Case Note: Vaioleti v Cross & The Commodities Board

VAIOLETI v CROSS & THE COMMODITIES BOARD

[1990] TLR 108
Supreme Court, Nuku'alofa, Tonga

Facts:

The Board advertised a prize draw for which only its employees who were not late or absent during a specified period were eligible for entry. The plaintiff went to work every day but one during the specified period, and on that day she arranged for a replacement to do her shift for her. Further, in the week of her absence the plaintiff did extra shifts herself, completing 44 to 48 hours all together, whereas one shift each day, as required to qualify for the draw, would only have totalled 40 hours. The draw was cancelled by the Board on the basis that none of its employees had qualified.

Claim:

The plaintiff sued Cross, the former manager of the Board's factory, and the Board for breach of contract. She claimed specific performance of the agreement to hold the draw or damages for breach of the agreement to do so.

Outcome:

The plaintiff qualified for the draw and judgment was given in her favour. Specific performance being inappropriate, damages were awarded on the basis of the value of the plaintiff 's lost chance to win a prize. The plaintiff's evidence that two other employees had also qualified to participate in the draw being undisputed, damages in respect of the main draw were calculated as the equivalent of either one-third of the value of the first prize, one-half of the value of the second prize, or one-third of the value of the third prize, which ever was the greater. In addition damages in the sum of one-third of the value of the prize in the special draw were payable. Costs were also awarded against the defendants.

Legal Principles:

Ratio Decidendi

The advertisement to hold a prize draw constituted an offer that was accepted by the plaintiff when she began working at the beginning of the specified period.

The express terms of the unilateral contract, contained in the advertisement of the draw, were intended to be supplemented by terms implied from known custom and usage (in this case, the usage of allowing an employee to arrange a stand in to replace them during a shift).

The court may refuse to exercise its discretion to grant the equitable remedy of specific performance if a long period of time had elapsed since the events in question.

Damages are measured by what the guilty party ought to have foreseen as the loss liable or not unlikely to result from the breach.

Contract terms must be interpreted in the light of the purpose that the parties were attempting to achieve, which in this case was the improvement of production.

Obiter Dicta

In addition to implying terms from known usages, a court may imply a term from a previous course of dealing.

It is a serious procedural error to mislead an opponent, whether deliberately or by mistake, by failing to

expressly plead a specific fact relied on, such as that the plaintiff was disqualified from entry into the draw by failure to attend work on a particular day.

It is also a serious procedural error to fail to disclose documents relating to a fact to be alleged at trial during discovery.

Failure to object to production of evidence as to facts that have not been pleaded will result in that evidence being considered by the court if it is relevant.

Commentary:

Parol Evidence of Implied Terms

According to the parol evidence rule, extrinsic evidence is not admissible to vary the terms of a written contract. Here, evidence was allowed to show that the written terms of the agreement contained in the advertisement were supplemented by other terms. The court did not explain why the parol evidence rule did not apply. However, one exception to the rule is that evidence of a custom or usage relating to the subject matter of the contract may be adduced (Hutton v Warren (1836) 150 ER 517). Evidence of the custom of allowing employees to arrange their own reliefs or swap shifts was therefore admissible on this basis.

In any event, a contract partly oral and partly in writing, as opposed to wholly in writing, is not governed by the rule. Here, it was conceded by the defendants that not all terms were contained in the advertisement, and His Lordship found clear evidence that the written contract was supplemented by oral terms, such as absence supported by a medical certificate not disqualifying an employee from the draw.

Evidence of custom and usage

In this case Webster J gave the following three reasons why, on the balance of probabilities, he accepted the plaintiff's evidence as to custom and usage at the factory:

It would have been unreasonable for the Board to have allowed absences for sickness but not for other reasons. In particular, it would have been unreasonable in Tonga to refuse an absence for the funeral of a very close relative.

It was in the Board's own interest to allow reasonable absence with a relief as this was less disruptive than absence for sickness without a relief.

If the practice of allowing absence with a relief had been suspended the plaintiff clearly did not know about it.

The first reason is a good example of judicial notice being taken of the circumstances of a particular country. It also demonstrates the importance of ensuring that the judiciary is knowledgeable about social and cultural factors operating in the country in which they are weighing evidence. Such knowledge is also essential in order to be able to properly decide on the applicability of introduced law (introduced law will not apply if there is a local statute on point, Civil Law Act 1966, S3). This is because English common law and equity and English legislation is only to be applied in Tonga 'so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary' (S3 Civil Law Act 1966).

Measure of Damages and Remoteness of Damage

In considering damages, it appears that the learned judge confused the measure of damages with the question of remoteness. It is a fundamental principle that the measure, or monetary assessment, of compensation must be distinguished from the question of remoteness, which is concerned with the kind of damage which the plaintiff is entitled to recover compensation for (Chaplin v Hicks [1911] 2 KB 786 at 797). His Lordship stated that 'damages are measured by what the contract breaker (ie the Board) ought to have foreseen when the contract was made as being not unlikely or liable to result from the breach'. Strictly speaking, forseeability is not the 'measure' of damages in contract. Nor for that matter is it the 'measure' of damages in tort. The measure in contract cases is such sum as is required to put the plaintiff in the position that s/he would have been in if the contract had been performed. In tort, it is such sum as would put the plaintiff in the position that s/he would have been in if the tort had not been committed

Before measuring damages the court must ask the quite distinct question of what kind of damage is the plaintiff entitled to recover, or what kind of damage is not too remote. Again the law of contract and of tort

differ as to the test to determine whether loss is too remote. In contract the loss must be within the reasonable contemplation of both parties at the time the contract was made, in order to be recoverable (The Heron II [1969] 1 AC 350). In tort the test is the more stringent one of reasonable forseeability. In this case it would appear that not only did Webster J confuse the question of measure of damages with that of remoteness, but also he fell into the error of applying the test applicable to remoteness in tort rather than contract. His Lordship indicated that he was considering what the defendants 'ought to have foreseen', whereas he should have been trying to ascertain what they (and the plaintiff) should have reasonably contemplated at the time when the contract is made.

Defining the degree of probability required, when applying the test of reasonable contemplation applicable in contract, has caused the courts some difficulty. The colloquial, but useful phrase 'on the cards' suggested by Asquith LJ in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 was rejected by the House of Lords in The Heron II [1969] 1 AC 350 as imprecise. Unfortunately, no unanimous decision on a suitable substitute was arrived at. In the present case Webster J appears to have favoured 'not unlikely' or 'liable to result'. In fact, in The Heron II, Lords Reid and Hodson appear to have viewed these tests as incompatible. Lord Reid rejected a test of 'liable to result' as too vague, and preferred 'not unlikely' and Lord Hodson disapproved 'likelihood' as conveying 'the impression that the chances are all in favour of the thing happening'.

Calculation of the measure of actionable damage

As stated above, the measure of damages in contract is such sum as is required to put the plaintiff in the position that s/he would have been in if the contract had been performed. In common cases, calculation of this amount can be done by applying specific rules, evolved by the courts. For example, in sale of goods contracts, a buyer who does not receive the goods is entitled to the difference between the contract price and the market price. In the current case no specific rule applies. However, the courts have made clear in cases such as Chaplin v Hicks [1911] 2 KB 786 that the fact that assessment is difficult, and to some extent speculative, is no reason to deprive a plaintiff of damages. The facts of Chaplin v Hicks bear some resemblance to the present case. There, the plaintiff was a candidate in a beauty competition who, after succeeding in earlier heats, was deprived of the opportunity of competing in later stages. This was held to be in breach of contract. She was awarded substantial damages on the basis of the loss of the chance of being successful, of which she was wrongfully deprived.

In this case, the plaintiff had quantified her loss on an expectation basis (as opposed to a reliance basis. See Anglia Television Ltd v Reed [1972] 1 QB 60), claiming all the prizes in the draw, the value of which was presumably $6,500, although this is not clear from the report. Given the accepted evidence for the plaintiff, that two other employees were also qualified to take part in the main draw, the court quantified her loss as the greater of the following:

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

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

The certainty of winning the third prize of the new washing machine, measured at its full value.

Similarly, the plaintiff had a one in three chance of winning the prize in the special draw, and was therefore entitled to one-third of its value.

This would appear to be a fair and reasonable approach to a difficult question of assessment. The court pointed out that even if the plaintiff had been the only person qualified to go into the draw, she would not have been entitled to all the prizes in the main draw as the principle of a prize draw was that a participant's name goes into a draw only once. As soon as a prize is won the winner does not take any further part in the draw.

Intention to Create Legal Relations

A useful device for promoters of competitions is the 'honour clause', which is often inserted into competition forms. Such a clause states clearly that there is no intention to be legally bound. Honour clauses inserted in competition forms were successfully relied on in Jones v Vernon Pools Ltd [1938] 2 All ER 626 and Appleson v Littlewoods Ltd [1939] 1 All ER 464. Insertion of such a clause would have protected the defendants from action in the current case.

Procedure

The defendants failed to give particulars of their defence, merely stating that 'nobody met the requirements as advertised'. At trial they sought to show that this failure was constituted by the plaintiff's failure to be present every day, and called evidence to show that she was not at work on 21 September. The plaintiff raised no objection to this until making closing submissions.

Objection to production of evidence on the grounds of procedural irregularities should be taken when the evidence is called. Such objections cannot be left to be made during closing submissions, as the court will not have the advantage of hearing argument and rule on point, and will have heard the evidence, without objection, it will consider it, if it is relevant.

JENNIFER CORRIN CARE
SENIOR LECTURER
SCHOOL OF LAW
UNIVERSITY OF THE SOUTH PACIFIC