

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 236 of 1978

BETWEEN: CARLTON BREWERY (FIJI) LIMITED Plaintiff

and

LEES TRANSPORT LIMITED Defendant

Mr. B. Sweetman, Counsel for the Plaintiff
Mr. S.H. Koya, Counsel for the Defendant.

J U D G M E N T

The plaintiff's writ and Statement of Claim allege that the defendant is using the plaintiff's beer bottles for bottling the defendant's aerated waters.

A declaration is sought to the effect that the defendant is not entitled to retain possession of the plaintiff's bottles; an account; damages for conversion; a return of the plaintiff's bottles held by the defendant and an injunction restraining the defendant from using the plaintiff's beer bottles.

The Statement of Defence alleges that the plaintiff is selling bottles of beer has parted with ownership of the bottles as well as with possession; and denies that it holds or uses any bottles belonging to the plaintiff.

The Statement of Claim alleges in para 4(a) that the bottles bear a notice moulded on them that they remain the property of the plaintiff.

It is noteworthy that the Statement of Defence does not deny the existence of that proprietary declaration moulded on the bottles but simply does not admit it.

The writ was filed on 8th August this year and now the plaintiff seeks an interim injunction restraining the defendant from using the kind of bottles which the plaintiff alleges belong to it.

Counsel for the defence criticised para 2 of the plaintiff's affidavit in support of the interim injunction application which swears that the Statement of Claim is, in effect

correct. However, para 2 is followed by facts which support the allegations in the Statement of Claim.

The defence affidavit is on lines similar to the defence.

This application is not concerned with conjectures as to the possible outcome of the proceedings but I have to be satisfied that there is a matter for serious consideration. I have no doubt on that aspect.

Mr. Koya, for the defendant, has urged that damages have been claimed and therefore should be assessable for the period preceding the actual hearing date and that an award of damages will be a proper way of dealing with the situation. It seems to me that the plaintiff's damages will be very difficult indeed to assess and that any attempt to do so would involve considerable evidence as to costing. In my view the prospect of receiving damages and any undertaking to pay them will not be a satisfactory mode of dealing with this problem from the plaintiff's position.

The defendant's position is somewhat similar. He has bottles with the alleged proprietary markings upon them and must know how many he holds. If he is restrained from using them it may or may not affect his ability to dispose of the aerated water which he wishes to bottle and to manufacture. There can be no point in manufacturing more aerated water than he can bottle. If it affects his sales he can as from now begin to keep an account thereof and to formulate his claim for damages until he obtains an alternative supply of bottles.

However, one cannot say that a probable interruption in his business may cost him in terms of good will if his supply of bottles is seriously restricted.

It is therefore necessary to try and determine the issue on the balance of convenience. As was pointed out in *American Cyanamid v. Ethicon* 1975 1 A.E.R. 504 at 511 b & c if the defendant is temporarily enjoined to stop doing something which he has been doing in the course of an established enterprise it could cause great inconvenience to him since he may have to establish himself again.

An interim injunction in this case would not halt the defendant's enterprise but it could seriously affect the flow of his business. This is supported by the plaintiff's allegation that the defendant has been using such bottles in large quantities for over 2 years.

On the other hand, I apprehend that refusal of an interim injunction will in no way halt the flow of beer from the plaintiff's breweries. I can take judicial notice of the fact that the plaintiff's have no competitor at present in the manufacture of beer and there can be little fear of a loss of good will.

On balance I am of the opinion that the defendant would be subject to greater inconvenience by a grant of the injunction than the plaintiff will be by its refusal.

The plaintiff's application for an interim injunction restraining the defendant from using the beer bottles in question is refused.

Costs of this application to the defendant in any event.

LAUTOKA,
15th NOVEMBER, 1978.

(Sgd.) J.T. Williams,
JUDGE.

2684

CAP. 207]

SEA CARRIAGE OF GOODS

or agreement to the contrary or purporting to oust or lessen the jurisdiction of the courts of Fiji in respect of the bill of lading or document shall be illegal, null and void and of no effect.

(2) Any stipulation or agreement, whether made in Fiji or elsewhere, purporting to oust or lessen the jurisdiction of the courts of Fiji in respect of any bill of lading or document relating to the carriage of goods from any place outside Fiji to any place in Fiji shall be illegal, null and void and of no effect.

Saving.

8. (1) Nothing in this ^{Act} Ordinance shall affect the operation of any other ^{Ordinance} Ordinance for the time being in force limiting the liability of the owners of sea-going vessels nor the operation of sections 446 to 450 both inclusive and 502 and 503 of the Merchant Shipping Act, 1894 (Imperial) as amended by any subsequent enactment.

(2) The rules shall not by virtue of this ^{Act} Ordinance apply to any contract for the carriage of goods by sea made before the commencement of this ^{Act} Ordinance.

(3) Article VI of the rules shall, in relation to the carriage of goods by sea in ships carrying goods from any port in Fiji to any other port in Fiji, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

(Section substituted by 5 of 1928, s. 2.)

SCHEDULE

(Section 2)

RULES RELATING TO BILLS OF LADING

ARTICLE I

Definitions

In these rules the following expressions have the meanings hereby assigned to them respectively, that is to say—

“carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper;

“contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

“goods” includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;