BLUE LAGOON CRUISES LIMITED

v.

RICHARD EVANSON

and

TURTLE ISLAND AIRWAYS

and

TOTIS INCORPORATED

[SUPREME COURT, Lautoka—Dyke J.—8 August 1980.]

Civil Jurisdiction

Passing off—plaintiff's long use of "Blue Lagoon" had so become part of its operation as to entitle it to restrain others from using names so similar as to deceive or cause confusion.

B. C. Patel with V. Kalyan for Plaintiff

R. Krishna for Defendants

The plaintiff a company incorporated in 1965 to operate cruises to the Yasawa Islands and other services sought an injunction to restrain the defendants from using the words "The Blue Lagoon" in the course of their business.

One of the places visited by the plaintiff company as part of its cruises was an area of water near the Island of Sawa-i-Lau and the under water caves therein generally referred to as "The Blue Lagoon", the area also known by local islanders by a name The English translation of which is the "Blue Lagoon".

The learned trial judge made certain findings which are set out in summary form.

(1) When people in these parts talked about "The Blue Lagoon" the place they referred was the area of water mentioned above near the island of Sawa-i-lau

(2) One of the reasons the term had special significance is that in 1948 a film by the same name was made largely in this very area.

(3) Although the plaintiff company had operated cruises under the name "Blue Lagoon Cruises" since 1965, there were cruises similarly named operated in the same area since about 1950; and in 1965 the plaintiff bought out the previous operators and took-over these cruises with the name and its goodwill.

(4) The plaintiff operated a very successful business since incorporated establishing a very high reputation for its services. It carried out an extensive, continuing advertising campaign amongst the public, tourist agents and airlines referring to the area in question.

(5) The operations of the plaintiff were associated with the words "Blue Lagoon" travel brochures, not necessarily issued by the plaintiff, in respect of its operations in this area used various terms, including, as was found, the words "Blue Lagoon".

(6) In this part of the world in the tourist business "Blue Lagoon" had become more than a descriptive term, and one associated with the plaintiffs operations.

(7) The first defendant was the Managing Director of the second defendant and operated a flight of aircraft around the Fiji Islands including the Yasawa Islands and ferried people and supplies to an island in the group named Nanuya Levu. The third defendant was a registered owner of the island, being a company incorporated in the United States, and registered in Fiji, of which first defendant is President.

(8) The defendants were out to develop and expand their business in Fiji carrying out an extensive advertising campaign.

Nanuya Levu (also called Turtle Island) had been developed as a tourist centre. A resort type hotel was built there which it called Yasawa Lodge. In late 1979 the name of this was changed to "Blue Lagoon Lodge", a name which also figured prominently in the defendant's advertising campaign. The same phrase was used in flight schedules.

(9) No attempt was made to make it clear that Blue Lagoon Cruises had nothing to do with the Blue Lagoon Lodge.

(10) The two phrases must have lead to confusion. 1979 is significant because a retake of the film "Blue Lagoon" was made, predominantly filmed on Nanuya Levu, for which reason the defendants renamed the hotel as previously mentioned. The 1948 film had been mostly filmed at Sawa-i-lau.

(11) So far as the 1948 film was concerned "Blue Lagoon" stuck to the lagoon near Sawa-i-lau and not the lagoon of Nanuya Levu.

The defendants were quite prepared to take advantage of any goodwill the plaintiff had brought to the use of the name "Blue Lagoon". Evidence showed that in fact there was confusion which had arisen e.g. a Travel Agent thought the "Blue Lagoon Lodge" was part of the plaintiff's business; letters for the defendants' were constantly being sent to the plaintiff by mistake.

The trial judge referred to principles in decided cases e.g. *N.Z. Insurance Co. Ltd. v. The N.Z. Insurance Brokers Ltd.* (1976) N.Z.L.R. 40; *Ewing v. Buttercup Margarine Co. Ltd.* (1917) Ch. 1; *J. Bollinger & Ors. v. Costa Brava Wines Co. Ltd.* (1961) 1 All E.R. 561. The principle enunciated or referred to in these assisted him in his decision.

In the Ewing case it was stated:

> "the grounds of interference by the court in these name cases is that the use of the defendant company's name, or intended name, is calculated to deceive and so to divert business from the plaintiff to the defendant, or to occasion a confusion between the two business."

The same case indicated that a relevant form of deceiving was the "occasioning confusion between the two businesses, by suggesting that the defendant's business is an extention, branch or agency of, or otherwise connected with the plaintiff's business."

Held: The defendants' use of the name "Blue Lagoon Lodge" and "the famous Blue Lagoon" was calculated to deceive or mislead, or cause confusion, or to lead to the belief that there was a close association between the two enterprises.

The plaintiff was entitled to an injunction to restrain the defendants and their operatives or agents or any of them from trading under the name "Blue Lagoon Lodge" or using the words "Blue Lagoon" and as he held, other similar expressions, in such a way as to lead to confusion.

Cases referred to:

N.Z. Insurance Co. Ltd. v. The N.Z. Insurance Brokers Ltd. (1976) N.Z.L.R. 40.

Ewing v. Buttercup Margarine Co. Ltd. (1917) Ch. 1

J. Bollinger & Ors. v. Costa Brava Wines Co. Ltd. (1961) 1 All E.R. 561.

Legal and General Assurance Society Ltd. v. Daniel (1968) RPC 253.

Judgment

DYKE J:

The plaintiff company was incorporated in 1965 to operate cruises to the Yasawa Islands offering accommodation on board, food, visits to various spots on or among the islands, and entertainment in the Fijian style. Among other places visited is an area of water near the island of Sawa-i-lau and the underwater caves therein, generally referred to as "the Blue Lagoon". It is also known by the local islanders by a name, the translation of which is Blue Lagoon. It is not the only place in the Islands called a blue lagoon, but from the evidence given before the court it is quite clear that when people in these parts talk about "the Blue Lagoon" that is the place that they mean.

Apart from the descriptive and rather romantic nature of the term, it seems that one of the reasons for the term to have a special significance with relation to this spot is the fact that a 1948 film by the same name (i.e. "Blue Lagoon") was made largely in this very area. Although the plaintiff company has operate cruises under the name Blue Lagoon Cruises since its incorporation in 1965, cruises similarly named were operated in the area since about 1950. But in 1965 the plaintiff bought out the previous operators and took over the name "Blue Lagoon Cruises" and its goodwill.

A What has emerged from the evidence is that the plaintiff has operated a highly successful business since its incorporation and has established for itself a very high reputation for the services it offers. It carries out an extensive and continuing advertising campaign amongst the public and tourist agents and airlines in many parts of the world. And there is no doubt that its operations are very much associated with the words "Blue Lagoon". Travel brochures and other material advertising, or praising the plaintiff's operations—not necessarily issued by the plaintiff company—
B seem to use quite indiscriminately the terms such as "Blue Lagoon", "Blue Lagoon Holiday", "Blue Lagoon Products", "Blue Lagoon Bookings", as well as "Blue Lagoon Cruises". So that in respect of this part of the world, in the tourist business, in the business of catering for tourists, accommodating and entertaining them "Blue Lagoon" has ceased to become merely a descriptive term but has become very much associated with the plaintiff company's operations. "Blue Lagoon" is used shortly
C for "Blue Lagoon Cruises Limited", "Blue Lagoon Holiday" means a holiday with the plaintiff company enjoying the services provided by the company.

The third defendant is a company incorporated in the United States, and registered in Fiji, of which the 1st defendant is president and owns 100% of the shares. The 1st defendant is the managing director of the 2nd defendant which operates flights of seaplanes or amphibious seaplanes round Fiji, including the Yasawa
D Islands. The 3rd defendant is the registered owner of an island in the Yasawas named Nanuya-Levu, although the 1st Defendant calls it "my" island and on that island is a hotel or holiday resort which was called the Yasawa Lodge, but which was renamed Blue Lagoon Lodge towards the end of last year. The 2nd defendant ferries people and supplies to the island and provides publicity for the Lodge. Bookings are made for the Lodge through the 2nd defendant, though the running of the Lodge and operations on the island seems to be in the hands of the 1st defendant. The
E activities of the defendants are much interwoven, and clearly the 1st defendant is the driving force behind them all.

The defendants are out to develop and expand their businesses in Fiji and have been carrying out and are carrying out an extensive advertising campaign for the purpose. The island of Nanuya Levu, also called Turtle Island, or Big Turtle Island, is being developed as a tourist centre. A resort type hotel has been built on the island
F and in late 1979 the name of this was changed from "Yasawa Lodge" to "Blue Lagoon Lodge". This figures prominently in the advertising campaign as does what the defendants call the "famous Blue Lagoon". The brochure for Turtle Airways, amongst other attractions offered has the following:—

> "BLUE LAGOON FOR THE DAY: Yes, a full day on the famous Blue Lagoon at Big Turtle Island".

G In its flight schedule it has entries for "Lautoka (Blue Lagoon Cruise)" and just beneath "Blue Lagoon Lodge/Big Turtle Island".

It was admitted in evidence that Lautoka is not a regular flight stop but that planes will on special charter pick up from or drop passengers at Lautoka to connect up with Blue Lagoon Cruises.

H No attempt has been made to make it clear that Blue Lagoon Cruises has nothing to do with Blue Lagoon Lodge. The words "the famous Blue Lagoon" (using capital letters for Blue and Lagoon) unquestionably must lead to confusion with the Blue Lagoon with which Blue Lagoon Cruises is connected. It may well be that the

lagoon off Nanuya Levu is blue but there was no evidence that it had acquired a local or any other reputation as the "Blue Lagoon" or the "famous Blue Lagoon"—at least before 1979. A

The year 1979 is significant because then Columbia Pictures made a retake of the film "Blue Lagoon" and this time it was filmed predominantly on Nanuya Levu. It was after this that the defendant's renamed the hotel "Blue Lagoon Lodge" and made this "famous Blue Lagoon" one of the features of their advertising programme. The 1948 film was mostly filmed about 12 miles further north near or at Sawa-i-lau, although apparently one small scene seems to have been shot on a small island just below and almost connected to Nanuya Levu. But so far as the 1948 film was concerned the name "Blue Lagoon" stuck to the lagoon near Sawa-i-lau and not the lagoon off Nanuya Levu. Clearly one of the main reasons for the defendant's use of the name Blue Lagoon was the fact that the retake of the film was made on Nanuya Levu. This of course offered wonderful publicity opportunities to the defendants, and they have every right to make as much of it as they can. But I have no doubt that they were and are quite prepared also to take advantage of any goodwill that the plaintiff company has brought to the use of the name "Blue Lagoon" and which may be reflected in their favour. It is not without significance that in their early advertisements the defendants even copied, to a certain extent, the tariff pattern used by the plaintiffs. For instance they advertised a special 3-day, 2-night rate just as did the plaintiff. It is true that the later advertisements have adopted a different form of tariff, and that may be as the 1st defendant stated in evidence, because it did not work out well. B C D

This is a passing off action and the plaintiff company seeks an injunction to restrain the defendants from using the words "Blue Lagoon" in the course of their business. The claim for damages is not pursued, and of course it would have been almost impossible to estimate damage. E

I do not think that the injunction sought would or is intended to prevent the defendants from capitalising on the fact that the 1979 film "Blue Lagoon" was made on the island, or even claiming that their lagoon is a blue lagoon (without capital). I think that what the plaintiff seeks is an injunction to restrain the defendants from using the words "Blue Lagoon" in any way in the course of their business so as to deceive people or to confuse them into thinking that there was some connection between the plaintiffs and the defendants. F

The essence of a passing off action is that the use of a trade name or description or device by the defendant is calculated to deceive others into a belief that the business is the business of the plaintiff or that there is some close assocation between them. Even if there is no deliberate intention to deceive, but in fact people are or are likely to be deceived or led to believe that there is some close association an injunction will lie. G

The case of *New Zealand Insurance Co. Ltd. v. New Zealand Insurance Brokers Ltd.* (1976) NZLR 40 is very appropriate. The two businesses concerned were both in the insurance business, though the business conducted by each was quite different from the other. The plaintiff company carried on the business of insurer whilst the defendant was an insurance broker. The plaintiff sought to restrain the defendant from carrying on business under a name similar to its own, though with perhaps a significance difference (i.e. the defendant declared itself to be an insurance broker). H

The court had to decide as a question of fact that the use of the name by the defendant was calculated to lead to the belief that its business was that of the plaintiff and it was in that case declared to be material for the court to ascertain—

A

(a) whether the two companies dealt in the same commodity;
(b) Had mistakes already been made. Although not essential this could be material; and
(c) The probability, on account of the nature of the two businesses carried on, of persons doing business with them making mistakes as to their identity.

B Many authorities were considered by the court. For instance *Ewing* v *Buttercup Margarine Co. Ltd.* (1917) Ch. 1. where it was stated "The grounds of interference by the Court in these name cases is that the use of the defendant company's name, or intended name, is calculated to deceive and so to divert business from the plaintiff to the defendant, or to occasion a confusion between the two businesses."

The judgment of Lord Denning in Legal and General Assurances Society Ltd. v
C Daniel (1968) RPC 253 was referred to and is also pertinent—"It seems to me that although these words "Legal and General" are descriptive words, nevertheless they have acquired such a connotation, such as significance in business and elesewhere, that they have become especially associated with the plaintiff company."

Another relevant form of deceiving in Ewing's case was referred to namely—"by occasioning confusing between the two business, by suggesting that the defendant's
D business is an extension, branch, or agency of, or otherwise connected with the plaintiff's business."

In this case the evidence has shown that the words "Blue Lagoon" have acquired a connotation, a significance in the tourist trade of Fiji and specially with regard to the Yasawas, an association with the plaintiff company.

E The defendant has attempt to show that there can be no confusion between the plaintiff company and Blue Lagoon Lodge, and that they both offer different services. In the words of the 1st Defendant they are as different as night and day and he has pointed out that the plaintiff offers cruises, where accommodation and food (mostly) are provided on board, whilst the lodge offers accommodation and food on land. There is a different address given for each, the plaintiff operates out of Lautoka whilst the defendant operates out of Nadi—
F except to the extent that is sometimes picks up passengers or drops passengers at Lautoka. The defendant transports customers to Nanuya Levu by seaplane. There are other differences and discerning customers should be able to separate one operation from another. That is correct, a discerning customer might take note of the differences, he might even deduce that the two businesses are separate enterprises with separate owners. But he might also be misled into thinking that there was at least a close association between the two
G businesses. And in any case it is not the discerning customer that is the criterion in cases such as these. In the New Zealand Insurance Brokers case for instance the experienced discerning customer ought to have appreciated that one firm offered insurance whilst the other was an insurance broker.

In the case *J. Bollinger & Ors. v Costa Brava Wines Co. Ltd.* (1961) 1 All E.R. 561 the
H court was concerned with the defendant's marketing of a wine under the name of "Spanish Champagne" which it was claimed was being passed off as French

"Champagne". The court agreed that persons who knew anything about wines would not be misled, the very use of the words "Spanish Champagne"; should put some people on guard. Nevertheless an injunction was granted because— A

(a) a substantial portion of the public, being persons whose life and education had not taught them much about the nature and production of wine, but who from time to time wanted to purchase "Champagne" as the wine with the great reputation, were likely to be misled by the description "Spanish Champagne"; B

(a) the use of the description "Spanish Champagne" was intended to attract to the Spanish product the goodwill connected with the reputation of champagne and was dishonest trading.

In this case it was argued on behalf of the defendants that most bookings were made through travel agents who would know that two different companies were involved. In the first place I don't think that followed necessarily, because no attempt seems to have been made by the defendants to point out that they have nothing to do with the plaintiff company. In any case there was the evidence, which I accept, of Taina Ravutu, a travel agent for Fiji Air, who says that she was so confused, and thought that the Blue Lagoon Lodge was part of the plaintiff's business, until she was put wise by the plaintiffs. If a local person working for Fiji Air was misled how much more likely is it that a travel agent or a tourist living thousands of miles away, who may not even know exactly where on the map Fiji is, might be misled. The evidence of Mrs Jan Wendt was also significant. Her evidence showed that letters for the defendants were constantly being sent to the plaintiffs by mistake. This was sometimes because letters for the defendants had been sent to Lautoka, sometimes even to the plaintiffs' box number or office address, or because the postal authorities clearly thought that the plaintiffs were the right recipients. The 1st defendant argued that this merely showed that the postal authorities were not doing their job properly, but I don't think that is good argument at all. Clearly the words "Blue Lagoon" on the letters, with or without the addition of the work "Lodge" meant "Blue Lagoon Cruises" to whomever put the letters in the plaintiffs' letter box. C D E

It is not without significance that the words "Blue Lagoon Lodge" have never been registered with the Registrar of Business Names. The 1st defendant said that he had not got round to it yet, which is an excuse that does not commend itself to me at all. It transpired that the defendants had tried to register the name Blue Lagoon Hotel but this was rejected. The 1st defendant said he was not told and did not know the reason for this, but in any case whether I accept that or not I think there can be little doubt that the reason was because of confusion with the plaintiff's name. F

It is not as if the defendant's business were in some other quite different sphere of activity. For instance "Blue Lagoon ice cream" or sports goods. Or if the Lodge were on an island in the Lau Group—a Blue Lagoon Lodge in the Lau Group or even on Taveuni might not be open to objection. But the main sphere of both parties' activities is catering for tourists in the Yasawas, both offering accommodation, food, entertainment, blue lagoons and white sands. G

I am satisfied that the defendants' use of the name "Blue Lagoon Lodge" and "the famous Blue Lagoon" is calculated to deceive or mislead, or cause confusion, or to lead to the belief that there is a close association between the two enterprises. H

The plaintiff is entitled to an injunction to restrain the defendants, their directors, officers, servants or agents or any of them from trading under the name of "Blue Lagoon Lodge" or using the words "Blue Lagoon", "Blue Lagoon Holiday" or "famous Blue Lagoon" in such a way as to lead to confusion with the plaintiffs' business and I so order. As I have indicated previously the order will not prevent the defendants from exploiting the fact that the 1979 film "Blue Lagoon" was filmed on Nanuya Levu, or even that it has its own "blue lagoon" so long as the words "famous Blue Lagoon" (with capitals) are not used so as to cause confusion with the generally accepted "Blue Lagoon" further north. The plaintiff to have costs to be taxed if not agreed.

Injunction granted