IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 3 OF 1993
(High Court Civil Action No. 643 of 1985)

BETWEEN:

BURNS PHILP (SOUTH SEA) COMPANY LTD — APPELLANT

-and-

LEES TRADING COMPANY LIMITED — RESPONDENT

Mr. S. Parshotam and Mr. John Ireland Q.C. for the Appellant
Mr. B. C. Patel for the Respondent

Date of Hearing : 12th August, 1993
Date of Delivery of Judgment : 20th August, 1993.

JUDGMENT OF COURT

This is an appeal with leave from a decision of Scott J given on 5th November 1992.

The action commenced as long ago as 12 July 1985 as a claim by the appellant in respect of an alleged breach by the respondent of a contract to supply biscuit tins. The respondent counter-claimed and, following withdrawal of the original claim, the action proceeded on the counterclaim only.

Both parties were, in addition to other business interest, manufacturers of biscuits, and between them apparently accounted for 90% of all biscuits made in Fiji. In the early months of 1984 the parties entered into negotiations for the sale to the respondent of the appellant's biscuits making operation. The

respondent's counterclaim was that, at a meeting on 5th June 1984, agreement was reached but the appellant by a letter on 7th June repudiated the contract. The appellant's defence was that no binding or final agreement was made on 5th June or at all.

Very substantial damages were claimed and, as it was clear there would be considerable dispute, counsel agreed the trial before Rooney J would be restricted to determination of the appellant's liability. If it was found liable, the Court would assess damages at a separate hearing.

On 18 May 1987, the learned Judge in a lengthy and well reasoned judgment found there was a binding agreement, the appellant was liable and, as it was also in issue, that the respondent had not by an subsequent conduct released the appellant from its obligations under the agreement.

In view of the likely length and detail of the claim for damages the Judge urged counsel to try and secure agreement. Failing that, he advised them to attempt to narrow the issues in order to define the extent to which damages flowed from the breach of contract and the actual figures involved.

The record does not show the reason, but the hitherto leisurely progress of this litigation then appears to have come to a complete halt until statements of issues were eventually filed pursuant to a Court order more than five years after the

Judge suggested them and eight years after the meeting in June 1984 that spawned the action.

The appellant sought, in the first three issues, to raise the suggested illegality of a clause of the agreement. On application by the respondent, Scott J ordered they be struck out and it is that order the appellant now seeks to set aside.

The first three issues are:-

> *"1. Whether the availability of damages of loss of profit claimed by the 2nd Defendant against the Plaintiff depends upon the validity of the covenant contained in clause 9 of the draft agreement for sale and purchase between the parties.*
>
> *2. Whether such covenant was valid and binding or was illegal and of no effect as an unreasonable restraint of trade.*
>
> *3. Whether the 2nd Defendant is entitled to recover damages for loss of profit in consequence on the breach of any other term of the four draft agreements which were intended to be executed by the parties and if so, which provision of which of such agreements."*

The 2nd defendant is the respondent to this appeal.

The agreement found by Rooney J was in fact four parallel agreements and the clause referred to occurs in the agreement for sale of the plant and equipment:

> *"9. In consideration of these presents and the Agreements of even date made by the Vendor and the Purchaser, the Vendor hereby agrees and undertakes that for five (5) years from the date hereof it will not without the Purchaser's consent in writing directly or indirectly carry on or be concerned or interested in the business of manufacturing or distribution of edible biscuits in Fiji either alone or jointly with or as agent or trustee or manager of any other person firm or company nor sell or export within the said period biscuits manufactured in Fiji other than by Purchaser or its associate or subsidiary company."*

The respondent's reply questions the right of the appellant now to challenge the nature of that clause:-

> *"1. WHETHER the points 1 and 2 of the Plaintiff's Statement of Issues relate to the issue of liability and not the assessment of damages because no issue was raised in the pleadings or at trial questioning the validity of the contract.*
>
> *2. WHETHER an issue estoppel now arises against the Plaintiff (on points 1 and 2) from challenging the enforceability of the contract which has been found to have been breached.*
>
> *3. WHETHER an issue estoppel arises in respect of point 3 of the Plaintiff's Statement of Issues as the Court has found that Plaintiff breached the contract in whole and not in parts and damages should be assessed on that basis rather than attempting to list those provisions which were breached by the Plaintiff and those which were not breached by it."*

Scott J considered both written and oral submissions and ruled in favour of the respondent. His ruling was short and may be set out in full:-

"I think it is not doubted that restrictive covenants in restraint of trade between a vendor and purchaser of a business are not obnoxious to public policy if reasonable given the nature of the business and reasonably limited in space and time. (Nordenfeld v. Maxim Nordenfeld Co (1894) AC 535).

It is also clear that the onus of proving that the convenants are contrary to the public interest lies on the party attacking the contract. (Morris v. Saxelby (1916) 1 AC 688).

In my view so fundamental a point as illegality of the contract in issue should have been raised by being of pleaded by the Plaintiff and argued at the time the question of liability fell to be decided (see RHC O.18 r 8).

Furthermore that the aim of the whole exercise was for the Defendant to acquire a monopoly is clear from the judgment of Rooney J. The expectation of receiving a monopoly clearly affected the price to be paid and the profits to be derived from running the sole remaining monopoly business once the acquired business had been shut down.

I accept that the assessment of damages is intimately connected with the question of liability but consider that it was the intention of the parties that all questions of liability should be determined by Rooney J.

If the restraint were palpably obnoxious the position might be different. But I do not find it so on the papers before me.

I rule that it is not open to be Plaintiff to raise illegality at this stage and accordingly I grant the Defendants application."

The grounds of appeal to this Court are:-

"1. *That the Learned Judge erred in law in concluding that it was not open to the Appellant to raise the invalidity of the Covenant contained in Clause 9 of the Draft Agreement for Sale & Purchase between the parties upon the assessment of damages in relation to the Respondent's Counter-Claim against the Appellant in the action.*

2. *That the Learned Judge erred in law and in fact in determining that the issue of invalidity of the said Covenant had been concluded against the Appellant by the decision and order of the Honourable Mr Justice Rooney given in the proceeding on 18 May 1987.*

3. *That the Learned Judge erred in law in determining that the onus of establishing the invalidity of the said Covenant lay upon the Appellant.*

4. *That the Learned Judge erred in the exercise of his discretion in refusing to permit any necessary amendment of the pleadings on the part of the appellant to raise and maintain its argument in relation to the invalidity of the said Covenant for the purposes of the assessment of damages recoverable by the Respondent against the Appellant under the Counter-Claim in the action."*

The Court has had the benefit of well presented and thoughtful submissions by counsel on both sides. It is accepted by Mr Ireland for the appellant that the question of illegality of clause 9 should have been pleaded in relation to liability. He accepts also that the burden of demonstrating the illegality lay on the appellant. However, he points out that the measure of damages depends to a very major degree on whether or not that clause was valid. He places his case firmly on the question of fairness. The validity of that clause could make the difference,

in his phrase, "between four million and forty thousand". There will, in any event, be a lengthy and detailed hearing on damages and if the matter is included then the respondent will have a full opportunity to deal with it. He does not, of course, ask us to decide whether clause 9 is in fact illegal for being in restraint of trade. He asks that he be allowed to argue the point before the Court assessing damages and in relation only to quantum. He does not, he says, seek to go behind the learned trial Judge's finding on liability.

As Scott J found, it was the intention of the parties that all matters of liability should be determined by Rooney J. Whichever way it is considered, the appellant effectively seeks to challenge his finding and we feel that determines this appeal.

Counsel for both sides have cited authorities and, with respect to counsels' research, the propositions are familiar to us and undisputed in essence by either party. We do not feel this appeal depends on a decision on them.

We accept that agreements in restraint of trade may be illegal as contrary to public policy. We accept it depends on the circumstances of the case including the extent of the restraint and the position of the negotiating parties to each other. We consider such illegality should be pleaded but we accept that in a case where it is clear on the face of the agreement it should not be enforced, the Court may take the point even if not pleaded and dismiss the claim. We do not feel this

is such a case of ex facie illegality and that question would need to be considered on the evidence as a whole.

That, of course, is the appellant's point. Admitting the failure to plead the illegality, that factor has such a profound effect on the measure of damages, the appellant should be entitled, even at this stage, to have it determined by the Court. Even if the Court is in its favour, it would only, Mr Ireland claims, go to quantum and not to liability.

In the trial, although the covenant was referred to frequently in the evidence and the summing up, it was never suggested to be contrary to public policy even though the appellant obviously appreciated the sale it was negotiating would have given the purchaser a virtual monopoly. It no doubt used that to obtain a higher price. No concern about the public interest appears to have featured in the discussions at that time or before the Judge at trial. The appellant sought to avoid the whole agreement and the learned Judge's finding was that it had made the agreements as a whole and was bound by them in that form.

The liability for damages flows from breach of that agreement including clause 9. Despite valiant efforts to persuade us to the contrary, Mr Ireland's suggestion that he wishes to contest it as a measure of damages only does not bear scrutiny. If the Court is to find damages should not flow from breach of clause 9, it would have to be persuaded the clause was illegal. That is a reversal

of part at least of the trial Judge's finding. It would mean the appellant is liable for the agreement apart from clause 9 when Rooney J found it liable on the whole.

The time to avoid clause 9 if it could be avoided was at the trial. We would suggest, with respect, it should have been apparent to the appellant then that the very large sum claimed for loss of profit must have flowed from a breach of that clause. The appellant chose not to raise it then and cannot raise it now.

The appeal is dismissed with costs.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Justice of Appeal

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Mr Justice Gordon Ward
Justice of Appeal