

- (1) The Attorney General of Trinidad and Tobago
- (2) Victor Cockburn Comptroller of Customs and Excise

Appellants

v.

Kalicklal Bhooplal Samlal (Trading as "The Tile Shop")

Respondent

FROM

THE COURT OF APPEAL OF THE REPUBLIC
OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLERTON
SIR DUNCAN McMULLIN
[Delivered by Lord Ackner]

The respondent Mr. Samlal carries on business in Trinidad under the name of "The Tile Shop". In 1981 he wished to import from Spain a quantity of high quality glazed tiles. The Minister of Industry and Commerce in the exercise of his statutory powers had on 24th February 1971 caused the following entry to be made in the Negative List of the Open General Licence, thereby necessitating a licence for their importation:

"666.02.01: Ceramic Floor and Wall Tiles (Glazed)."

On 28th September 1981 Mr. Samlal made an application for a licence on an indent, the appropriate form used and approved by the authorities, to import glazed tiles from Spain. The licence was granted on 15th October 1981 and the goods arrived loaded in 51 containers on 6th July 1982. On their arrival, a limited number of the

containers was examined and the consignment was released to Mr. Samlal. At the end of July, as a result of information received, the Comptroller of Customs and Excise despatched a party of his officers with a writ of assistance to enter Mr. Samlal's warehouse at Bamboo Village, La Romain and carry out a detailed examination of the consignment. He found that there were a number of tiles in the consignment which were of a non-floral design, removed 23 pallets of such tiles and certain documents and threatened to remove all such tiles on the ground that the licence which had been granted only permitted the import of glazed tiles which had a floral pattern. Bearing in mind that the customs officials might carry out their threat, Mr. Samlal applied by motion for *inter alia* a declaration that the Comptroller had no lawful authority to seize and carry away his tiles and documents and for an order that "the Comptroller do return the same and pay compensation". The motion was served both on the Comptroller and the Attorney General of Trinidad and Tobago who are the appellants in this appeal.

On 30th March 1983 Persaud J. dismissed Mr. Samlal's motion with costs. On 14th December 1984 the Court of Appeal allowed Mr. Samlal's appeal, granted Mr. Samlal the appropriate relief with costs, remitting to a judge of the High Court sitting in chambers the question of what compensation should be awarded to Mr. Samlal.

As will be apparent from this short description of the nature of the litigation, the essential issue is - were non-floral tiles covered by the licence which was granted? The resolution of this issue depends upon the proper construction of the licence. It is now common ground between the parties that this raises a question of law and accordingly the Court of Appeal rightly criticised the learned trial judge for concluding that whether the licence covered the tiles was a question of fact.

The application for the licence was headed "Indent For Grooved/Lifted/Patterned/Sculptured Embossed/Floral Glazed Tile". The indent records that the sale had been made to the Tile Shop, gives the name and the particulars of the vendor and the terms of payment. Thereafter there follow seven columns which have to be completed in relation to the full range of tiles the subject matter of the indent. The headings of the columns are - Customs Item No. - Quantity - Unit - Description of Article - Price - Actual Estimated value c.i.f. of each item - Shipping Weight. Towards the foot of the document, the country of origin and the country of shipment is specified and the total f.o.b. and c.i.f. value of the goods. At the foot of the indent the applicant has to certify for what purpose the goods ordered are essential, and in this

case the answer was "Building Trade". As stated above the licence was granted on 15th October 1981 by rubber stamping and initialling the indent. The only limitation on the licence, and this again was by way of rubber stamp, was that it was valid only for the total f.o.b. and c.i.f. value stated on the indent, and that goods shipped in excess of those values were liable to confiscation.

The submission made on behalf of the appellants before their Lordships was a simple one. The goods the subject matter of the indent, as was apparent from the heading quoted above, were floral glazed tiles, the characteristics of which could be that they were grooved/lifted/patterned/sculptured/embossed (although the / was omitted between sculptured and embossed). Any doubt that this was the true construction of the indent was resolved by the description of the goods set out on the indent under the column "Description of Article". In that column each of the seven different kinds of glazed tiles was qualified by the word "floral". Hence it was contended that the licence did not cover any plain glazed tiles, and accordingly the importation of such plain tiles was illegal and therefore liable to seizure by the Comptroller. — This wholly-technical approach to the construction of an indent, a document of which the essential purpose is to record a commercial transaction, as if it was a section in a complex Act of Parliament, is not an attractive one. It is however based upon a clear fallacy. The true construction of the indent does not necessitate the blinkered concentration upon one document. It is abundantly clear that the licence (the indent as approved) must be construed in the light of two other important documents. These are:-

A. The brochure issued by the Spanish manufacturers of the glazed tiles Porcelanosa S.A. This brochure, it is common ground, was attached to the indent and was seen by the officer who approved the grant of the licence. These facts were recorded by the learned judge at an early stage in his judgment. The catalogue contains in the centre page a number of the different "series" of tiles, including illustrations of four of the seven different tiles described in detail under the column "Description of Article". The catalogue establishes quite clearly the following important facts:-

1. Each of the series of tile illustrated, (with one exception to which their Lordships will refer hereafter) contained a floral pattern which had a counterpart which bore no pattern at all, apart from, in some instances, a border. Although plain, the colouring of this was identical with the background colour of the floral tile. The brochure made it abundantly clear that the plain

tile was meant to complement the floral tile. Indeed, Mr. Samlal under cross-examination made the obvious point that the floral and plain tiles were intended to be used together so as to produce a pattern.

2. One of the "series" specifically identified on the indent was "Diseno Floral Lifted Embossed Glazed Tile". As the brochure clearly revealed "Series Diseno" was not a floral tile. It was a patterned tile bearing coloured stripes, complemented by a plain tile reproducing the background colour of the striped tile. This clearly established that "floral" on the indent was a misdescription and that one of the categories of tiles there described was a patterned tile, with no flowers upon it at all.

B. The letter of 12th October 1981. Mr. Childs, Mr. Samlal's customs broker, wrote a letter dated 12th October 1981 to the Ministry, which it is common ground was received in the Ministry prior to the grant of the licence. In her affidavit, Miss Harrinauth, the Chief Trade Officer in the Ministry, stated she did not see or have before her that letter at the time that she approved the licence. She did not however dispute that she did receive it in the ordinary course of post. The terms of the letter are important. It reads as follows:-

"Dear Sir,

Permission is hereby sought to import a shipment of Grooved/Lifted/Sculptured/Flowered/Embossed/Patterned Tiles from an importer in Spain.

These tiles are not made in the country and because of the rare nature and quality, there is quite a demand from my clients.

I would appreciate if favourable consideration would be given to this application."

This letter makes it quite clear that Mr. Samlal was seeking a licence to import glazed tiles, (since only glazed tiles were on the negative list) such tiles being either grooved or lifted or sculptured or floral or embossed or patterned. Plain coloured glazed tiles would clearly be covered by this letter. Their Lordships consider that it matters not whether Miss Harrinauth did see or have before her that letter at the time she approved the licence.— She did not dispute that she received and read that letter before she approved the licence.

The Comptroller has power by virtue of Regulation 4 of the Import and Export Control Regulations 1941, re-enacted by section 10 of The Trade Ordinance Act 1958, when granting the licence, to impose such conditions, restrictions and limitations as he shall deem necessary. His failure to exercise such power by imposing the condition that none of the tiles to be imported under the licence were to be plain tiles (assuming always that the imposition of such a condition could not be shown to be irrational) makes it clear to their Lordships that the licence which was granted was intended to authorise Mr. Samlal to import glazed tiles covered by the description in the letter of 12th October.

In their Lordships' opinion, when the licence is construed, as it must be, in the light of the brochure and the letter of 12th October 1981, there can be no doubt that the licence permitted the importation of plain as well as floral tiles and accordingly the Comptroller acted unlawfully in seizing the pallets of tiles and documents belonging to Mr. Samlal and in threatening to seize any further plain tiles imported by him from Spain as part of the consignment the subject matter of the licence.

The reasons given above are sufficient to justify the dismissal of this appeal. There is however a further matter upon which their Lordships would wish to make some observations. It is common ground that the application for the licence was presented by Mr. Childs and that he produced the brochure. This brochure Miss Harrinauth recalled being shown to her (see paragraph 4 of her affidavit sworn on 23rd September 1982). Mr. Childs in his affidavit and in the evidence that he gave stated that he had produced samples of the tiles to Mr. Headlie acting Chief Trade Officer in the Ministry. In his affidavit Mr. Childs referred to six sheets. In his evidence he corrected this to four sheets. Miss Harrinauth both in her affidavit and when giving evidence denied that she had ever seen any samples and Mr. Headlie, who saw the brochure when he was assisting in the preparation of the case, said in evidence that he did not recall seeing any samples when dealing with the application. He did however concede that he would think that an officer dealing with the indent would ask for the brochure and samples. There was thus a conflict upon an important issue of fact.

Persuad J. in his judgment stated that he did not accept that either Miss Harrinauth or Mr. Headlie were shown samples of the tiles. He gave no reason for reaching that conclusion, and the Court of Appeal, while expressing their reluctance to disturb a finding of fact made by a trial judge, felt entitled in the circumstances of this case to reverse this finding and to hold that Mr. Childs did produce

both to Miss Harrinauth and to Mr. Headlie samples of the tiles. The Court of Appeal justified their taking this course by the following process of reasoning:-

1. Miss Harrinauth accepted that she saw the brochure. Accordingly she must have seen and known that the Serie Diseno was not of a floral design, accordingly the statement in her affidavit at paragraph (7) that she approved no licence in respect of the non-floral tiles depicted in the brochure as Serie Diseno could not be accurate.

2. Miss Harrinauth conceded that she fully appreciated, that the brochure did not contain pictorial examples of the tiles described in the indent as Serie Cuadros, Gama and Tropico. The Court of Appeal found it "inconceivable that officers of the calibre of Harrinauth and Headlie would, on the mere *ipse dixit* of the Applicant have approved a licence in respect of the tiles described as serie Cuadros, Gama and Tropico, without satisfying themselves from samples or otherwise that the articles described on the face of the licence conformed with those samples".

Persaud J. gave no reasons for preferring the evidence of Miss Harrinauth and Mr. Headlie. This is the more surprising since Mr. Headlie's evidence was far from positive "I do not recall seeing samples when I was dealing with this application" and Miss Harrinauth conceded that her memory of the licence was limited. The learned judge may well have reached his decision entirely as a result of the impression made upon him by the manner in which the witnesses gave their evidence. Indeed, it is difficult to draw any other conclusion. But a judge must check his impression on the subject of demeanour by a critical examination of the whole of the evidence - see *Yuill v. Yuill* [1945] P. 15 at p. 20. In this case the Court of Appeal were fully entitled to conclude he did not balance demeanour against the rest of the evidence and had thus not taken proper advantage of having seen and heard the witnesses. It is essential when weighing the credibility of a witness to put correctly into the scales the important contemporaneous documents - the brochure and the letter of 12th October 1981 and the inherent improbability, as the Court of Appeal percipiently pointed out, that the licence would have been granted without samples of those tiles which were not depicted in the brochure, being produced. Thus the balancing operation, which is of the very essence of the judicial function, was not properly carried out.

It might have been argued, but it was not, that this appeal could be distinguished from the recent decision (December 1986) of the Privy Council in

Grace Shipping Inc. and Another and C.F. Sharp & Co. (Malaya) Pte. Ltd., upholding a decision of the Court of Appeal of Singapore which reversed the trial judge's decision on fact, because in that case the evidence of the most crucial witnesses was not given until over five years after the relevant facts occurred and accordingly the oral evidence was, in that case, in the nature of things, as the Privy Council so held, likely to be unreliable. In this case the oral evidence was concluded within a year of the grant of the licence and within three months of the arrival of the goods. Accordingly, it might have been submitted but it was not, that if the judge's conclusion of fact was not satisfactory, by reason of his inadequate appreciation and consideration of all the material evidence, the proper remedy would have been an order for a re-trial. As this contention was not put forward by the appellants, and further in view of the fact that this part of the Court of Appeal's decision is academic, having regard to the reasons given by their Lordships for the dismissal of the appeal in the early part of this judgment, their Lordships are not prepared to disturb the decision of the Court of Appeal that Mr. Childs did produce to both Miss Harrinauth and Mr. Headlie the four sheets of samples.

Their Lordships accordingly dismiss this appeal with costs.





