

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 329 of 1985

Between:

DEANS AGENCIES (a firm) of Suva Plaintiff

- and -

MAKANS LIMITED a limited liability Company having its registered office at 103 Vitogo Parade, Lautoka, trading as MAKANS DRUG AND PHARMACEUTICAL SUPPLIES 1st Defendant

- and -

THAKORLAL'S PHARMACY LIMITED a limited liability Company having its registered office at 103 Vitogo Parade, Lautoka 2nd Defendant

- and -

GOVIND BHAI (f/n Jeikishan Patel), ASHOK KUMAR (f/n Govindbhai) trading as C.J. PATEL & COMPANY of 126 Toorak Road, Suva 3rd Defendant

Mr. V. Parmanandam for the Plaintiff
 Mr. M.P. Patel for the 1st & 2nd Defendant
 Mr. H.M. Patel for the 3rd Defendant

JUDGMENT

The plaintiff in this action complains that the defendants have imported into Fiji, without any right to do so a product named DR DRUCKREYS DRULA BLEACHING WAX and illegally supplied the said product throughout Fiji.

The plaintiff claims that they have the sole right to distribute the product in Fiji by virtue of the fact that they have been appointed sole distributing agents by the manufacturers of the product.

They seek orders restraining the defendants from importing this product into Fiji and distributing it. They also seek an order that the defendants withdraw all the said products from sale until hearing and determination of this action.

This action was commenced by the late Mr Ashik Ali and due to his untimely death Mr Parmanandam has appeared to represent the plaintiff.

The late Mr ali after issuing the writ took out a summons seeking the same orders as those sought in the action.

It is not clear why the summons was issued. It is not an originating summons nor is it a summons seeking interim orders. The Court queried the procedure followed by the late Mr Ali who sought an adjournment to obtain Counsel's advice.

When Mr Ali next appeared it became apparent that the summons was intended to be an ex parte one and the court ordered that the application be made inter partes.

Although Mr Ali did not amend his summons, when counsel appeared on the 9th May, 1985 it was agreed that the plaintiff's application be treated as the hearing of the claim, limited to the issue of liability, and that if the defendants be held liable that damages be assessed by the Chief Registrar.

Counsel have put in written submissions. The late Mr Ali put in his submission shortly before his death. It is apparent that he had completely misconceived the legal issues involved.

The misconception commences at the beginning of his submissions where he states that the defendants have illegally imported into Fiji and illegally sold in Fiji a product which the plaintiff claims to have the sole right to distribute as he had been appointed sole distributor by the manufacturer of the product.

The product which the defendants have imported is the genuine product and no question of passing off arises.

There can be two ways the defendants obtained the product. One was by the manufacturer supplying the goods to the defendants direct which could be a breach of the agreement entered into by the manufacturer with the plaintiff unless the agreement provides in that event for the plaintiff to receive commission.

The other way is by the defendants ordering the goods from a supplier in Germany to whom the manufacturer had sold the product. That is what has apparently happened in the instant case.

There is no illegality in the sale to the supplier in Germany by the manufacturer and resale by that supplier to the defendants. If the manufacturers were aware that the goods would be resold to the defendants there could be a claim by the plaintiffs against the manufacturers for commission on the goods sold.

The late Mr Ali referred to a number of cases which makes it clear that he considered his client's case was akin to a breach of copyright or infringement of a patent.

The three main cases quoted by Mr Ali are:

(1) Plimpton v Spiller (1876) 4 Ch. 286 where there was an alleged infringement of a patent and an interlocutory injunction was sought.

(2) Harman Pictures N.V. v Osborne and Others 000295
(1967) 1 W.L.R. 723 where there was an infringement of
copyright, and

(3) Donmar Productions v Bark and Others (1967)
1 W.L.R. 740 also a copyright case.

The plaintiff's remedy lies against the manufacturer if there has been a breach of contract by the manufacturer. If there is no breach the manufacturer can assist in two ways. Firstly, by refusing to supply the company supplying the defendants or, secondly, agreeing in any event to allow the plaintiff commission on all the products covered by the distribution or agency agreement which are imported into Fiji.

It appears to me that the plaintiff is not satisfied with the commission but seeks also a monopoly so as to receive not only commission but also profits from wholesale and retail sales.

The importation into and sale of the product in Fiji by the defendants was legal and not in breach of any of the rights of the plaintiff, and I so hold.

The action is dismissed with costs to the defendants.

(R.G. Kermode)

J U D G E

SUVA,

August, 1985