

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0016 OF 1996S

(High Court Civil Action No. 410 of 1992)

BETWEEN:

UNITED APPAREL LIMITED

APPELLANT

-AND-

SAVILLE HEATON AND COMPANY LIMITED

RESPONDENT

**Mr. S.J. Stanton and Mr H.K. Nagin for the Appellant
Mr J. Howard for the Respondent**

**Date and Place of Hearing: 11 November, 1997, Suva
Date of Delivery of Judgment: 14 November 1997**

JUDGMENT OF THE COURT

This is an appeal from the judgment of Scott J. given on 9 April 1996 at Suva. It arose out of an action by the respondent, Saville Heaton and Company Limited, (Saville Heaton), against the appellant United Apparel (Mfg) Limited. (United Apparel) for damages. Scott J. gave judgment in favour of the plaintiff in the Fiji dollar equivalent, at the rate of exchange prevailing on 1 July 1991, of 27,711.74 pounds (sterling) together with interest at 10% from the date of the commencement of proceedings until the date of judgment, together with costs to be taxed if not agreed. Later, on 30 July 1996, on the application of Saville Heaton, he expanded upon his order relating to costs but in such a way, as will be discussed later, as to leave the effect of it somewhat unclear. United Apparel appeals against the finding in favour of Saville Heaton, the damages and the order for costs.

The circumstances out of which this action arose may be stated fairly shortly. We take these facts substantially from the judgment in the Court below. Saville Heaton is a British Company based in Yorkshire which wholesales imported clothing in the United Kingdom. The Chairman of the company is Mr David Heaton and his two sons John and William are directors. United Apparel is a sizeable and well established Fiji manufacturer of clothing with its factory in Suva. In 1989 United Apparel was interested in expanding into Europe and it so happened that a Mr Jitendra Thakorlal, the son-in-law of one of the directors, Ramesh Solanki, was a salesman in a clothing shop in West Hampstead, London. Mr Solanki visited Mr Thakorlal and appointed him United Apparel's European agent. At about that time Mr Thakorlal in addition to his salesman activities, began trading as "Jay's Enterprises - Merchants Importers, Exporters and Manufacturers". Jay's Enterprises was based in West London and was a customer of Saville Heaton.

In about May 1989 Mr Thakorlal and Mr John Heaton met and discussed the possibility of having clothes made for Saville Heaton by United Apparel in Fiji. The position at that stage was that much or most of Saville Heaton's clothing had been made for it in the Far East, especially Taiwan. This arrangement had been satisfactory, although there was one disadvantage in that the clothing was liable to customs duty upon entry into the EEC of which, of course, the United Kingdom is part. The negotiations with Mr Thakorlal culminated in his sending a fax, stated to be from M/s Jays Enterprises, Mr Jitendra Thakorlal, and dated 18 May 1989 giving prices for mens casual and formal trousers, based on certain conditions as to the supply of materials, and indicating production capacity of the factory in Fiji. It concluded with words to the effect that imports to the United Kingdom were duty free under concessions

made to former British possessions under a convention called the Lome Convention. There were other discussions and at all events an order was placed in September 1989 followed by further orders. The goods were imported and entered duty free but in July 1991. Saville Heaton received a demand from the United Kingdom Customs and Excise for payment of duty on the clothing imported which in fact was not eligible for duty free access. The duty amounted to 27,711.74 pounds and was paid by Saville Heaton.

Saville Heaton based its claim on two alternative causes of action. These can be stated in a brief form as follows: first, in tort on the basis that United Apparel was negligent in stating that the goods were exempt from duty when in fact they were not. This cause of action was in effect a claim in terms of the principle enunciated in Hedley Byrne & Co. Ltd. V. Heller & Partners Ltd. [1964] A.C. 465. The alternative cause of action was in contract, on the basis that there had been a breach of contract on the part of United Apparel in that it was a term of the contract that the clothing would be imported into the United Kingdom duty free. United Apparel's defence to the negligence claim was that Saville Heaton was not in fact misled as to the duty free aspect, as it was informed the goods would be subject to customs duty of 13% - 13 1/2%, and to the breach of contract claim, that there had been no breach. This latter defence involved an acknowledgement that it had been thought at first that the goods would be duty free but later it was realised they would not and that a discount of 6 1/2% instead was agreed between the parties. It is unnecessary to consider this latter defence further as the learned trial Judge held that it was not a term of the contract that the goods should be duty free and the case was decided upon the negligence claim.

The learned Judge heard oral evidence from the David Heaton, the Chairman of Saville Heaton, and from two witnesses for United Apparel, Mr Solanki and Mr Kumar. He stated in plain terms his view of these witnesses. He found Mr Heaton a witness of truth. On the other hand, he was singularly unimpressed by Mr Solanki as not only was his evidence frequently self-contradictory but he also presented as someone both shifty and evasive. Mr Kumar he considered, was plainly repeating what he had been told. In so far as their evidence materially contradicted that of Mr Heaton, he rejected it. In addition to the oral evidence, there were a large number - one might say a very large number - of documents placed before the learned Judge.

There are eleven grounds stated in the final notice of appeal. However, there is no point in setting these out as the appellant's submission in skeleton form lodged in writing before the hearing, Mr Stanton's written notes of argument put in at the hearing, and his extensive and vigorous oral submissions, did not follow the form of the notice of appeal. We propose in this judgment to deal, as necessary, with the matters raised in Mr Stanton's argument as he developed it.

The first part was an analysis of the evidence, and in particular, in relation to five areas a submission, in effect, that the learned Judge was wrong in respect of a number of his findings fundamental to the cause of action. These five areas were;

- (a) the making of the representation that the goods were duty free,
- (b) the terms of the contract,

- (c) the matter of Saville Heaton's reliance on the representation as to the duty free entry of the goods,
- (d) whether it was reasonable for Saville Heaton to behave as it did in relying upon that representation and making no check of its own and
- (e) the question of the agency or otherwise of Mr Thakorlal.

In respect of this part of the argument, little needs to be said. We have considered all the matters raised by Mr Stanton. While on one or two matters the learned trial Judge may not have stated the position wholly accurately, we are quite satisfied that there is no basis for this Court to interfere with his findings. An example of inaccuracy was when the Judge referred to "the mysterious production at the eleventh hour of the spurious document which was exhibit 7" which in fact had been disclosed by United Apparel in its affidavit of discovery. However, we were told by Mr Howard that in fact Counsel had earlier settled some bundles of agreed documents, which had not included this one and it was then produced at the trial by Mr Solanki not in evidence in chief but in re-examination.

It follows that we are satisfied that the learned trial Judge was entitled to find, as he did, that the representation was made and that a duty of care was owed by Mr Thakorlal, as agent of United Apparel to Saville Heaton, though we discuss this aspect further later in this judgment, that he failed in that duty of care and that Saville Heaton relied upon the representation and as a result suffered loss.

Mr Stanton next submitted that in the light of the circumstances and of the discussions and negotiations between the parties, no duty of care was owed. In our view, applying the tests usually applied of proximity and foreseeability, and asking the question whether the finding is just and reasonable, the learned trial Judge was clearly right. A number of cases were cited to us but it is sufficient to mention two! Pacific Associates Inc. V. Baxter & Ors. (1989) 3 WLR 1150 and South Pacific Manufacturing Co. Ltd. v. New Zealand Security Consultants and Investigations Ltd. (1992) 2 NZLR 282. As Richardson J. said in the latter case of this issue of mixed fact and law, it is an intensely pragmatic question requiring careful analysis; we are of the opinion that that is exactly what the Judge gave it.

The main thrust of Mr Stanton's submissions appeared to be directed to the proposition that a representation which induces a contract, but which is not included as a term of the contract, should not be held to be actionable as a negligent misstatement in tort under the Hedley Byrne principle, since any such representation could not provide a cause of action in contract. This appears to be the converse of the case that has been argued in other cases that, if a person has a cause of action in contract then the Courts should be reluctant to permit on the same facts a cause of action based in tort. Mr Stanton referred to a number of cases including Kavanagh v. Continental Shelf Co. (No.40 Ltd. (1993) 2 NZLR 648; Pacific Associates Inc. v. Baxter & Ors. (Supra); Aiken v. Stewart Wrightson Members Agency Ltd. (1995) 31 DLR (4th) 481. In our view this submission confuses two separate issues; the first is whether a duty of care exists at all in the particular circumstances and, the second, is whether the remedy in tort is so inconsistent with the applicable contract that the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.

In Henderson & Ors. v. Merrett Syndicates Ltd. (1994) 3 WLR 761 Lord Goff of Chieveley in a speech, in which the other four Law Lords concurred, held that where a duty of care existed, then a person was free to pursue a remedy which was open to him either in contract or tort. It follows then that there is no logical reason why there should not be concurrent remedies in both tort and contract. At 788 Lord Goff said:

“The common law is not antipathetic to concurrent liability. There is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the common law and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy, which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.”

The situation in this case is that the learned trial Judge held that the contract did not contain a term that the clothing would enter the United Kingdom duty free. If the appellant's submission were right, a representation which induced a contract but which was not included in the terms of the contract could not be actionable either in tort or on contract. That proposition cannot be correct.

The authorities relied upon by the appellant are either concerned with the question of whether in the circumstances of each case a duty of care existed at all; or, whether the contract entered into was inconsistent with, or expressly excluded, a remedy in tort, or that there were otherwise policy reasons for denying a cause of action. It is true that in Kavanagh's case, the New Zealand Court of Appeal appeared to lean towards holding that, if a cause of action existed

in contract, then in some circumstances the Court would rule against a cause of action in tort. However, in that case there were special considerations. It related to an alleged breach of warranty of authority, which, first, gives rise to a cause of action whether the warranty was negligently given or innocently, and second, in the circumstances of that case it would enable a person to recover damages from a public body contrary to the provisions of the Public Bodies Contracts Act 1959 by means of invoking the principle of vicarious liability.

The Court considered there were thus two reasons of policy for denying a claim in tort. However, as Richardson J. went on to say at 652, that while without further consideration he would not then rule finally against any claim in negligence solely on the first policy ground, he was satisfied that, together, they clearly told against a duty of care in tort. It should be noted, however, that what was primarily being considered was the question of whether any duty of care existed at all; of course, if no duty of care existed, then no cause of action would exist in tort at all and no question of concurrent causes of action would arise. It may also be noted in passing that **Kavanagh's** case was decided before **Henderson v. Merrett Syndicates** and Lord Goff's speech in relation to concurrent remedies. We therefore reject counsel's submissions under this heading.

Mr Stanton went on to mount an argument on the question of damages. He based this on submissions that there was no duty of care breached and that, as the learned trial Judge had held the duty free representation was not included in the contracts, Saville Heaton could not recover damages. Obviously for the reasons already given, those submissions must fail. Counsel made some further submissions based on the evidence but we see no merit in them. In our view,

it is clear that Saville Heaton suffered loss as a result of the negligent misstatement relating to the duty free entry of the clothing and the measure of that loss was the duty paid to HM Customs.

It follows that the appeal is dismissed. However there remains the question of costs to which we made reference at the beginning of this Judgment.

Scott J. in his supplementary Judgment for reasons there given made the following order:

“I therefore order that the Plaintiff recover its costs on a party and party basis but direct the Chief Registrar when taxing the bill to do so in such a way that the Plaintiff recovers all costs reasonably incurred by it. Any doubts which the Chief Registrar may have as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the Defendant.”

This order was a special order made pursuant to Order 1 r. 9(3)(a) of the High Court Rules. Both Counsel made submissions as to how this order should be construed and applied. Regrettably, we did not find the submissions of either of them resolved the matter in our minds. Indeed, we have been unable to determine just what was meant. Accordingly, we quash the order for costs made.

We propose to make a special order by way of a fixed sum. Bearing in mind all the numerous pleading and applications, hearings in interlocutory matters as well as the

substantive hearing before Scott J., and all incidental matters, we fix that sum at \$20,000. The respondent is also entitled to all disbursements and witness expenses, including the travel costs of Mr Heaton in coming to Fiji and his hotel and other reasonable expenses incidental to the journey. The respondent is also entitled to costs in this court which are fixed at \$2,500 and disbursements.

Save in respect of costs the appeal is dismissed.

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Sir Ian Barker
Judge of Appeal

[Handwritten signature: I.R. Thompson J.A.]

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Mr Justice I. Thompson
Judge of Appeal

[Handwritten signature: Savage JA]

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Mr Justice Savage
Judge of Appeal