the cane carrier at the relevant mill in accordance with the Corporation's directions.

10.5 After the Corporation has weighed any cane, it shall immediately give one copy of the delivery slip...to the driver of the lorry which delivered the cane, completed to show the weight of the cane.

12.1. The Corporation shall -

- (a) maintain at each mill accurate weighbridge and other auxiliary equipment to record the weight of cane delivered to the mill; and
- (b) As soon as reasonably possible on receipt of cane at a mill, weigh the cane to be crushed in a manner that gives its correct weight; and
- (c) as soon as cane has been weighed at a mill, complete the delivery slip.

15.7. Notwithstanding the provisions of Regulation 15.8 all cane delivered to the Corporation more than seven days after burning may be rejected.

15.8. Without prejudice to Regulation 6.2 and for the purpose of ascertaining the basic price payable for burnt cane, in calculating the hours from burning to delivery and acceptance, the day the cane was burnt shall be ignored irrespective of the time that day the burning occurred and time shall run from the commencement of the following day."

The basis upon which the Tribunal dealt with the matter forms the subject of grounds 1 and 2. Scott J's different approach is reflected in grounds 3 and 4. Counsel addressed us on both aspects. It is convenient to deal with the latter first, and we deal with grounds 3 and 4 together.

Compliance with Regulations 6.2 and 10.4

The real question under these Regulations and the approach adopted by Scott J depended on the interpretation to be given to the expression "deliver" or "delivery".

On behalf of the appellant it was argued that delivery could not be said to have been effected until the cane had been weighed and deposited in the carrier. The converse argument for the respondent was that the concept of delivery simply involved the arrival of the cane at the mill notwithstanding that additional procedures were required before the cane reached the carrier. It was, of course, the latter argument which was accepted by Scott J although this was apparently not a matter which had been canvassed before the Tribunal.

The way in which the appellant's case was presented before us caused us some concern because it proceeded upon an explanation by counsel as to the way in which burnt cane is handled at the mill. This necessarily involved statements of fact from the bar, and our concern was as to whether those statements correctly represented the practice applying to all the Corporation's mills, and as known to and accepted by both the growers and the Corporation. We should hasten to say that we accept without question that counsel's explanation was given in the utmost good faith and represented his genuine understanding of the procedure, but we needed to be assured that it was agreed to by the respondent. We accordingly asked counsel to provide

us, if they could, with an agreed statement of facts covering these matters. We realise that all those who were involved before the Tribunal, and the Tribunal itself, will have been so familiar with the operations of the industry that it will not have occurred to them to ensure that evidence was given of these matters.

We have received the agreed statement of facts referred to and are grateful to counsel for having provided this quickly and in clear terms. Having had time to consider the matter since we requested the statement, and for the reasons we are about to give, we do not after all find it necessary to base our decision on that statement.

In the result, the appellant's case was presented upon the basis that the procedures followed in the industry are so clear and well known that the Master Award must be interpreted in such a way as to give effect to that knowledge. We have felt unable to accept that approach and consider our only proper course is to construe the Master Award by the application of the normal principles of construction. The first of these is that the words of the document must, if possible, be given their natural and ordinary meaning. This is where we have encountered considerable difficulty.

The expressions "deliver" and "delivery" are not defined in the Master Award. Giving the various Regulations their normal meanings there is considerable support for the conclusion that

the obligation on the grower is to transport the cane to the mill at some point (which may differ according to the circumstances) when it is available to the mill staff. In the present case, that could be said to have been when the chemist was able to and did conduct a test of the cane. While the point of delivery on this basis may be somewhat imprecise, it would certainly be substantially before the cane reached the carrier. We should observe that it would have been a simple matter for the Master Award to have spelled out what was intended as the point of delivery. The sheer inequity of a construction which means that a grower, whose cane has reached the mill within the prescribed time but which is then prevented from reaching the weighbridge and the carrier within that time because of a breakdown in the mill machinery, having that cane rejected would suggest that the drafters of the Master Award could never have intended such a result.

It is because of the uncertainty which the absence of a definition has caused that we have thought it better to decide this appeal upon a basis different from that adopted by the Judge. We should add that we are not prepared to say that the Judge was wrong, but we are told that this case has raised a matter of considerable importance to the industry. This case involves only one set of circumstances but of course there may be many others. We do not think this case is an appropriate one for a definitive finding on the question of delivery when such a finding may not properly apply in quite different circumstances. We think it better that the uncertainty be determined for the

future by all those involved in the industry by means of an appropriate amendment to the Master Award.

We accordingly turn now to grounds 1 and 2 of the Notice of Appeal.

Breach of Regulation 15.7

In its Award the Tribunal found that "the Corporation breached Regulation 15.7 by failing to exercise the discretion conferred on it by that provision on the mistaken basis that the provision was couched in mandatory terms..." and consequently, ordered payment of compensation.

Three matters arise for determination in respect of that finding:-

1. Whether Regulation 15.7 required the exercise of a discretion by the Corporation.
2. If it did, whether that discretion was exercised.
3. If it was not, whether this amounted to a breach of the Master Award so as to justify an order for compensation.

We deal with these in turn:-

1. **Discretion**

It is plain that the words of Regulation 15.7 are in a form which is customarily regarded as permissive rather than

mandatory.

On behalf of the appellant considerable stress was placed upon the provisions of Regulation 6.2 and the observation of Scott J, namely:-

"Cane offered in breach of Regulation 6.2 must in my view be rejected since it is not eligible to be offered for acceptance."

It was argued by Mr. Sweetman that this was the heart of the matter and required that Regulation 15.7 must be regarded as mandatory. We do not think that is correct.

While it appears that Regulation 6.2, read on its own, is in mandatory terms it cannot properly be read in isolation. Later in the same Regulation, namely 6.5, there is an acknowledgment that cane burnt more than seven days previously may nonetheless be capable of acceptance by the Corporation. We have set out previously the relevant parts of Regulation 6.5, but, because of its importance to the present topic, we repeat it:-

"6.5 Notwithstanding the fact that the Corporation may have accepted cane, or that the ownership thereof has passed to the Corporation, it may reject it-

(a) if it subsequently, discovers that the cane-

- (i) was delivered to the Corporation contrary to Regulation 6.1 or 6.2; or
- (ii) has a juice purity of less than 70%."

Not only is this Regulation expressed in permissive terms, but it expressly contemplates that the Corporation has the right to retain possession and ownership of cane delivered contrary to Regulation 6.2. If the Judge's observation set out above was correct then Regulation 6.5 could have no meaning.

We conclude that, just as Regulation 6.5 confers on the Corporation a discretion, so also does Regulation 15.7. Both those Regulations deal with the same subject, both are expressed in permissive language, and like Regulation 6.5, Regulation 15.7 should be construed as conferring a discretion.

We therefore agree with the finding of the Tribunal that Regulation 15.7 conferred a discretion on the Corporation.

2. Exercise of Discretion

There can be no doubt that the Corporation did not purport to exercise any discretion and this much was conceded.

The way in which the discretion may have been exercised would have been a matter for the Corporation having regard to all the circumstances. In view of what occurred, namely the arrival of the cane at the mill about two hours before the expiry of the seven days, and the power failure which caused the delay, it is difficult to think that the exercise of the discretion by rejecting the cane could have been regarded as anything but altogether unreasonable, and so the result would presumably have

been in conformity with the Tribunal's decision. We do not, however, have to express a concluded view on that.

3. Breach of the Master Award

It was conceded for the appellant that, if there was a failure to exercise discretion, that would amount to a breach of the Master Award. We are sure that concession was properly made.

In the result, we consider that the Award of the Tribunal was correct. This Court in a civil appeal has the same power as the High Court (s.13 of Court of Appeal Act, Cap.12) and accordingly is able to affirm the Award of the Tribunal, notwithstanding that the basis for doing so differs from that of the High Court.

The appeal is dismissed with costs.

Moti Tikaram

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Sir Moti Tikaram
President Fiji Court of Appeal

Peter Quilliam

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Sir Peter Quilliam
Judge of Appeal

I. R. Thompson

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Mr. Justice Ian R. Thompson
Judge of Appeal