IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 3 of 1980

Between:

LEES TRANSPORT LIMITED Appellant

and

CARLTON BREWERY (FIJI) LTD. Respondent

Mr. S.M. Koya for the Appellant.
Mr. B. Sweetman for the Respondent.

Date of Hearing: 20th June, 1980

Delivery of Judgment: 30/6/80

JUDGMENT OF THE COURT

Spring J.A.

The appellant company is in business at Lautoka as a manufacturer of aerated waters. The respondent company is in business in Fiji as a brewer and sells bottled beer in stubbies and 26 oz. bottles to hotels and other holders of liquor licences. The bottles have embossed or stamped thereon the respodent's Trade Mark and the words:

"Fiji Beer"

"This bottle always remains the property of Carlton Brewery (Fiji) Limited."

For the past two to three years the appellant has been using and dealing in these bottles in the course of its business as soft drink manufacturers.

Respondent's solicitors wrote to the appellant on 24th May, 1978 complaining about the appellant's illegal use of the respondent's bottles. No reply was received. As a result of proceedings issued out of the Supreme Court by the respondent it was ordered:

(a) that the appellant account to the respondent for all the respondent's bottles in its possession embossed with the respondent's trademark.

(b) that the appellant be restrained from using the bottles belonging to the respondent in its business and ordered to return them to the respondent and thereupon receive payment at the normal current rate apid for the return of empty beer bottles.

The respondent sought also an injunction to restrain the appellant from continuing to use its bottles in the future and from refusing to deliver up to the respondent its bottles when demanded. The learned judge in the Supreme Court in declining to grant the injunction said:

> " It seems to me that I cannot grant an injunction to restrain the defendant from acquiring and using similar bottles in the future, since it is only on demand that the defendant can be obliged to return bottles, but no doubt after this judgment the defendant will be more careful in the future about bottles it acquires from bottle collectors, and in resisting any legitimate demands made by the plaintiffs. "

A claim for damages and an application for an order restraining the appellant from infringing the respondent's Trade Mark were abandoned.

The appellant now appeals to this Court against the orders made. The respondent filed a notice seeking relief by the inclusion of an additional order restraining the appellant from retaining any of the respondent's bottles which may subsequently came into its possession, and directing that the appellant deliver to the respondent at its brewery in Suva or Lautoka all such bottles as and when demanded by the respondent upon payment of such sum or sums as shall be due to appellant for the return of the empty bottles in accordance with the then current rates payable for the return of empty bottles.

The facts may be briefly stated. The respondent is the only brewery in Fiji and manufactures beer under the name of "Fiji Bitter", 90% of which is sold in bottles which since 1971 have been stamped or branded with the respondent's trade mark and the words as to ownership being retained by the respondent as above mentioned. All bottles are required to be imported.

At least four times a year a notice expressed in clear and precise wording is published in newspapers circulating in Fiji in the English, Fijian and Hindustani languages drawing the attention of the public to the markings on the bottles and advising that bottles so marked are not sold by respondent and always remain its sole property; further that bottles when emptied must forthwith upon demand be surrendered to the respondent or its collecting agents; thereupon the respondent will pay cash to the persons returning such bottles at a rate fixed by the respondent. A copy of "Fiji Times" published in 1971 was produced in evidence showing the warning notice published therein. Appellant's witnesses all acknowledged that they had read the notices in the newspaper and were aware of the

wording on the bottles and of the respondent's claim to ownership thereof.

The respondent does not sell its beer to the public but only to holders of liquor licences; when a sale is made the respondent issues an invoice bearing the respondent's trade mark and couched in these terms:

" BOTTLES NOT SOLD

Bottles having moulded thereon the mark shown in the margin hereof are not sold but always remain the sole property of CARLTON BREWERY (FIJI) LIMITED. When emptied of their present contents the bottles must forthwith on demand be delivered to that Company or to its Agents appointed in that behalf. Persons delivering such bottles to CARLTON BREWERY (FIJI) LIMITED or to its agents will be paid for their care ar trouble in preserving and so delivering bottles a reward at the appropriate rate fixed by that Company and ruling at the time of such delivery CARLTON BREWERY (FIJI) LIMITED reserves the rig of fixing differential rates and of altering such rates from time to time and without notice

Respondent became alarmed over the non return of a large proportion of its bottles and in 1979 imported 4 million new bottles.

The learned trial judge found that the appellan used the respondent's bottles in its business to a substantial degree; appellant claimed, however, that it had acquired ownership of the bottles when it purchased them from the general public and bottle collectors and that the respondent is estopped by its conduct in allowing retailers to deliver beer in bottles from sayin that it did not authorise those retailers to sell the bottles.

Mr. Lee, Managing Director of the appellant company said:

> "I say that when we buy the bottles we own them and we refuse to deliver them up to plaintiff. We will continue to use bottles unless the court orders otherwise. "

We turn now to consider the 6 grounds of appeal.

The burden of Mr. Koya's argument on the 1st ground of appeal was based on the formation of the contract; he submitted that when an hotel or other holder of a liquor licence orders a quantity of beer from the respondent an unconditional offer to buy is thereby made and the acceptance thereof is the delivery of the beer; however, the delivery of the beer is accompanied by an invoice in terms set out above. Mr. Koya submitted that this amounts to a counter offer and that the new terms, namely, that the respondent retained ownership of the bottles, not having been agreed to by the offerer he is not bound thereby. Further if the respondent claimed that these new terms were part of the contract then the respondent should have produced evidence to confirm that the purchaser agreed to these new conditions.

Mr. Sweetman, for respondent, submitted that the respondent offers to sell its beer on the terms set forth in its invoice and that a purchaser of beer in accepting same is bound by the express terms of the contract set out on the invoice.

Further the witnesses called by appellant all of whom were employees of liquor licence holders acknowledged that they were aware of the terms on which respondent sold its beer; they confirmed that they had knowledge of the terms of the delivery invoice, namely

that the bottles were not sold. In addition they agreed that the bottles were embossed with the respondent's trade mark and the other wording set out above.

We are satisfied therefore:

(1) That the respondent's sale of bottled beer is restricted to hotels and other holders of liquor licences; the method employed on the sale of bottled beer is as Narayan Sami Naidu Sales Manager of Punja and Sons stated:

" When we receive beer from brewery we receive a pink copy of Exhibit 5(produces own pink slip.) It says that the bottles is not sold. I'm familiar with that. I have been familiar with that for 4 years. I know what it says (repeats). We only buy the beer and sell it, we don't return the bottles. "

We agree with the statement made by the learned trial judge when he said:-

" The plaintiff has always claimed retention of ownership in the bottles in its bills and invoices, by the embossed words on the bottles themselves and by its frequent notices to the public at large. And on the evidence before me it is not open to the defendant, or to Vishnu Deo the bottle collector to say that when they purchased these bottles they were unaware of the plaintiff's declared claim of ownership in them. "

(2) If Mr. Koya's submission is correct and the respondent's action in delivering bottled beer together with the invoice containing the printed notice as to onwership of the bottles is a counter offer then the original offer is thereby rejected. When the beer is delivered t and accepted by the purchaser the contract is concluded upon the very basis contended for by the respondent. Mr. Chesterman, respondent'

manager, explained the system used by the Company and said:

" Top right hand cover shows "Bottles not sold" and note, those records have been on all invoices since 1971 when we started bringing in our own bottles. 4 copies of invoice are made out. White copy for statement, yellow for office, blue for delivery abd pink goes with product. "

(3) In our opinion therefore all bottled beer sold by the respondent to its customers, is sold on the express terms set forth in the invoice namely that the bottles remain the property of the respondent and what is sold is the contents of the bottle only.

(4) That in addition the bottles have embossed, moulded or stamped upon them, to be seen by every person into whose hands the bottles may come, the trade mark, the words "Fiji beer", and the words "This bottle always remains the property of Carlton Brewery (Fiji) Limited."

(5) The respondent had supplemented the warnings and notices on its bottles and invoices by advertising in newspapers circulating in Fiji at least four times a year in English, Fijian and Hindustani languages a warning notice couched in terms similar to the one appearing on the invoice.

(6) The fact that the respondent included in the price of a dozen bottles of beer the sum of $1.10 for empty bottles was in our view prudent business practice as the respondent had to make some allowance for the moneys it would pay for the return of empty bottles and does not in any way detract from the express terms of sale as set out on the delivery invoice.

In our opinion therefore the whole of the contract relating to the sale of bottled beer was consist with the respondent retaining ownership of the bottles and no evidence was adduced by the appellant to the contrary.

Accordingly this ground of appeal fails.

Mr. Koya acknowledged that if Ground 1 failed he could not sustain Ground 2 and accordingly we pass now to consider Ground 3 which reads:

> "3. THE learned Trial Judge erred in law in not holding that having regard to all the circumstances of the case and by reason of Section 24 of the said Act that the Respondent was precluded from denying that its immediate customers had authority to sell the bottles in question to their own customers and that the householders or consumers having purchased them in open market without notice of any defect in the title held by their immediate sellers, had acquired good title to sell the same to others. "

Mr. Koya submitted that the evidence showed that the immediate purchasers of bottled beer from the respondent sold beer to their own customers and that while the immediate purchasers may not have had a good title to ownership of the bottles the respondent was precluded from denying that the seller had authority to sell and thereby transfer title to the bottles to the sub-purchasers.

Counsel for appellant relied on section 24 of the Sale of Goods Ordinance (Cap.206) which reads:

> " Subject to the provisions of this Ordinance, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the onwer, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell....."

Mr. Sweetman submitted that there was no evidence that the respondent had given authority to its immediate purchasers to sell the bottles to third persons - in fact it would be completely inconsistent with the terms of the sale of bottled beer concluded between the respondent and its purchasers, which terms the purchasers were aware of.

Further that ground of appeal was in effect a plea of estoppel.

Section 24 of the Sale of Goods Ordinance states the general rule that no one can transfer a better title than he himself posseses. However, there is an exception created by the statute where the owner of the goods by his conduct is precluded from denying the seller's authority to sell. Briefly, it must be shown either that there was a respresentation by the owner that the seller was ntitled to sell the goods or that the owner by his words, silence or acquiescence leads another to believe that he was not the owner and has no interest in the goods whereupon the buyers sell them to an innocent purchaser and the true owner cannot afterwards claim that the goods are his. Regard must be had to the conduct of the owner and it is the effect of this conduct that will bear heavily on the decision whether the owner is precluded from assisting that the goods are his. It was claimed that where the bottled beer was sold by hotelkeepers and merchants (who had bought direct from the respodent) that the bottles were dealt with, disposed off and sold by persons into whose hands the bottles came and that they dealt with such bottles as if they were their own property and that the respondent has merely stood by and acquiesced in this practice.

First, there was no evidence called by the appellant is support of the submission made by counsel

for appellant that the respondent had authorised the immediate purchasers from it to sell bottles to their own particular customers. Secondly it cannot be said that the respondant merely stood by and took no steps to ensure ownership of the bottles remained in the respondent. It is clear that the respondant never divested itself of the ownership of the bottle; the notice printed on the invoice, the notice and words on the actual bottles and the regular newspaper warnings to the public confirm and establish that the respondant took all possible means to make the public aware of the fact that the bottles remained the property of the respondent and not a single witness was called by the appellant to give evidence to the contrary.

We adopt with respect the words of Isacc J. in Curtis v Perth and Freemantle Bottles Exchange Co. Ltd. (1914) 18 C.L.R. 17 at p.28:

> " Beyond question the Bottle Company contemplated as part of the use to which these bottles should be put, that they, containing beer, should be handed on to retail dealers for the purpose of being handed to customers in the ordinary course of business, that part of that business should be the sale of the contents, and that some right short of ownership and terminating only with consumption of the contents should pass to the purchaser in respect of the bottle. If no notice to the contrary were conveyed to a purchaser in the ordinary course of trade, I should say that notwithstanding the actual secret limitations of authority the property in the bottle also would be presumed to pass to him. The ostensible authority would be taken to be the real authority. So it comes to this: Was there a sufficient intimation to the purchaser that, notwithstanding the ordinary presumption of trade over the counter, the bottle itself was not to be sold, because it was not the property of the retailer to sell. I have had some doubt on account of the comparative indistinctness and want of conspicuousness of the notice at the foot of the bottle, and the absence of a statement that the notice is limited to the bottle. But, remembering that the onus of the issue lies on the appellant, on the whole I think he has discharged it. The notice is there; the trade mark,

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prominent enough, is also there; the public advertisements notifying the actual positions were numerous; the matter was likely to be known in Perth, and particularly in the limited area assigned for the branded bottles; and no case of deception was proved, although witnesses likely to know of deception if it had occurred were called.

I agree, therefore, in the result that, upon the evidence in this case, no estoppel has been established in favour of the retail customers; and, that being so, the actual title of the Company must be given effect to, and the appeal dismissed. "

We agree with the learned trial judge here when he said:

" The present case is stronger than in the Curtis case because here the wording moulded onto the bottles is in much clearer terms. "

Mr. Koya submitted that there was a market overt in Fiji and that purchasers of bottles sold in "market overt" accordingly to the usage of the market obtained a good title to the bottles provided they purchased them in good faith and without notice of any defect or want of title on the part of the seller. It is noted that section 22 Sale of Goods Act 1893 (U.K.) provides for sales in market overt which means "an open, public and legally constituted market". There was no evidence that such a market exists in Fiji nor is there any provision in the Fiji Ordinance for a "market overt".

Accordingly in our view the submissions made by Mr. Koya on this matter have no application in Fiji. This ground of appeal fails.

We turn now to ground 4 which reads as follows:

"4. THE learned Trial Judge erred in law in not holding that having regard to all circumstances of the case when the appellant purchased empty bottles, the Respondent had not avoided the title of the appellant's

> immediate seller and therefore under section 25 of the said Act the appellant acquired a good title to the same. "

Mr. Koya submitted that where persons purchased bottled beer from a hotelkeeper or a merchant and believed in good faith that they were buying the bottles as well as its contents and they had no notice of any defect in their vendors title that section 25 assisted such persons to acquire a good title to the bottle.

Section 25 of the Sale of Goods Ordinance states:

> " When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title. "

However, it is implicit in section 25 that the original transaction between the true owner and the seller must confer upon the seller a voidable title to the goods; accordingly if the transaction is not a sale but merely a bailment of the bottles, as is the case here then the seller will not have a voidable title to the bottles, but merely possession of the bottles and in our view cannot pass a good title under section 25 (supra).

The evidence in the Supreme Court clearly established that there was no intention on the part of the respondent that the property in the bottles would pass to any purchaser of beer and accordingly in our view there is no scope for the application of section 25; neither the bottle collectors nor any intermediate holders of the respondent's bottles could obtain any proprietary right thereto. On the contrary the bottles have embossed or moulded upon them an express notice negativing what might but for its

presence involve an inference of title in the purchaser of the bottled beer or other person into whose possession the bottle may fall. N.Z. Breweries Ltd. v. Grogan [1931] G.L.R. 412 was a case where the defendant an aerated water manufacturer sold his products in the plaintiff's bottles which were clearly marked as being the plaintiff's property Kennedy J. at p. 416 said:

> "A notice so unusual and so explicit as 'This notice is the property of New Zealand Breweries Limited' and so at variance with an unrestricted power of disposition by the person receiving it with knowledge, calls for some explicit negation by a person who claims that the notice does not affect him and that his transaction is other than the notice declares it to be. So long as that notice is not obliterated, it constantly proclaims, to those aware of its existence, that to which it is affixed is the property of the plaintiff."

The evidence clearly showed that the appellant was aware of the respondent's claim of ownership to its bottles.

In our view the respondent retained throughout ownership of its bottles and there was no evidence called to the contrary which showed that title of the bottles whether voidable or not was vested in anyone else and we adopt with respect the statement by the learned Judge when he said:

> " Surely there is nothing in the conduct of the plaintiff in selling its product, or in the way beer finds its way to the ultimate consumer, or in the plaintiff's use of authorised collectors to recover bottles rather than demand immediate return from customers or consumers, to indicate any intention on the part of the plaintiff to relinquish ownership of the bottles as argued by counsel for the defendant. The very fact of the embossed markings on the

bottles as argued by counsel for the defendant. The very fact of the embossed markings on the bottles and the frequent advertisements in the paper-indeed this action - show quite clearly that this is not case ..... I cannot see that any of this should be taken to imply, as the defendant would have me imply, that the plaintiff had any way abandoned its rights in the bottles, or that it should be estopped from now reasserting its claim to the bottles."

Accordingly for the reasons given we reject this ground of appeal.

Ground 5 reads:

"5. THAT the learned Trial Judge erred in law in not holding that the Respondent's buyers had full right to confer good title to their sub-purchasers as if they were a merchantile agent in possession of the bottles with the consent of the true owner by reason of section 27(2) of the said Act because:

(a) the buyers obtained possession of the bottles with the consent of the seller in possession;

(b) there were deliveries by such buyers to their sub-purchasers who received them in good faith without notice of any lien or other right of the original seller. "

Mr. Koya submitted that where the holder of liquor licence purchases bottled beer from the respondent and then sells it on to sub-purchasers, act as a merchantile agent, lien or other right of the original seller acquire a good title to the bottles.

Section 27(2) of the Sale of Goods Ordinance reads:

" Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a merchantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of goods shall have the same effect as if the person making the delivery or transfer were a merchantile agent in possession of the goods or documents of title with the consent of the owner. "

A study of section 27(2) above shows

(1) that the buyer - the holder of the liquor licence - must have bought or agreed to buy the bottles. The evidence is clear that the respondent did not sell the bottles to its immediate purchasers - in fact the evidence from all appellant's own witnesses is to the contrary. The respondent had no intention of selling its bottles to its immediate purchasers - at the highest it was a bailment of the bottles and the respondent retained ownership of the bottles throughout.

There was no evidence that sub-purchasers of the bottles received them without notice of the respondent's claim to ownership nor was there any evidence that the

respondent knew that its own customers were selling the bottles as well as the contents to sub-purchasers. Accordingly in our view no such inference could be drawn; in point of fact the evidence called by appellant supported the respondents's claim to ownership of the bottles.

In N.Z. Breweries Ltd. v. McKendrick Bros. Ltd. (1937) N.Z.L.R. 112 Myers C.J. said:

> "In any event, how can it be said that the plaintiff, which expressly reserves to itself the property in the bottles in every sale it makes of bottled beer, and which remains the true owner of the bottles, has, at all events in the absence of any evidence that the plaintiff knew of any of its direct purchasers selling or purporting to sell the bottles, misled or deceived the retail customers who buy the beer from such direct purchasers. "

This ground of appeal fails.

Ground 6 raises issues as to how long each bottle had been in circulation; whether the bottles were identifiable as the respondent's property and several other matters all of which we consider irrelevant to

this present appeal and accordingly this ground of appeal is rejected.

We turn now to consider the respondent's notice and the relief sought thereunder. The appellant doubtless finds it much cheaper to use the respodnet's bottles than to buy bottles of its own. It was proved that it made a practice of filling the branded bottles of the respondent without paying any regard to the notice on the bottles or the notices published in the press although he stated he was fully aware of both.

Appellant stated he would continue to use respondent's bottles unless prevented by a Court Order and his attitude is summed up by the learned trial judge when he said:-

> "I think the answer is that he always knew exactly what he was doing, the extent to which he was using the plaintiff's bottles, and he took the view, rightly or wrongly, that the plaintiff had no further right to the bottles; so far as he was concerned the bottles were now his, he wasn't bothered how many of the "Fiji Beer" bottles he had in his store, he would continue to use them until or unless stopped by a court order. "

In Beswicke v. Alner (1926) V.L.R. 72 the Full Court of Victoria held that "where the plaintiff has established the invasion of a common law right and there is a ground for believing that without an injunction there is likely to be a repetition of the wrong, he is, in the absence of special circumstances entitled to an injunction aganist such repetition."

The learned trial judge was not prepared to grant an injunction to restrain the appellant from acquiring and using similar bottles in the future. However, the appellant claims the right to use the respondent's bottles without troubling whether they are

the property of the respondent or not. The expressed intention of the appellant to continue using and filling the bottles of the respondent is to deprive the respondent of the use of its property. Model Dairy Pty. Ltd. v. White 1935 41 A.L.R. 432 was a case where the plaintiff sued for conversion upon the ground that the defendant without authority used milk bottles belonging to the plaintiff and we adopt with respect the statement made by Gavan Duffy J. at 43

> " Branded bottles as they are used in the milk trade are a continuous invitation to dishonest use. The number of separate cases of conversion in a year might be very large, and the evidence suggests that if the defendant is unrestrained they will be considerable. The difficulties of detection are great. It is very unlikely that evidence can be collected in a large enough number of instances to make proceedings for damages anything but a useless remedy, and misuse of a dairyman's bottles on an extensive scale may interfere seriously with his buying arrangements. To force the plaintiff to depend on actions for damages in individual cases would be to deprive him of all real protection. "

Accordingly in our view having regard to the expressed intention of the appellant to continue to violate in the future the respondent's common law rights of ownership of its bottles and the inadequacy of an action for damages we hereby order that the judgment of the Supreme Court be varied and the following order be included along with the orders already made by the Supreme Court on 21st December, 1979:

> " That in respect of bottles now in the appellant possession or under its control, or that may hereafter come into its possession or under its control having embossed stamped moulded blown branded or otherwise marked thereon the respondent's Trade Mark No. 7023 and also the words "Fiji Beer". "This Bottle always remains the property of Carlton Brewery (Fiji) Limited"

the appellant whether by itself or by its directors, officers, servants or agents or otherwise howsoever be restrained from detaining the same after demand by the respondent of its agent and from refusing after such demand to return and/deliver up the same to the respondent or its agent or agents provided always that the respondent on delivery and return of the same as hereinbefore mentioned shall pay to the appellant such sum as may from time to time be payable hereafter to other persons delivering bottles to the respondent's brewery premises at Suva or Lautoka for their care and service in keeping and promptly delivering such bottles."

The appeal by the appellant is dismissed with costs to the respondent thereon; the respondent's notice is allowed to the extent already indicated together with costs to be agreed and failing agreement taxed by the Chief Registrar.

(Sgd.) T. Gould
Vice President

(Sgd.) G.D. Speight
Judge of Appeal

(Sgd.) B.C. Spring
Judge of Appeal

SUVA,
30th June, 1980.