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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.12/84

BETWEEN	QUIRKE EXPORT LIMITED	
	Plaintiff	
A N D	HODDER AND TOLLEY LIMITED	
	First Defendant	
A ND	SGS (NEW ZEALAND) LIMITED	
	Second Defendant	

Hearing: 30 & 31 July, 1 & 2 August 1985

Counsel: D.J.R. Holderness and T.C. Weston for Plaintiff
J.C.A. Thomson for First Defendant
S.P. Bryers for Second Defendant

Judgment: 30 SEP 1985

JUDGMENT OF WILLIAMSON J.

Introduction

Under-sized onions are the subject of this claim. It is alleged by the Plaintiff that a large proportion of a consignment of onions comprising some 6,250 bags and containing 125 metric tonnes were under-sized. That is they were less than 2.25 inches in diameter. These onions had been purchased from the First Defendant and were destined for Taiwan. The demand for onions in Taiwan is principally for onions of greater than 2.5" in diameter. Apparently the size is important because the fast

food shop consumers have their machines set up to handle onions of this size.

Prior to the consignment of onions leaving New Zealand they were inspected by the Second Defendant who then supplied a report as to their condition, size, weight and packing. When the onions arrived in Taiwan the purchaser, Morn Sun & Co. Ltd rejected the shipment. Eventually the onions were resold in Taiwan but at an ultimate loss of NZ$35,007.19.

Pleadings

The Plaintiff has alleged:

a) That the First Defendant was in breach of the provisions of Section 15 of the Sale of Goods Act 1908 in supplying onions which did not correspond with their description in the contract between the parties; and

b) That the First Defendant was in breach of the provisions of Section 16(a) of the Sale of Goods Act 1908 in that it supplied goods that were not fit for the purpose for which they were required.

In reply the First Defendant has denied that the onions were under-sized and further has claimed that it was an express or implied term of the contract between the Plaintiff and the First Defendant that the Plaintiff would satisfy itself as to the

quality and size of the onions prior to the ship's departure from Auckland and for that purpose would obtain an independent certificate that the onions complied with the terms of the contract and that the certificate so issued would be binding between the Plaintiff and the First Defendant.

The Plaintiff has also alleged:

a) That the Second Defendant was in breach of an express or implied term of the contract between them to inspect the consignment and to provide an accurate report upon which the Plaintiff could rely as to the size of the onions being consigned.

b) That the Second Defendant was negligent in:

1. Inspecting the consignment;
2. Reporting to the Plaintiff; and
3. Making a misrepresentation as to the contents of the consignment.

For its part, the Second Defendant has replied denying that the onions were under-sized or indeed that instructions were given to it as to the exact sizes of the onions. The Second Defendant has further relied upon the exclusion or limitation clause in its certificate which states:

"This certificate is issued in pursuance of the principal's instructions. The findings contained in the certificate reflect a statement of opinion made with due care and skill within the limitations of instructions received. The issuance of this certificate does not exonerate buyers or sellers from exercising all their rights and discharging all their liabilities under the contract of sale. Stipulations to the contrary are not binding on us. The Company's responsibility under this Certificate is limited to gross negligence proven by Principals and will in no case be more than ten times fees or commissions."

Pursuant to Rule 99(n) of the Code of Civil Procedure the First Defendant has also given notice that it is entitled to contribution or indemnity from the Second Defendant upon the grounds that the Second Defendant knew or ought to have known that the Plaintiff and the First Defendant would rely upon the certificate which the Second Defendant had contracted to supply to the Plaintiff and that to the detriment of the First Defendant the Second Defendant was negligent in its inspection or in the preparation of the certificate.

Evidence

For the Plaintiff evidence was given by three witnesses: John Edward Cox, Barry Thomas Quirke, and Stavors Anastiosios Kalavos. The narrative of the events that took place was largely contained in the evidence of Messrs Cox and Quirke. This established the following matters.

April 1983: Mr P.T. Shu, the Managing Director of Morn Sun & Co. Ltd Taiwan contacted the plaintiff company concerning the possible supply of onions. Inquiries throughout New Zealand were made by Mr Cox and various offers and counter offers were made for the quantities of onions that were available. It had been made clear by Mr Shu in the initial telexes that he required only large onions. All early telexes dealt with the size of onions which were available. In offers made by him Mr Shu invariably mentioned 2.5 - 3 inch onions and above 3" onions. These negotiations eventually led to a firm offer being made by the Plaintiff to the First Defendant.

7 June 1983: A telex from the Plaintiff to the First Defendant (Exhibit 2/14) confirmed the purchase of approximately 50 metric tonnes of Pukekohe Longkeeper onions sized 2.5" - 3" at NZ$203 per metric tonne F.O.B. Napier, packed in 20 kg net bags and also approximately 50 metric tonnes Pukekohe Longkeeper onions sized 2.25" - 3" at NZ$203 per metric tonne F.O.B. Auckland packed in 20 kg net bags for shipment per Kweilin in ventilated containers. A formal contract in the same terms but on the Plaintiff's standard form (Exhibits 2/15 and 15A) were forwarded on the same day.

9 June 1983: A telex was forwarded on this day to Mr P.T. Shu confirming the purchase of the onions from the First Defendant and the forwarding of the pro forma invoice so that the shipping and customs details could be arranged. This invoice recorded a

total price to Morn Sun & Co. of US$34,125. The costing noted on the invoice contained the following breakdown:

Amount paid to supplier	$25,535.00
Freight	$21,759.68
Postage	$5.00
Certificate fee SGS	$93.75
Total cost	$47,393.43
Credited by bank	$51,306.88
Profit	$3,913.45

15 June 1983: The First Defendant wrote to the Plaintiff confirming the sale of the onions in the following terms:

> "As promised, this is to confirm in writing the sale to yourselves of onions.
>
> (a) Approximately 60 tonnes size 2.5-3" packed 20 kg net bags at $203.00 per tonne FOB Napier.
>
> (b) 50 tonnes size 2.25-3" packed 20 kg net bags at $203.00 per tonne FOB Auckland.
>
> Both lines are being loaded on "Kweilin" V4 in 20 ft containers. These containers will hold somewhere between 700 - 780 bags of onions each. Naturally we will load them to the best advantage.

As discussed, payment terms will be on demand draft based on 7 days after loading of vessel. This sale is also based on New Zealand Phytosanitary Certificate being final. All documents will be completed by yourselves, however, we will send you an AG84, being the record of inspection for the Phytosanitary Certificate by the Ministry of Agriculture & Fisheries. We, of course, will guarantee quantity, etc., however, you were to advise me if you require any independent tallies.

All the above should be in order, and as soon as we have container numbers and all details we will advise you.

Regarding further quantities, we are still working on this at present and will advise as information comes to hand."

16 June 1983: Mr Cox telephoned Mr Kirk of the Second Defendant and requested a survey of the shipment of onions. This was followed by a telex (Exhibit 2/25). During the following days various telexes and telephone calls were made relating to the shipping arrangements, the certificate and letter of credit.

29 June 1983: The Second Defendant issued a certificate concerning this shipment of onions in the following typed terms:

"QUIRKE EXPORT LIMITED

VESSEL: M.V."KWEILIN"V4 FROM: AUCKLAND & NAPIER

COMMODITY: N.Z. EXPORT GRADE ONIONS TO: KEELUNG

SHIPPER: Quirke Export Limited

QUANTITY: 6250 Bags x 20kg Net Weight = 125,00M/T
3000 x 20 kg bags ex Auckland
3250 x 20 kg bags ex Napier

QUALITY: Goods inspected during packing operation. Found to comply in all respects to the quality requirements cited in the Standard Grade for the Export of Onions Notice 1977. Under regulation thirteen (13) of the New Zealand Grown Fruit and Vegetables Regulations 1975. All goods of 1983 Harvest.

SAMPLING: A random selection of the consignment was sampled for sizing during bagging and was found to be within the limitations required by the consignee.

WEIGHING: Check weighing carried out on Government registered scales during bagging operation. Newly bagged goods found to be in excess of stated 20kg Net weight to allow for the 5% moisture loss during storage and transit.

PACKING: Goods loaded in loose weave bags to allow maximum ventilation. Clearly marked with Commodity, Country of Origin and Net weight per bag.

Bags packed into standard 20'ISO shipping containers 4 x 750 ex Auckland, 3 x 800 and 1 x 850 ex Napier."

5 July 1983: Following the receipt of this certificate the Plaintiff telexed Mr Shu in the following terms:

"Onions now loaded Kweilin (V4) ETD NZ 7/7 ETA Keelung 31/7 Will send docs asap - we did have shpmnt surveyed by SGS N their report/cert is excellent in all respects - will send with docs - final nett wt shipped was 65M/T 2.5-3in 60M/T 2.25-3in = total 125M/T"

7 July 1983: The vessel Kweilin left New Zealand with an expected date of arrival in Keelung of 31 July 1983.

3 August 1983: The Kweilin arrived in Keelung in order to discharge the onions. They were then taken to a coolstore at the Chen Fong Freezing Factory.

11 August 1983: Mr P.T. Shu telephoned Mr Quirke to complain about the size of the onions. He was upset because the onions were not what he had ordered and he requested Mr Quirke to make

inquiries and ring back.

12 August 1983: Mr Quirke telephoned Mr P.T. Shu and said that he was unable to understand how the consignment could not be up to standard since he had an SGS certificate as to the size and condition of the onions. He agreed with Mr Shu that a further survey should be carried out at the Plaintiff's expense.

15 August 1983: A telex was sent by Mr P.T. Shu to Mr Quirke setting out the same complaint and asking for an urgent confirmation that SGS in Taiwan could conduct a further survey. Mr Cox then telephoned Mr Kirk, the Manager of the Second Defendant to advise him of the problem which had arisen and to make arrangements for SGS in Taiwan to carry out the further survey.

18 August 1983: SGS Far East Ltd carried out a survey of the shipment of onions taking a sample of 80 bags, i.e. 40 bags from each of the two consignments. In the first lot containing the 2.25-3" onions they found 26% were under-sized and in the second lot, i.e. the 2.5-3" onions they found that 73.54% were under-sized.

Further telexes emphasising the same matters were received by the Plaintiff from Mr Shu on 19 August and 20 August. These telexes stated:

"1) ONIONS - WE SINCERY SUGGEST YOU COME HERE TO SEE AND

LET YOU BELIEVE WHAT KIND OF ONIONS YOU HAD EXPORT TO US, IF POSSIBLE HOPE YOU TAKE BACK AND PAY BACK US COST AND 56 PCT IMP TAX"

A detailed response was then given by way of telex from the Plaintiff to Mr P.T. Shu and dated 20 August 1983. This stated:

"MR QUIRKE WAS IN PHONE CONTACT WITH US TODAY HE COMMENTS AS FOLLOWS

RE ONIONS

1. WE OBTAINED AN OFFER FROM THE GROWER AND SUBSEQUENTLY SOLD ON THE SPECIFIED SIZE.
2. IN ORDER TO SATISFY US THE QUALITY SIZE ETC. WAS UP TO SPECIFICATION WE HAD SGS CERTIFY THE SHIPMENT THEIR REPORT STATED IT WAS FULLY UP TO SPECIFICATION IN ALL RESPECTS
3. UPON ARRIVAL AND YOUR INSPECTION IT SEEMS EVIDENT THE SHIPMENT WAS MISREPRESENTED BY THE SGS REPORT
4. WE DONOT WANT YOU TO THINK WE DO NOT BELIEVE YOU THIS IS NOTTHE CASE WE ARE VERY CONCERNED AND WANT TO RECTIFY THIS SERIOUS PROBLEM
5. OUR SITUATION IS THIS WE HAVE PURCHASED FROM THE GROWER AND HIS DELIVERY HAS BEEN CERTIFIED BY SGS AS BEING UP TO STANDARD. IN ORDER TO GET RECOMPENCE FROM THE GROWER WE WILL MOST PROBABLY HAVE TO TAKE LEGAL PROCEEDINGS AGAINST HIM. BEARIN IN MIND WE ARE NOT IN A STRONG POSITION BECAUSE OF THE SGS CERTIFICATION HERE IT IS VERY IMPORTANT SGS IN TAIPEI CARRY OUT A THOROUGH SURVEY ON QUALITY ETC. WE WOULD

APPRECIATE THIS REPORT ASAP. I DO NOT THINK MY VISITING TAIPEI WILL BE BENEFICIAL THE SGS REPORT WILL BE THE KEY TO THE PROBLEM WE TRUST AND RESPECT YOU AND YOUR OBSERVATIONS AND WANT TO SOLVE THE PROBLEM AS QUICKLY AS POSSIBLE.

6. PLS ADVISE THE APPROX AMOUNT YOU INTEND TO CLAIM ON THE SHIPMENT. WE WANT TO TAKE THE MATTER UP WITH SGS/GROWER. WE WILL GIVE THEM VERBAL ADVICE OF THE PROBLEM AND ONCE THE SGS SURVEY FROM TAIPEI IS RCVD AND CONFIRMS WHAT YOU HAVE REPORTED WE WILL FORMALISE PROCEEDINGS

7. PLS ADVISE IF YOU HAVE DISPOSED OF THE SHIPMENT AT A MUCH LOWER PRICE THAN WOULD HAVE BEEN OBTAINED IF THEY WERE THE CORRECT SPECY OR WHAT IS THE SITUATION?

8. YOU CAN BE ASSURED IF THE CLAIM IS JUSTIFIED AND SUBSTANTIATED WE WILL HONOUR OUR COMMITTMENT TO YOU. WE SHIPPED TO YOU IN GOOD FAITH AND FIRMLY BELIEVED OUR DELIVERY WAS FULLY UP TO STANDARD. WE TRUST THAT YOU UNDERSTAND THIS. I WOULD NOT LIKE TO THINK THIS SITUATION WOULD PREJUDICE YOUR BUSINESS RELATIONSHIP WITH QUIRKE EXPORT LTD

KIND REGARDS BARRY QUIRKE"

<u>24 August 1983:</u> Mr Cox telephoned Mr Kirk to discuss the findings of the further survey which had been carried out in Taiwan. Mr Kirk told him that the surveyors in New Zealand had found the onions already packed when they located them and that accordingly a survey for size had not been carried out.

25 August 1983: A detailed telex was forwarded from the Plaintiff to the First Defendant setting out the position and asking for an undertaking that the First Defendant would reimburse the Taiwanese buyer for the difference between the amount received from the realisation of the onions in Taiwan and the original costs. The same day the First Defendant replied in a telex denying liability and relying upon the certificate given by the Second Defendant. Further telexes were then exchanged concerning arrangements for resale of the onions and advising the First Defendant of the steps which had been taken.

26-31 August 1983: SGS Far East Ltd carried out a further and more detailed survey taking a sample of 300 bags, i.e. 150 bags from each of the two consignments. In the first lot they found that 24.17% were under-sized and in the second lot they found 72.62% were under-sized. Photographs were taken of the onions to show their condition and size.

12 September 1983: Morn Sun & Co. made a claim on the Plaintiff by telex in the following terms:

"2. CURRENT MARKET VALUE ON ABOVE UNDERSIZED ONIONS.

A. 3,250 BAGS (65M/T) ...NTD210.00...USD5.20 PER BAG.

B. 3,000 BAGS (60M/T)....NTD240.00...USD6.00 PER BAG.

3. TOTAL IMPORT COST AFTER PAID IMPORT DUTY AND OTHER CHARGES.

PER BAG NTD371.71 (USD9.25) EXCHANGE RATE AT NTD40.20

4. (USD9.25 - USD5.20) x 3,250 BAGS ...USD13,242.50
(USD9.25 - USD6.00) x 3,000 BAGS ...USD9,750.00

TOTAL CLAIM AMOUNT USD22,992.50"

13 September 1983: By this date arrangements had been made for the resale but at a substantial loss. Details were given by the Plaintiff to the First Defendant and an opportunity supplied to arrange for a more advantageous resale if that were possible.

1 October 1983: The claim by Morn Sun & Co. was settled by the Plaintiff upon payment of NZ$35,007.

22 November 1983: The Plaintiff's solicitors wrote to the Second Defendant making a formal claim.

In addition to the testimony of Messrs Cox and Quirke concerning the matters which were set out in various telexes produced as exhibits there was also in evidence a number of telexes from Mr P.T. Shu of Morn Sun & Co. Some of these, being those contained in the booklet Exhibit 2, were admitted by consent but others were the subject of a ruling made by me on the first day of the hearing. I then held that these telexes were admissable pursuant to Section 3 of the Evidence Amendment Act 1980. They were later produced as Exhibits 1 and 3 to 9 (inclusive).

During the course of the hearing a further telex from Mr Shu dated 30 July was tendered. I reserved the question of admissibility at that stage. For similar reasons to those given in my ruling of 30 July 1985 I admit that document also pursuant to Section 3. The matters of possible prejudice raised by Mr Bryers concerning those matters are questions which I believe go to weight rather than admissibility. Mr P.T. Shu was unable to come to New Zealand to give evidence but I was satisfied on the sworn testimony of Mr Quirke that Mr Shu, as the maker of these documents, had personal knowledge of the matters contained in them and that he was genuinely unavailable. I was also satisfied that undue delay and expense would be caused by obtaining his evidence in New Zealand.

The principal points covered in the telexes from Mr Shu were:

a) His company had prearranged the sale of the onions prior to their arrival in Keelung.

b) The terms of this sale meant that the total costs of importing onions were covered including the import duty of 56%. This total cost to him was US$9.25 per bag.

c) The eventual alternative sale, made by him personally, was at the best price then obtainable for that type of onion on the market in Taiwan, being US$5.20 for 3,250 bags and US$6.00 for 3,000 bags.

d) The difference between the amount paid by Morn Sun & Co. for the total consignment of onions and the amount which they recovered from their eventual sale was US$22,992.50.

Under Section 17 of the Evidence Amendment Act (No. 2) 1980 the Court in determining the weight, if any, to be attached to such statements must have regard to all the circumstances from which any inference could reasonably be drawn relating to the accuracy or otherwise of the statements and in particular to:

a) The time when the statements were made in relation to the occurrence or existence of the facts or opinions stated that the statements are tendered to prove; and

b) The question whether or not the maker of the statements, or any person by or through whom information was supplied to the maker of the statements, had any motive to conceal or misrepresent any fact or opinion relating to the subject matter of the statements.

I have been conscious of the statutory provisions and of the detailed criticisms made by Counsel for the Second Defendant when considering this evidence. In particular Counsel strongly contended:

1) That there was no evidence of the eventual purchase from Morn Sun & Co. Any details of who had purchased the onions;

for what reason and at what price or prices was not the subject of any documentation

2) There was no independent evidence of the market price at the time of sale by the Plaintiff to Morn Sun & Co.

3) Mr P.T. Shu may well have had a motive to misrepresent the facts since he may have made an unwise buy from the Plaintiff in New Zealand and when faced with a falling market price in Taiwan had used this strategy of complaint and resale to avoid his difficulties.

The third witness for the Plaintiff, Mr Stavors Kalavos, was an onion marketing and export expert from Pukekohe. Mr Kalavos had been a member of the Onion Export Committee for some years and was able to speak with confidence about the business. He indicated that there had been a rapid growth in onion exporting and that whereas some 950 acres had supplied the market six or seven years ago, there were now some 6,000 acres necessary to supply the market. He described the sorting, sizing, and packing process used for onions. He also detailed the method of work usually followed in packing houses. After perusing the photographs which accompanied the SGS Far East reports he stated that the onions were clearly below standard. He also confirmed that because of the high freight costs involved, the sensible course if problems arose with export onions was to apologise to the buyer and arrange for their sale at the best price possible. Further, Mr Kalavos said that the bags for holding

onions cost approximately 65 cents each and he confirmed that from time to time mistakes can occur when onions are being graded.

For the First Defendant evidence was also called from three witnesses. Donald Ross Forgie gave evidence concerning his dealings with the Plaintiff and the arrangements which he had made for the supply of the onions. He said that he had arranged to purchase 65 tonnes from a Mr Naoro, Opiki, and 60 tonnes from Mr Aarts, Pukekohe. He confirmed the nature of the contract documents which the First Defendant had completed with the Plaintiff. Mr Forgie said that he personally had visited Mr Naoro's property twice while sorting and packaging of these onions was taking place, although he agreed that he did so for a comparatively short time and that he had not been concentrating on any particular inspection during that period. He said he was aware that the Plaintiff had instructed the Second Defendant to make a survey and that he had been contacted by a Mr Jim Gear, who was acting on the Second Defendant's behalf. He said that he had no memory of another employee of the Second Defendant, Mr Gibbs, contacting him about the size of the onions. During cross-examination he agreed that his firm had a responsibility for the size of the onions and that size was included in the guarantee given in his firm's letter dated 15 June 1983.

Benny Leong, a company representative for the First Defendant, gave evidence concerning his arrangements to purchase 60 tonnes of onions from Mr Aarts. He said that he had inspected these

onions during the packaging process by way of a spot check of three bags which he untied and tipped out. He said that the onions appeared to be satisfactory and that they did not have any dirt or mould on them as was indicated in the photographs of the onions taken in Taiwan. He confirmed that the onions had been packed in Hodder & Tolley bags and that they gave a similar appearance to the stacked onions shown in the photographs.

Gerardus Aarts, who is a commercial grower of onions in Pukekohe, confirmed that he had supplied 60 tonnes of onions to the First Defendant upon the basis that they were sized between 2.25 to 3" in diameter. He described in detail and produced photographs to show the nature of the grading machines used by him. He said he accepted there was an element of error in these machines but that he had personally adjusted them with help from an employee and accordingly he found it hard to accept that approximately one-quarter of the onions supplied by him had been below size. He said that he had never had any complaints before about under-sized onions. He confirmed that the price of onions during 1983 fluctuated considerably but he said he believed that if the onions had been resold in New Zealand in 1983 it was unlikely that there would have been any loss.

For the Second Defendant one witness was called, namely Christopher McDonald Kirk. Mr Kirk said that the Second Defendant was in business as an industrial goods and products inspection firm. He said that as part of their work onions were often surveyed. He recalled the initial contact with Mr Cox of

the Plaintiff firm and the receipt of instructions to survey this consignment of onions. However he had a different recall as to the nature of his initial instructions from Mr Cox. He said that sizing of the onions was never mentioned and that this did not form part of the instructions. The survey was actually carried out and the certificate given by a Mr Gibbs, an employee of the First Defendant.

Because the Pukekohe onions had already been bagged and on pallets at the time of Mr Gibb's inspection he had been unable to carry out any detailed inspection. He said arrangements had been made for Mr Gear to survey the onions from Opiki. Mr Kirk believed that he had told Mr Cox at the time that a detailed inspection had not been possible. He confirmed that a certificate dated 23 June 1983 had been supplied to the Plaintiff and that this certificate had stated that the consignment was sampled for sizing and was found to be within the limitations required by the consignee. No invoice for fees had been submitted but the total fees and disbursements would normally have been in the vicinity of $125.

Mr Kirk accepted that this certificate was clearly inappropriate. He said this had occurred because the certificate was in the normal form for onions and was a precedent which was on his firm's word processor. He agreed that it should have been amended to meet the conditions. In particular he agreed that the references to inspection and to sizing were inaccurate. He further agreed that Mr Cox had

contacted him after the shipment arrived, that he had known of the complaint and indeed that he had been involved in the arrangements for the further inspection by SGS Far East Ltd.

Mr Kirk also drew attention in his evidence to the exclusion or limitation clause which he said had been in his firm's certificates for a number of years and that it had certainly been in the certificates previously supplied to the Plaintiffs.

In those parts of Mr Kirk's evidence where he differs from the evidence given by Mr Cox I prefer and accept the evidence of Mr Cox. My assessment is based not only on my observations of both men giving evidence but also on the actions of Mr Cox at the time these events occurred. The telexes he sent and the actions he took at those times were consistent with the evidence he gave. In particular, I accept that his instructions to the Second Defendant involved checking the onions for size. I accept that he was unaware that this sizing check had not been carried out and therefore he was unaware that the certificate was inaccurate until after Mr Shu had complained on 11 August 1983.

Issues

A number of issues arise on this evidence. The principal ones are:

1. a) Has the Plaintiff established that the First Defendant

was in breach of Section 15 of the Sale of Goods Act in that the onions supplied were not in accordance with the description in the contract?

b) Has the Plaintiff established that the First Defendant was in breach of Section 16(a) of the Sale of Goods Act in supplying goods that were not fit for the purpose for which they were required?

2. If so, what loss has the Plaintiff established as a consequence of such breach?

3. a) Has the Plaintiff established that the Second Defendant was in breach of its contract with the Plaintiff in that the onions were not inspected for size and the report supplied was not accurate as to the size of the onions?

b) Has the Plaintiff established that the Second Defendant was negligent in its inspection of the consignment or reporting to the Plaintiff or in making a misrepresentation as to the contents of the consignment?

4. If so what loss has the Plaintiff established was suffered in consequence of such breach or negligence?

5. Does the exemption or limitation clause contained in the Second Defendant's certificate enable it to avoid or limit its liability?

Size of Onions

The contract between the Plaintiff and the First Defendant is clear. The onions were to comprise approximately 100 metric tonnes Pukekohe Longkeeper onions comprising 50 metric tonnes size 2.5-3" and 50 metric tonnes of size 2.25-3". There was no doubt on the evidence of all the witnesses that this size requirement was stipulated.

The evidence contained in the SGS Far East report and photographs and the telexes from Mr P.T. Shu is that a substantial quantity of the onions were seriously under-sized. Counsel for both defendants submit that evidence should not be accepted in view of:

1. The evidence of Messrs Forgie, Leong and Aarts as to the procedures followed for sizing and packing.

2. The inspections of Messrs Gibbs and Gear.

3. The fact that the alleged error was large and unique.

4. The fact that the error allegedly involved two different consignments

from two different areas, namely Opiki and Pukekohe.

5. That little weight should be attached to the telexes.

6. That the SGS Far East reports referred to the shipment of onions as "said to be delivered ex Keelung".

In effect it is suggested that there may have been other onions which were inspected by SGS Far East or that Mr P.T. Shu may have been deliberately deceiving the Plaintiff.

After considering these matters I accept that the evidence of the reports and telexes is sufficient to establish that the onions were under-sized. In particular the two reports from SGS Far East are clear and detailed. They provide support for the evidence contained in the telexes from Mr Shu. The fact that the phrase "said to be delivered" is used is not significant in my view because it is to be read in the light of the other evidence concerning the volume and packing of these onions and the details of their shipment. It is not reasonable to suggest that there could have been another large quantity of onions (6,250 bags) in Hodder & Tolley bags in Taiwan at that time. Also the nature of the telexes, the invitations to visit Taiwan to inspect the onions and the nature of the tests carried out by SGS Far East Ltd render the suggestion of deceit by Mr Shu as untenable.

In arriving at this view I have been conscious of the provisions

of Section 17 of the Evidence Amendment Act 1980. It is correct that the evidence of Messrs Forgie, Leong and Aarts indicates that they were unaware of errors in the sizing of the onions but the opportunity for observation they referred to appears small in comparison with the volume of onions involved. Certainly their evidence does not exclude the possibility of errors in sizing. A similar problem had not occurred before and it would appear that everyone relied upon someone else to ensure the correctness of the sizing. The workmen operating the graders may well have had the same attitude at the time they were carrying out the work. No evidence was called from Mr Gibbs or Mr Gear who saw the consignments on behalf of the Second Defendant. The evidence is that Mr Gibbs did not check the sizes and it is not known whether Mr Gear actually made any checks or not.

Application of the Sale of Goods Act 1908

Section 15 of the Sale of Goods Act 1908 applies where there is a contract for the Sale of Goods by description. It implies in such a contract a condition that the goods shall correspond with the description. In my opinion the present sale was a sale by description and the First Defendant was in breach of that implied condition.

For Section 16(a) of the Act to apply several tests must be met. The goods must be of a description which it is in the course of the seller's business to supply; the buyer must

expressly or by implication make known to the seller the particular purpose for which the goods are required; and the circumstances must be such as to show that the buyer relied on the seller's skill and judgment (see Finch Motors Ltd v. Quin No. 2 1980 2 NZLR 519 at p.521). In this case the First Defendant knew the purpose for which the Plaintiff wanted the onions and in particular knew that the onions' suitability for such export to Taiwan depended on their sizing. On the inferences to be drawn from all of the circumstances of this transaction I am of the view that the contract between the First Defendant and the Plaintiff was subject to the condition applied by Section 16(a) of the Sale of Goods Act 1908. There has also been a breach of this implied condition.

The Survey

In relation to the size of the onions the certificate (Exhibit 2/37) stated "a random selection of the consignment was sampled for sizing during packing and was found to be within the limitations required by the consignee". On the evidence which I have accepted this statement was clearly incorrect. It was also misleading because it indicated to the Plaintiff that an inspection for size had been made whereas in fact that inspection had not been carried out at all. Indeed I do not understand Mr Kirk to seriously suggest otherwise in his evidence, rather he claimed that the Plaintiff had been aware of the failure to inspect for size but had chosen to proceed nevertheless. In that respect I have rejected Mr Kirk's

evidence. I hold that the Second Defendant was in breach of the terms of its contract with the Plaintiff, namely that the size of the onions would be checked and that the report to be provided would be accurate.

Also I am of the view that the Second Defendant was negligent in failing to adequately inspect the two consignments of onions and in misrepresenting the position in their report to the Plaintiff. Obviously precedents on the word processor can be a trap unless instructions are given to alter the standard form. This error however would have been apparent as soon as the prepared certificate was placed before Mr Gibbs for signature. In the circumstances his signing of the patently incorrect certificate was a signficant cause of the losses which followed.

Loss Arising from First Defendant's Breaches

In relation to loss Counsel for the First Defendant submitted

a) There was no evidence of any loss arising directly or naturally from any breach of warranty by the First Defendant.

b) The Plaintiff could not recover any loss from the First Defendant because the breach could have been discovered with reasonable diligence.

c) The Second Defendant's certificate was binding as between the Plaintiff and Morn Sun & Co. and accordingly no loss should have been met by the Plaintiff.

As to the first submission it is appropriate to note the relevant sections of the Sale of Goods Act 1908. Section 13(3) provides for a breach of any condition to be treated as a breach of warranty when the contract is not severable and the buyer has accepted the goods. Sections 36 and 37 provide for a buyer's right of examining goods and the circumstances in which acceptance is deemed. In this case the facts disclose that the Plaintiff forwarded the onions purchased from the First Defendant to Taiwan. This action was inconsistent with the ownership of the First Defendant and accordingly the Plaintiff is deemed to have accepted the goods. Any damages for breach of warranty in this case fall to be measured in accordance with the provisions of Section 54(2) to (4) which state:

> "(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (3) In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
>
> (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage."

There is no clear evidence of the market value of the onions in New Zealand as at the time of such deemed acceptance but the evidence given by Mr Aarts suggested that there would have been no loss at all if the prima facie rule (i.e. the difference between the value of the goods at the time of delivery and the value they would have had if they had answered to the warranty) is used.

Sub sales by a buyer of goods are irrelevant to the buyer's claim for damages. That is the general rule (see Slater v. Hoyle & Smith 19230 2 KB 11, William Brothers Ltd v. Ed. T. Agius Ltd 1914 AC 510, James Finlay v. N.V. Quik Hoo Tong 1929 1 KB 400, Benjamins Sale of Goods 2nd Ed. para. 1386, and Atiyah The Sale of Goods 5th Ed. pages 307-312). In exceptional cases where the seller is liable for loss of profits or expenses under the sub sale his liability is based on the party's reasonable contemplation of the consequences of a breach of the contract which depends on the knowledge of the seller at the time of the contract (see Hall v. Pim 1928 All E.R. Rep 763; 139 L.T. 50 and Biggin & Co. Ltd v. Permanite Ltd 1951 2 KB 314).

In the circumstances of this case the First Defendant knew or must reasonably have contemplated that the onions were being resold to third parties in Taiwan or the Far East. If the consignment had not been the subject of inspection by surveyors then I am of the opinion that the Plaintiff could recover from the First Defendant the losses suffered and may well have also

been able to claim for loss of custom or repeat orders (see GKN Centrax Gears Ltd v. Matbro Ltd 1976 2 Lloyds Rep 555).

The amount paid under a settlement if reasonable should be taken as the measure of damages. The question of whether or not the settlement was reasonable is one which must be determined by the evidence in any particular case (see Biggin & Co. v. Permanite supra page 321).

The evidence in this case is that the reasonable contemplation of the parties at the time of the purchase of the onions must have been that the onions would have been rejected prior to their leaving New Zealand if they did not comply with the terms of the contract or if they were of poor quality. At that time the First Defendant knew of the inspection to be carried out by the Second Defendant both from information given to it by the Plaintiff and from telephone calls by representatives of the Second Defendant. I do not believe that the First Defendant could reasonably have contemplated a loss by the Plaintiff other than that which would have arisen if the goods had been rejected in New Zealand.

The second submission by the First Defendant raises a similar point to that already dealt with in the above authorities although the approach is a different one. It is submitted on the basis of the authority of Bostock & Co. Ltd v. Nicholson & Sons Ltd 1904 1 KB 725 that the Plaintiff should not recover damages against the First Defendant because the breach could

have been discovered with reasonable diligence. The authority relied upon concerned the presence of arsenic in sulphuric acid which was used in the manufacture of brewing sugar and sold to brewers who eventually used it in the brewing of beer. This was rendered poisonous. Because the plaintiffs in that case might have discovered the presence of the arsenic in the acid by the exercise of ordinary care their damages were limited to the price of the acid and the value of the goods spoiled. This case is an illustration of the application of the rules in Hadley v. Baxendale 1854 9 Ex 341. These have been re-stated by the House of Lords in Koufos v. Czarnikow Ltd 1969 1 AC 350. The view I have already expressed concerning the first submission is also applicable to this submission.

The third submission was that the Second Defendant's certificate was binding between the Plaintiff and Morn Sun & Co. and consequently there should not have been any loss. Reliance was placed on the cases of Arenson v. Arenson 1973 2 WLR 553; 1973 2 Lloyds Rep 104 and Alfred C. Toepfer v. Continental Grain Co. 1974 1 Lloyds Rep 11. These cases discuss a situation where parties have already agreed that certificates are to be final and binding.

The circumstances in this case however are different in that the certificate was obtained by the Plaintiff for its own protection and not as part of its contract with Morn Sun & Co. There are no provisions in the telexes which passed between the Plaintiff and Morn Sun & Co. to indicate any agreement for the parties to

be bound by such a certificate. In any event the Plaintiff could hardly have defended any claim by Morn Sun & Co. on the basis of the certificate when it knew that the certificate was patently false or given on a fundamentally erroneous basis (see Arensen v. Casson Beckman Rutley & Co. 1977 AC 405 and Burgess v. Purchase & Sons Ltd 1983 2 All ER 4).

Loss Arising from Second Defendant's Actions

At the time of issuing the certificate dated 29 June 1983 the Second Defendant was aware that the quantity of onions involved were being exported per the "MV Kweilin V4" to Keelung. As I have already held the Second Defendant was also aware that the minimum size of onions was specified and that it was part of the Plaintiff's instructions for the Second Defendant to check the sizing of the onions. The Second Defendant failed to check the size but then incorrectly reported that they had made the checks and gave a certificate to this effect.

The contract between the Plaintiff and the Second Defendant was one in which the Second Defendant was to perform a service (that is, an inspection of onions for quality and size, and a report) in consideration for a fee. The Second Defendant failed to carry out a portion of its part of the contract. In particular, it failed to check the consignment for size and to report accurately. The Plaintiff was owed a contractual duty of care by the Second Defendant and clearly the Second Defendant's omission and actions amounted to breaches of that duty.

The same careless conduct of the Second Defendant in failing to check the size and in making an incorrect statement or misrepresentation in its certificate as to sizing gives rise to a liability in tort as well as contract (see Esso Petroleum Co. Ltd v. Mardon 1976 QB 801, and Ross v. Caunters 1980 CH 297).

Counsel for the Second Defendant argued that the measure of any damages suffered by the Plaintiff had not been proved to be the amount which the Plaintiff paid to Morn Sun & Co. in settlement. Further, he submitted that the settlement had not been shown to be a reasonable one. He referred to the Plaintiff's failure to produce the actual contract documents with Morn Sun & Co. and to the failure to produce independent proof of the market values of onions in Taiwan at the date of the contract and at the date of resale by Morn Sun & Co. He also criticised the Plaintiff's failure to investigate regrading or rebagging the onions since approximately 50% of them must still have been in excess of 2" in diameter.

Every situation of this nature must be judged in the light of its particular facts and at the time the events occurred. In view of the overall narrative of the events established by the telexes and the evidence of Messrs Quirke and Cox and the practical appreciation of the problems of such a situation evidenced in Mr Kalavos' testimony, I have concluded that the Plaintiffs did act prudently and reasonably in arriving at a settlement of NZ$35,007. In doing so I have not ignored the

weight to be given to the telexes and the desirability of oral evidence in such matters. The Plaintiff may well have been influenced to some degree by the prospect of further business with Morn Sun & Co. but this factor must have been within the reasonable contemplation of the Second Defendant at the time of issuing its certificate. The problems of dealing with deteriorating export produce at a considerable distance and its effect on an exporter's business would have been apparent to the Second Defendant. Also I accept that the cost of the bags and labour and possible further deterioration of the produce would have been so significant that the delay caused in regrading and rebagging would have created a risk of greater loss that the Plaintiff would have been unwise to run.

Exemption or Limitation Clause

Specific reliance is placed by the Second Defendant on the exemption or limitation clause contained in its certificate. It was established in the evidence that identical clauses were included in previous certificates given by the Second Defendant to the Plaintiffs. Despite Mr Cox's evidence that he could not recall having read the clause I am of the view that the history of previous contracts between the Plaintiff and the Second Defendant requires the inference to be drawn that the Plaintiff was aware of the clause and that it formed part of its agreement with the Second Defendant. The contract was made in the telephone call between Mr Cox and Mr Kirk on 16 June 1983. At that time the Plaintiff had notice of the nature of the

certificates issued by the Second Defendant. In this respect the situation is considerably different from those in the cases of Olley v. Marlborough Court Ltd 1949 1 KB 532 and Thornton v. Shoe Lane Parking Ltd 1971 1 All E.R. 686.

The law relating to exemption clauses has been discussed in a number of recent decisions in England. The House of Lords has not affirmed the old doctrine of fundamental breach but rather has held that the effect of such a clause depends entirely on its construction. I refer to:

Canada Steamship Lines Ltd v. The King 1952 AC 192 at 208.

Photo Production Ltd v. Securicor Transport Ltd [1980] A.C. 827.

Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon Ltd [1981] 1 WLR 138.

Ailsa Craig Fishing Co. v. Malvern Fishing Co. [1983] 1 WLR 964.

Geo Mitchell Ltd v. Finney Lock Seeds Ltd [1983] 3 WLR 163.

Recent New Zealand cases to which I have referred are:

Bisley & Co. Ltd v. Thompson [1982] 2 NZLR 696.

Williams & Peters v. Wormald Vigilant Ltd Unreported Judgment 16 August 1982 Davison CJ Wellington Registry A562/77.

Kaniere Gold Dredging Ltd v. The Dunedin Enginering and

Steel Co. Ltd Unreported Judgment 29 April 1985, Holland J. Greymouth Registry A181/84.

The approach indicated in these authorities involves applying the following propositions.

1) The question of whether and to what extent an exemption clause is to be applied to any breach of contract is a matter of construction of the contract.

2) Any such construction must have regard to the following:

   a) The necessity for clear words in order for a party to escape from the consequences of its own wrongdoing or the wrongdoing of one of its employees.

   b) The contra proferentem rule requiring construction against the party who relies upon the clause.

   c) The risks to which that party is exposed and the remuneration being received.

3) Limitation clauses are not to be construed to the same exacting standards applicable to exclusion and indemnity clauses.

The matter referred to in paragraph 3 above must depend upon the nature of the clause and its significance in the contract. Lord

Fraser of Tullybelton in the Ailsa Craig Shipping case said:

> "Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in condition 4(1) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. It is enough in the present case that the clause must be clear and unambiguous."

In this case no fee was actually charged and consequently if the clause was read in a literal way it would amount to a complete exclusion of liability. The degree of limitation in the clause affects the degree of improbability referred to by Lord Fraser and is a factor influencing the strength with which the strict rules of construction are to be applied.

The relevant clause in the contract between the Plaintiff and Second Defendant is printed in relatively small print at the

foot of a typed certificate. It is already set out at the beginning of this judgment. Logically the clause can be divided into three parts:

1) The first two sentences:

"This certificate is issued in pursuance of the principal's instructions. The findings contained in the certificate reflect a statement of opinion made with due care and skill within the limitations of instructions received."

These are statements which relate to instructions. They limit the certificate and the findings in it to the instructions received from the client. In this case the second of these two statements is incorrect because the findings were not made with due care and skill and were not within the instructions given by the Plaintiff.

2) The second two sentences:

"The issuance of this certificate does not exonerate buyers or sellers from exercising all their rights and discharging all their liabilities under the contract of sale. Stipulations to the contrary are not binding on us."

These relate to provisions in the contract between buyers and sellers. They have no particular application to this case since there were no such stipulations in the contract

between the Plaintiff and Morn Sun & Co. and indeed the buyers and sellers have exercised and discharged their obligations under their contract..

3) The last sentence:

"The Company's responsibility under this Certificate is limited to gross negligence proven by Principals and will in no case be more than ten times fees or commissions."

This limits the Second Defendant's responsibility under the certificate to gross negligence, proved by the principal to not more than ten times fees or commissions.

It is significant that the clause does not purport to exclude or limit any liability whatever arising from the contract. The provision in its express terms relates only to "responsibility under the certificate". In my view the Second Defendant was in breach of its contract with the Plaintiff and grossly negligent in failing to inspect the consignment of onions for size. That liability arose before the certificate was even prepared. Certainly in my view these words in this clause are not sufficient to exclude or limit liability for the Second Defendant's negligent performance of its overall contract with the Plaintiff.

Also, I believe that it can be properly said that the limitation in the final sentence of the clause must be read in the context

of the initial two sentences and are accordingly related to the manner of performance of a client's instructions. If these instructions have not been carried out or performed then the limitation does not arise.

Judgment

In view of the conclusions which I have reached, it follows that there will be judgment for the Plaintiff against the Second Defendant in the amount of $35,007.19, together with interest at the rate of 11% from the 1st of January 1984. I do not think it is appropriate to award interest for the period between 1 October 1983, when payment was made by the Plaintiff to Morn Sun & Co. and 1 January 1984, because of the delay in the making of the claim upon the Second Defendant. The Plaintiff is also entitled to costs and disbursements on the amount claimed. In view of the findings I have made against the First Defendant no order for costs is made in favour of the First Defendant either against the Plaintiff or the Second Defendant.

J.

Solicitors:

Weston, Ward & Lascelles, Christchurch, for Plaintiff
Cooper, Rapley & Co., Palmerston North, for First Defendant
Martelli, McKegg, Wells & Cormack, Auckland, for Second Defendant