IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0012 OF 2003S
(High Court Civil Action No. 204 of 2001S)

BETWEEN:

CHUNG EXPORTS LIMITED

First Appellant

JOHN CHUNG

Second Appellant

AND:

FOOD PROCESSORS (FIJI) LIMITED)

Respondent

Coram: Eichelbaum, JA
Tompkins, JA
Penlington, JA

Counsel: Mr R Naidu for the first and second appellants
Ms R S S Devan and Ms P Madanavosa for the respondent

Hearing: Friday, 22 August 2003, Suva

Date of Judgment: Tuesday, 26 August, 2003

JUDGMENT OF THE COURT

Introduction

[1] On 15th May, 2001 the appellants as plaintiffs commenced proceedings in the High Court against the respondent as defendant. They alleged that the respondent by its packaging had endeavoured to pass off its frozen cassava as that of the appellants and that its packaging was calculated to deceive the purchasers of the appellant's frozen cassava into the belief that the cassava sold by the respondent was that of the

appellants. The appellants further pleaded that the respondent's conduct was misleading and deceptive contrary to ss 54 and 55 of the Fair Trading Decree 1992.

[2] The appellants sought an injunction restraining the respondent from packaging selling marketing and exporting its frozen cassava in packaging similar to that of the appellants or in such a manner as to deceive purchasers into the belief that they were purchasing the appellant's frozen cassava and from passing off its frozen cassava as that of the appellant's. They also sought damages (unquantified).

[3] On the same day the appellants filed a notice of motion seeking an interlocutory injunction in substantially the same terms and seeking a further order requiring the respondent to remove its frozen cassava from all supermarkets shops and other outlets unless it is packaged in plastic bags not similar to those of the appellants.

[4] The application for an interlocutory injunction was considered by Pathik J on written submissions. The last of the written submissions was filed by the respondent on 19th September, 2001. By a judgment delivered on 31st March, 2003 the application for an interlocutory injunction was refused. From that decision the appellant has appealed.

[5] An application for an interlocutory injunction in circumstances such as these is intended to govern the position of the parties pending the hearing of the substantive application. For that reason, it is essential that the judgment on the application be delivered as promptly as possible. In the present case, there was a delay of 18 months between what was in effect the conclusion of the hearing and the delivery of judgment. This has the result that during that period the parties were in a state of uncertainty concerning their legal position. Also, it has resulted in considerable, undesirable delay in the hearing of the substantive proceedings.

[6] In the absence of circumstances making such a delay unavoidable - and neither this court nor counsel are aware of any such circumstances - the delay that occurred was inexcusable. Judges of the High Court in Fiji should be conscious of the duty that

rests on them to deliver their judgments promptly. It is to be regretted that in this case the Judge did not comply with this duty.

Factual evidence

[7] The affidavit of a director of the appellant states that the first then the second appellants have been trading since January 1989 when the first appellant commenced to export frozen cassava to Australia and New Zealand. They have been using the same type of plastic bag for packaging the frozen cassava with the same design, writing and colour. It is claimed on behalf of the appellants that the frozen cassava they have exported is highly regarded in Australia and New Zealand for its good quality, is well known and has acquired a high reputation.

[8] The affidavit of the acting manager of the respondent states that the respondent is owned by the National Trading Corporation Ltd. The National Trading Corporation Ltd took over the assets of the National Marketing Authority which had been established in 1971.

[9] The Authority commenced the export of cassava in 1980 using plastic bags that were transparent, had a red frame with black lettering and the authority logo. It is asserted in the affidavit on behalf of the respondent that the appellants have copied the plastic bag used by the Authority and that the appellants in doing so have been passing off its cassava for that of the respondent.

[10] This is disputed by the appellants. They claim that the Authority ceased to export cassava in 1987, and that it was not until 2000 that the respondent commenced the export of cassava. The respondent claims that the Authority was exporting cassava until 1989. For the purposes of this interlocutory application, it is unnecessary to resolve this factual issue. There was a period of at least eleven years when neither the respondent nor any related company was exporting cassava.

[11] The evidence from the appellants and the respondent is notable for what has been omitted. There is no evidence about the volumes of cassava exported by either

party in the past, the volume of cassava currently exported, the range of customers to whom it is exported, the location of the customers in Australia and New Zealand of each party, whether or not there has been in fact any customer confusion, supporting the claim by the appellants that the cassava of the respondent is inferior to that of the appellant, supplying details of any respect in which the trade of the appellant has been affected, supplying details to support the claim that the appellant has the financial ability to meet any damages award, the effect of the grant or refusal of an injunction on the appellants' and the respondent's businesses.

The approach to be adopted

[12] In a claim based on an allegation of passing off, the plaintiff must establish a goodwill or reputation attached to the goods in the mind of the purchasing public, a misrepresentation by the defendant to the public, and that it suffers or is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation: *Reckitt & Coleman Products Ltd v Borden Inc and ors* [1990] 1 All ER 873 (HL).

[13] The approach the court should adopt in deciding an application for an interlocutory injunction are too well established to require citation. The court will consider whether there is a serious question to be tried, and if so, where lies the balance of convenience. The latter will require consideration of such factors as the relative strength of the plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages, and any other relevant factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end, the court is required to determine where the overall justice lies.

[14] This last aspect was emphasised by Cooke J in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142:

> "Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. . . . the balance of convenience can

> have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way . . . it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."

The judgment in the High Court

[15] The Judge reviewed the submissions of the parties and the relevant authorities. He observed:

> "The question whether there is similarity in the package and the "get up" and that there is confusion in the minds of the consumers cannot on this case be decided on affidavit evidence alone. The facts as presented do not enable the Court to grant an interim injunction and make the orders sought. The issue has to be decided in the substantive action."

[16] However, having decided that the issues cannot be decided on affidavit evidence alone, he went on to say:

> "Bearing in mind the affidavit evidence before me, I have reached the conclusion that this motion ought to be dismissed. And I am not convinced as evidence stand, trusting my own eyes so to say, looking at the packaging produced as exhibits of likelihood of confusion. Although there may be some similarities, it maybe that the plaintiffs had directed their minds in their affidavits to similarities in packaging and neglecting all dissimilarities. Hence as evidence stands I am not fully convinced that any buyer with the remotest conception of what he is purchasing could be misled.
>
> I find there is no serious issue to be tried. The balance of convenience will lie in maintaining the status quo. Both parties have been running their respective businesses for some considerable time and to grant an injunction could be that the defendant would suffer greater harm and loss than the plaintiffs."

Conclusion

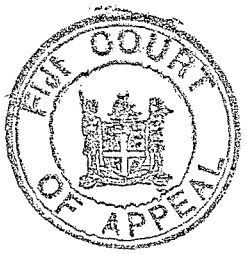
[17] With respect to the Judge, we consider that he erred in reaching the conclusion in the passage we have set out in paragraph [16]. Having, in the passage we have set out in paragraph [15], in our view rightly, said that the issue of similarity in the packaging and "get up" has to be decided in the substantive action, he went on to decide it. He did not determine the primary issue, namely whether, having regard to the similarities and dissimilarities and any other relevant evidence, the appellant had established a serious question to be tried in relation to the passing off claim.

[18] We have considered the packaging including the similarities in layout, the identical recipes and instructions printed on the back of the appellants' and respondent's packages, and also the dissimilarities. Although the appellants' case may not be strong, it is at least arguable that the similarities may cause some confusion. Whether there is a sufficient degree of similarity in the packaging, whether a buyer is likely to be misled, and whether the respondent's packaging amounts to a misrepresentation, are issues to be decided when the substantive action is heard.

[19] However, we agree with the Judge that the application should be dismissed. Looking at the issue broadly, we do not consider that the justice of the case lies in granting the injunction sought. Having regard to the possible weaknesses in the appellants' case, the time the parties or their predecessors have been exporting cassava, the consequence of an injunction on the respondent's business together with the deficiencies in the evidence to which we have referred in paragraph [11], we agree with the Judge that the status quo should continue until the hearing. If the appellants succeed in their claim, damages will be an adequate remedy.

The result

[20] The appeal is dismissed. The respondent is entitled to costs which we fix at $750 plus disbursements to be fixed by the Registrar.



Eichelbaum JA

Tompkins JA

Penlington JA

Solicitors:

Messrs. Sherani and Company, Suva for the appellants
Messrs. G.P. Lala and Associates, Suva for the respondent

D:\OFFICE\WDWIN\IUSHA\ABU0012U.03S