Vaioleti v Cross & The Commodities Board

Supreme Court, Nuku'alofa
Webster J.
Civil case No. 20/1989

6, 7 and 15 June 1990

Contract – formation of contract – unilateral contract
Contract – terms – implication of terms
Contract – damages for breach of contract to hold prize draw
Contract – specific performance – refused for prize draw

The Board advertised a prize draw for which only its employees who were not late or absent during a specified period were qualified. The prize draw was cancelled by the Board because it considered that none of its employees had qualified. The plaintiff brought proceedings to compel the Board to hold the prize draw or pay damages for failure to do so.

HELD:

(1) The advertisement to hold a prize draw constituted an offer which was accepted by the plaintiff when she began working during the stipulated period;
(2) Terms were to be implied into the contract allowing for absence if a relief was provided;
(3) The plaintiff qualified in accordance with the express and implied terms of the contract;
(4) Specific performance of the contract was not appropriate, especially since 18 months had elapsed since the scheduled date of the prize draw;
(5) Damages should be calculated having regard to the fact that three other employees were also shown to have qualified.

Cases considered:
Carlill v Carbolic Smoke Ball Co. (1891 – 4) All E. R. Rep. 127.
Hutton v Warren (1835 – 42) All E. R. Rep. 151

Counsel for plaintiff : Mr S. 'Etika
Counsel for defendant : Mr M. Paasi

Judgment

Preliminary

In this case the Plaintiff Mrs 'Alisi Vaioleti sues the Defendants Collin Cross, former Manager of the Desiccated Coconut Factory run by the Tonga Commodities Board, and the Board itself for breach of contract. She claims that the Board failed to hold a raffle for employees at the Factory as advertised in the Tonga Chronicle and therefore claims damages of $6,500 or alternatively an order for specific performance.

The Defendants deny the claims and contend that employees were informed through their foremen that no employee had met the conditions for the raffle.

Evidence

The Court heard evidence for the Plaintiff from herself and Mele Fau'ulua, another worker at the Factory; and for the Defendants from Tevita Tapavalu, Secretary of the Board, Vaiongo Pelesikoti, record keeper at the Factory, and Folola Ma'u, a leading hand at the Factory. I found the Plaintiff to be a credible witness, although she was a little deaf.

The Basic facts

The Board were operating the Desiccated Coconut Factory at Haveluloto but in 1988 had major problems due to low production. In order to improve production and encourage better attendance by workers they decided to hold a raffle, or more accurately a prize draw. To make it attractive they arranged good prizes from the Australian High Commission and companies involved with their products. The first prize was return air tickets for a family of 4 to Australia or New Zealand and there were other prizes of television and video sets, a washing machine and bicycle. They advertised the prize draw on Radio Tonga and in the Tonga Chronicle several times in May 1988.

The qualifications for entering the raffle given in the advertisement were very simple. A worker had to be employed at the Desiccated Coconut Factory from 30th May right up to the Christmas break in 1988. He or she must not be absent or late on any working day during that time.

Mrs Vaioleti determined that she would qualify for the prize draw. Her home was at Vaini, so each week on a Sunday evening she came in to the Factory, ready to start peeling coconuts when work started at midnight. The Factory worked continuously in 3 shifts from Sunday midnight till Friday or sometimes Saturday. When Mrs Vaioleti finished her peeling shift, she carried on with another shift as a daily labourer, then she rested at the Factory ready for the next day. Sometimes she did overtime as well. She did not go home again until the weekend. She kept this up for 7 months, more often than not doing double shifts, so great was her determination to qualify. She said she was never absent or late.

But one day her father's brother died and she had to go to his funeral according to Tongan custom. The Board said she was absent on 21st September. She said she arranged a relief or swop who did her shift on the day of the funeral: in return she did that person's shift. She was not certain it was 21st September. She said she notified the foreman in accordance with Factory procedure, but the Board said that while this had been the procedure, it was suspended during the period of the

prize draw. She said she did not call what she did missing work, but the Board disagreed. Even although Mrs Vaioleti worked 6 shifts that week, the Board still said she was disqualified. However a worker who was off sick would still qualify if he or she produced a medical certificate.

When Christmas came the Board cancelled the prize draw as they said nobody had qualified. Mrs Vaioleti said she and two others, Kuma and Pila, had qualified. She said the Board did not announce that the draw was cancelled. Although that is not a matter of importance in this case, the Board said they told their foremen and leading hands, who were to tell the workers. It is possible that Mrs Vaioleti was not told. It is also possible that she was informed but didn't hear or understand because of her deafness. Anyway she raised this action seeking satisfaction.

The law applied to the basic facts

Applying the law to these basic facts, the advertisement by the Board was an offer which the Plaintiff accepted when she started working at the Factory on 30th May. So a unilateral contract was formed. This case is very similar to the leading case of *Carlill v Carbolic Smoke Ball Co (1892) (1891 – 4) ALL E.R. Rep 127.* In this case the contract to hold the prize draw for those qualifying was subsidiary or collateral to the Plaintiff's contract of employment. The express terms of the contract were those in the advertisement –

> "that entries would be restricted to employees who would not be absent or late in any of the working days as from the 30th May to the beginning of the Christmas holidays"

but it also became clear in the evidence of the Defendants' witnesses either that these express terms were interpreted generously and not rigidly or that there was at least one supplementary implied term. Defendants' Counsel Mr Paasi conceded that the terms of the contract were not all included in the advertisement. A worker who was off sick would still qualify on production of a medical certificate, even although he or she was not contributing to the aim of increasing production. But according to Vaiongo Pelesikoti if workers were excused work for other reasons that disqualified them from the prize draw, as did reliefs or swopping shifts.

The Court can imply other terms into a contract in accordance with custom in which known usages have been established and prevailed – the principle is that the parties did not mean the whole of the contract to be expressed in writing, but to contract with reference to known usages. *(Hutton v Warren (1836)(1835-42) ALL E.R. Rep. 151; Chitty on Contracts (26th Ed) para. 917).* Similarly terms may be implied from a previous course of dealing *(Chitty para. 919).*

Here it was admitted that other terms were implied in the contract, such as absence not counting in the prize draw if a medical certificate was produced, in accordance with the practice of the Board. It was also agreed by the witnesses that the Board permitted a practice of swopping shifts or allowing absence if a relief was provided. Mrs Vaioleti said that procedure was still allowed but Tevita Tapavalu and Vaiongo Pelesikoti said it had been suspended or stopped. On the balance of probabilities I accept what Mrs Vaioleti says for three reasons. Firstly, it would have been unreasonable of the Board to refuse other necessary absences while still allowing absences for sickness - otherwise workers could just have gone to the doctor

with a headache or a stomachache when they needed a medical certificate: it would also have been unreasonable in Tonga to refuse an absence for the funeral of a very close relative. Secondly, it was in the Board's own interest to allow reasonable absence with a relief as this interrupted the production of the Factory far less than either absence without a relief or absence for sickness. Thirdly, even if the Board did suspend the practice of reliefs or swops, Mrs Vaioleti clearly did not know that this had been done - it is most unlikely, given her single minded determination to qualify for the prize draw, that she would have disqualified herself in this way if she had known that reliefs or swops had been stopped.

There was therefore a further implied term in the contract for the prize draw that absences where a relief was provided would not disqualify a worker. I accept Mrs Vaioleti's evidence that she obtained a relief when she went to her uncle's funeral, and so she was not disqualified.

But even if I am wrong in that view, there are other reasons why Mrs Vaioleti should not be disqualified. In the week in question, the Time Sheets produced by the Board show that, in all, she did 6 shifts with at least 44 if not 48 hours work, whereas if she had done the required 5 days work to qualify in the normal way she need only have done 40 hours work. The Board witnesses Tevita Tapavalu and Vaiongo Pelesikoti said that what was important to the Board was that each worker did his or her assigned shift each day, but given the main purpose of the prize draw of improving production I cannot accept that it was reasonable for the Board to interpret the terms so as to disqualify Mrs Vaioleti in these circumstances. Such a strict interpretation of the contract for the prize draw would be quite unreasonable as Mrs Vaioleti had in fact done very much more work than was required, rather than less, not only in the week in question but consistently throughout the period.

It was also not established to the satisfaction of the Court that Mrs Vaioleti was absent on 21st September. She was not certain of that date. The Defendants produced to the Court Mrs Vaioleti's Time Sheet for that week, with no entry for 21st. But they also produced as exhibits sheets with monthly summaries of Mrs Vaioleti's attendance, which Vaiongo Pelesikoti had prepared for the Manager. The original of the September sheet was not available but no objection was raised to a photocopy. Against that week there were the following written comments –

"O.K.!
4 days
(21st/9 - D/L)
but on D/L record"

D/L meant the daily labour shift and Vaiongo said somebody else had written these comments. With no other explanations being offered, these comments indicate to the Court that Mrs Vaioleti did work on 21st September and further that someone at the Factory considered she was therefore duly qualified and so wrote "OK!". The Court cannot therefore find on the balance of probabilities that Mrs Vaioleti was absent on 21st September.

There is a further aspect of procedure about this. The only indication of this ground of defence by the Defendants was the words in Paragraph 5 of the Statement

of Defence that "nobody met the requirements as advertised". There was no mention of 21st September to give the Plaintiff due notice that it was Mrs Vaioleti's alleged absence on this day that disqualified her. The first the Plaintiff knew of this allegation was at the trial. Even in the course of the discovery of documents Counsel for the Plaintiff Mr 'Etika had not seen any of those actually produced by the Defendant as exhibits: he said that all he was shown on inspection were large pay sheets which did not reveal anything and were not actually exhibited at the trial. While Mr 'Etika did not at the time object to evidence about 21st September or to the production of those documents *(Exhibits 2, 3 and 4)*, in his closing submissions he said that the Court should not consider this ground of defence. In light of the history of this case it clearly was not fair of the Defendants to conduct the case in this way and it is very serious indeed that a litigant of the standing of the Board should mislead its opponent, whether deliberately or simply in error. But the evidence was not objected to at the time and was heard by the Court and is relevant to the defence as a whole, so it must be considered by the Court.

Mr Paasi submitted that the Plaintiff had not proved her case, but for all the reasons stated above the Court is satisfied that Mrs Vaioleti was not disqualified from the prize draw. On her own evidence she was fully qualified as having met the 2 principal conditions.

However there was some confusion over which draws Mrs Vaioleti qualified to take part in. She believed that, of the 3 workers who qualified, she and she only as a daily labourer was entitled to take part in the main prize draw. She said the other two, Kuma and Pila, were huskers or deshellers and only entitled to take part in the special draw for their section with a single prize of a coloured television set and a video. On this aspect of the interpretation of the advertisement I believe the Plaintiff was confused.

It is very clear from the advertisement that there is to be one major prize draw for all workers at the Factory, plus an additional special draw with the same conditions for the coconut huskers, deshellers and kernel peelers. The main draw is advertised for the workers without restricting who that means, so it means all workers. This is consistent with the value and number of the prizes. The prize for the special draw is obviously offered as an additional incentive for the 3 special categories of workers, but as it is less valuable than the main prize of air tickets it clearly would not have been fair to exclude these workers from the main raffle because of this.

So all three, Mrs Vaioleti, Kuma and Pila, were on Mrs Vaioleti's evidence qualified to enter the main prize draw and also the special draw, as each was a husker, desheller or kernel peeler. There was no evidence that any other workers over and above those three were qualified for the prize draws.

Specific performance

Mr 'Etika requested an order against the Board for specific performance to hold the prize draws. This is an equitable remedy in the discretion of the Court and I am not satisfied that it would be appropriate in this case, especially after this lapse of time.

Damages

The Court therefore has to consider what damages should be awarded to the Plaintiff for the Defendants' breach of contract. The damages are measured by what the contract breaker (i.e. the Board) ought to have foreseen when the contract was made as being not unlikely or liable to result from the breach *(Halsbury's Laws (4th Ed) Vol. 12 para. 1174)*.

What the Board should have foreseen is that a worker such as the Plaintiff would lose her chance of winning the first or any prizes in the prize draws. In the absence of any other evidence about her probability of winning, but accepting the Plaintiff's evidence that 3 workers were qualified, I believe that in the main prize draw the quantification of her chances is the greatest of the following -

(a) a one-in-three chance of winning the first prize of return air fares to Australia for 2 adults and 2 children under 12, measured as one-third of the total cost of return fares; or

(b) a one-in-two chance of winning the second prize of the new colour television set and video, measured as one-half of their value; or

(c) the certainty of winning the third prize of the new washing machine, measured as its full value.

So the damages to be awarded to the Plaintiff will depend on the relative values of the first three prizes. As no evidence about this was led at the trial, further evidence will require to be given, including evidence from the Defendant with details of the models intended for the second and third prizes. Perhaps the parties can agree the figures without the Court hearing evidence.

Similarly in the special prize draw the value of the Plaintiff's chance was one-third of the value of the new colour television set and video to be awarded as prize.

Regarding the main prize draw, the Court must make it clear that even if the Plaintiff had been the only worker qualified for the draw, her claim to get all the prizes could not be upheld. The principle of such a prize draw is that a participant's name goes into the draw once only and if one prize is gained that person does not take part further in that draw. So even at the very best the Plaintiff would have been entitled to the first prize only.

Summary

The Court therefore grants judgment to the Plaintiff against the Defendants for an amount to be determined in accordance with this decision.

Costs

The Plaintiff asked for costs and in all the circumstances there is no reason why costs should not be awarded against the Defendants. The Court will order accordingly.