

CARLTON BREWERY (FIJI) LIMITED

A

v.

LEES TRANSPORT LIMITED

B

[SUPREME COURT—Dyke, J.—21st December 1979]

Civil Jurisdiction

C *Injunction—To restrain company using bottles which had remained property of (Plaintiff) supplier—as noted on invoices, bottles and advertisement.*

B. N. Sweetman for Plaintiff

S. M. Koya for Defendant

D Application for injunction where it was alleged the defendant company was using the plaintiff's bottles for the purposes of its soft drinks business, an order to account to the plaintiff for bottles still in its possession and return of the bottles and an injunction to restrain the defendant from using plaintiff's bottles or at least such of them as it now had in its possession.

E The learned trial Judge made these comments upon the evidence and findings thereon:

1. The plaintiff imports some four millions bottles per year at the cost of \$2.62 per dozen.
2. It uses the bottles several times and works on the basis that it should get five usages out of each bottle.

F Its costing is worked out on this basis, allowing for the initial cost and expecting to get the bottles returned, for which it pays authorised collectors 80c per dozen each time they are returned.

The bottles are in great demand, being used for soft drinks manufacturers, and other traders to contain various liquids.

G In an endeavour to retain its interest in the bottles, the plaintiff had adopted various measures for several years.

H In the first place bottles have embossed on the sign the Trade Mark of the plaintiff and around the base the words "Fiji Beer. This bottle always remains the property of (plaintiff)".

Further, the plaintiff caused to be inserted about four times a year in a newspaper circulating in Fiji advertisements in Hindi and Fijian drawing the public's attention to the markings on the bottle and giving warning that bottles so marked were not sold but remained the property of the plaintiff.

The advertisement also stated that on demand such bottles must be surrendered to the plaintiff or its agents; but that the plaintiff will pay persons returning them for their care and trouble in preserving and returning the bottles, at a rate to be fixed periodically.

A

Whenever the plaintiff sold its products to its customers it did so with an accompanying invoice which had an endorsement showing the Trade Mark under the words "Bottles not sold", followed by a notice showing the bottles were not sold but remained the property of the plaintiff and must be delivered up to the plaintiff on demand. The plaintiff's claim was simply that the bottles are not sold but remained their property always and should be delivered up to them on demand. It claimed that the defendant company was using its bottles for the purpose of the defendant's soft drinks business and had refused to deliver up the bottles on demand.

B

The plaintiff has agreed to pay the defendant the usual collection fee paid to any person who collects the bottles.

C

The Managing Director the defendant, Mr Allen Lee agreed that he would not be surprised if 90% of their soft drinks were bottled in Fiji beer bottles.

The issue was whether the plaintiff had retained ownership in bottles. Mr Lee and the defendant's witnesses were aware of the Trade Mark and words embossed on the bottles and had seen the plaintiff's advertisement; yet quite deliberately chose to disregard this claim.

D

Held: The plaintiff had always retained ownership in the bottles. It was not relevant that bottles may have been returned and reused by the plaintiff more than five times.

E

Order:

- (a) The defendant to account to the plaintiff for all such bottles in its possession.
- (b) The defendant be restrained from using such bottles in its own business and shall return them to the plaintiff, on the understanding that it be rewarded at the current rate for returned bottles.
- (c) Costs to be agreed or taxed.

F

Cases referred to:

Curtis v. Perth and Freemantle Bottle Exchange Co. Ltd. (1914) 18 CLR 17.
New Zealand Breweries Ltd. v. Mckendrick Brothers Ltd. (1937) NZLR 112.
William Leich & Co. Ltd. v. Leydon (1931) AC 90.

G

DYKE, J:

Judgment

- A The plaintiff company brews and bottles beer in Fiji. It sells its products to its customers in glass bottles and in casks. It is the bottles which constitute the basis for the present action. I suppose that in this age of throwaway containers which litter and disfigure so many country-sides there is much to be said in favour in glass reusable bottles. But bottles are not manufactured in Fiji and have to be imported, and the plaintiff uses a lot of bottles. The court was told that this year because the supply
- B of returned bottles had diminished drastically the plaintiff had imported about 4,000,000 bottles at a cost of \$2.62 per dozen. The plaintiff hopes to use the bottles several times, and in fact works on the basis that it should get 5 usages out of each bottle. Its costing is worked out on this basis, allowing for the initial cost of the bottles and expecting to get the bottles returned, for which it pays authorised collectors 80 cents per dozen each time they are returned.
- C It seems clear that the bottles are in great demand for other purposes, being used by soft drink manufacturers, and by other traders to contain such things as kerosene, coconut oil, mustard oil, etc.. But in an endeavour to curb his use the plaintiff has adopted several measures which have apparently been employed for several years.
- D In the first place the bottles themselves have embossed on the side its own Trade Mark and round the base the words: "This bottle always remains the property of Carlton Brewery (Fiji) Limited." Apparently the company still possesses and uses a few bottles left over from previous years not so marked, but this case is not concerned with those.
- E The plaintiff also causes to be inserted about four times a year in newspapers circulating in Fiji advertisements in English, Hindi and Fijian drawing the public's attention to the markings on the bottles and giving warning that bottles so marked are not sold but remain the property of the plaintiff. It also says that on demand such bottles must be surrendered to the plaintiff or its collecting agents, but that the company will pay persons returning such bottles, for their care and trouble in preserving and returning the bottles, at a rate to be fixed periodically. Whenever the plaintiff sells its products to its own customers it does so with an accompanying invoice or bill which has an endorsement at the top right hand corner showing the Trade Mark
- F under the words "Bottles Not Sold" and followed by a notice stating that bottles so marked are not sold but remain the property of the plaintiff and must on demand be delivered up to the plaintiff. There is also advice as to payment to persons returning bottles similar in wording to the advertisements put in the paper.
- G The plaintiff's claim is simply that the bottles are not sold but remain its property and should be delivered up to them on demand. It claims that the defendant company is using its bottles for the purpose of the defendant's soft drinks business and refuses to deliver up the bottles on demand.
- H The plaintiff seeks an injunction to restrain the defendant from using its bottles or at least such of them as it now has in its possession; an order that the defendant account to the plaintiff for bottles still in its possession, and return them to the plaintiff and an order, which was not pursued, restraining the defendant from infringing on the plaintiff Trade Mark. The plaintiff also claimed damages; but has not pursued this claim, not least because it would be almost impossible to assess damages in the circumstances of this case.

The plaintiff has naturally agreed to pay to the defendant the usual collection fees paid to any person who returns bottles.

I would have thought from the pleadings that it would have been a very simple matter to agree the issues in this case, and in fact to agree in substance all the relevant facts. It seemed from the outset that there was really a straight forward legal argument involved. Most surprisingly the two experienced counsel involved were quite unable to agree on the issues or on any of the relevant facts. And yet having heard evidence from both sides I do not think that there is anything that has emerged that could not have been agreed at the outset, particularly after it was made clear that no damages were involved. The legal issue remains virtually as it emerged from the pleadings.

The defendant makes substantial use of bottles embossed with the plaintiff's trade mark, and with the words "Fiji Beer This Bottle Always Remains The Property of Carlton Brewery (Fiji) Limited" in his soft drinks business and has done so for some years. Mr Allen Lee the Managing Director of the defendant company was at first somewhat evasive on the point, but I think he is basically honest and he eventually agreed that he would not be surprised if 90% of their soft drinks were bottled in "Fiji Beer" bottles. It is also significant that in opposing an interim injunction in this case it was part of the defendant's argument that an injunction to stop him from using the bottles would seriously affect the flow of his business.

I was not in the least impressed by Mr Lee's assertion that it wasn't his job to check the bottles and that even after this action had started he had made effort to check the proportion of "Fiji Beer" bottles he was using, or as Managing Director, get someone else to do it for him—at least for the purposes of this action. I think the answer is that he always knew exactly what he was doing, the extent to which he was doing, the extent to which he was using the plaintiff's bottles, and he took the view, rightly or wrongly, that the plaintiff had no further right to the bottles; so far as he was concerned the bottles were now his, he wasn't bothered how many of the "Fiji Beer" bottles he had in his store, he would continue to use them until or unless stopped by a court order. If he could get bottles for 80 cents a dozen from collectors he would take them willy nilly, rather than have to import them at the rate of \$2.62 per dozen. It made good business sense if he could get away with it after all.

He produced samples of other bottles which he said he also got from collectors and used, and I'm sure that was so, but he made no attempt to give the number of such bottles used or the proportions of the various bottles used.

I have doubt what in fact "Fiji Beer" bottles do form a substantial part of his soft drink business, though the principle is really the same no matter how many bottles he uses in the business.

It is not suggested that the plaintiff's trouble over bottles—e.g. the shortage at the beginning of the year that seriously affected production, and necessitated the large scale importation of new bottles is caused solely or even largely by the defendant. Many other bottling companies are or were involved, some of which have actions still pending and some of which have come to terms with the plaintiff. But clearly this case is important to the plaintiff because if it cannot prove retention of legal ownership in the bottles and stop other companies using them, it will presumably have to use other containers or increase the price of its product, or charge a substantial deposit for bottles.

The issue quite simply is whether the plaintiff has retained ownership in the bottles as against the defendant. There is no contractual or any other relationship between the plaintiff and the defendant companies. The bottles may have passed

- through many hands before reaching the defendant's premises. Although when the plaintiff sells beer to its own customers the bill or invoice always contains the warning with regard to the bottles which I have described above, those customers pass the beer on to other customers, who might be retailers or clubs or hotels, and those retailers or clubs or hotels then sell individually to consumers. These latter sales are not accompanied by any warnings on invoices as to the ownership of the bottles and clearly the plaintiff does not expect its own customers or its customers' customers to make special efforts to return the bottles. It relies on authorised collectors to collect bottles and return them to the brewery. And it relies on the words embossed on its bottles, and the frequent advertisements in the papers to ensure that the public is made aware of its claim to retain ownership in the bottles, and that it expects to have empty bottles returned to it upon demand being made.

- It is significant that Mr Lee, the managing director of the defendant company, Vishnu Deo who collected bottles and sold them to the defendant, and indeed all the witnesses for the defendant were aware of the trade mark and words embossed on the bottles and had seen the plaintiff's advertised warning about the bottles in the papers. They surely knew perfectly well that the plaintiff claimed ownership in the bottles and yet the defendant and Vishnu Deo chose quite deliberately to disregard this claim and to deal in the bottles, to buy and sell and use them in defiance of the claim, and the defendant has refused and still refuses to return them to the plaintiff upon demand having been made.

- Surely there is nothing in the conduct of the plaintiff in selling its product, or in the way beer finds its way to the ultimate consumer, or in the plaintiff's use of authorised collectors to recover bottles rather than demand immediate return from customers or consumers, to indicate any intention on the part of the plaintiff to relinquish ownership of the bottles as argued by counsel for the defendant. The very fact of the embossed markings on the bottles and the frequent advertisements in the paper—indeed this action—show quite clearly that this is not the case. The fact that the plaintiff has not brought more cases to court, or brought them to court earlier does not alter the position. It would hardly be worthwhile to pursue all the small users of the bottles, the people who use small quantities of the bottles to sell liquid products like coconut oil, and presumably the plaintiff has been more or less driven to take court action against some of the bigger users of the bottles because the flow of returned bottles had very drastically dried up. It cannot see that any of this should be taken to imply, as the defendant would have me imply, that the plaintiff had in any way abandoned its rights in the bottles, or that it should be estopped from now reasserting its claim to the bottles.

- The plaintiff has always claimed retention of ownership in the bottles in its bills and invoices, by the embossed words on the bottles themselves and by its frequent notices to the public at large. And on the evidence before me it is not open to the defendant, or to Vishnu Deo the bottle collector to say that when they purchased these bottles from that were unaware of the plaintiff's declared claim of ownership in them. In fact I am quite satisfied that they knew exactly what they were doing and were prepared to take the risk—either because they thought they had a legal answer to the plaintiff's claim or they hoped that the plaintiff would not think it worthwhile to take action against them.

Nor in my view is it any way relevant whether bottles may already have been returned and reused by the plaintiff more than 5 times. For costing purposes the plaintiff must work on some figure, and I presume that in practice, allowing for breakages, this is a reasonable figure to work on. Some bottles will not be returned 5 times, some may be returned many more than 5 times, but there can be no conclusion or inference that after 5 usages the plaintiff's ownership must automatically cease. That would be nonsense.

There are a number of cases which fully support the position of the plaintiff.

The defence in *Curtis v. Perth and Freemantle Bottle Exchange Co. Limited* (1914) 18 CLR 17 was based on estoppel, but the words of Isaacs J. at p.28–29 are very apt.

“Beyond question the Bottle Company contemplated as part of the use to which these bottles should but put, that they contain beer, should be handed on to retail dealers for the purpose of being handed to customers in the ordinary course of business, that part of that business should be sale of the contents, and that some right short of ownership and terminating only with consumption of the contents should pass to the purchaser in respect of the bottle. If no notice to the contrary were conveyed to a purchaser in the ordinary course of trade, I should say that notwithstanding the actual secret limitations of authority the property in the bottle also would be presumed to pass to him. The ostensible authority would be taken to be the real authority. So it comes to this. Was there a sufficient intimation to the purchaser that, notwithstanding the ordinary presumption of trade over the counter, the bottle itself was not to be sold, because it was not the property of the retailer to sell? I have had some doubts on account of the comparative indistinctness and want of conspicuousness of the notice at the foot of the bottle and the absence of a statement that the notice is limited to the bottle. But remembering that the onus of the issue lies on the appellant, on the whole I think he has not discharged it. The notice is there; the trade mark, prominent enough is also there; the public advertisements notifying the actual position were numerous; the matter was likely to be known in Perth, and particularly in the limited area assigned for the branded bottles; and no case of deception was proved, although witnesses likely to know of deception if it had occurred were called. I agree, therefore, in the result that, upon the evidence in this case, no estoppel has been established in favour of the retail customers; and that being so, the actual title of the company must be given effect to.”

Also at page 23 Griffith C.J. said:

“The foundation of the estoppel in such cases is that purchasers are deceived to their prejudice. There was really no evidence in support of that contention. The plaintiffs took all possible means to make the public aware of the real facts, and not a single witness was called to say that he was unaware of the real facts either by express notice to him, or through the press.”

The present case is stronger than in the *Curtis* case because here the wording moulded onto the bottle is in much clearer terms.

But the case which is really on all fours with this case is *New Zealand Breweries Ltd. v. Mckendrick Ltd.* (1937) NZLR 112. If anything the present case is even stronger because in the *New Zealand Breweries* case there was no evidence of warnings to the

A public advertised in the newspaper, the case depending on the moulded wording on the bottles and the original invoices between the Breweries and its customers. The facts in that case were otherwise almost identical to the facts in this case, and the issues involved were just the same. All the arguments in defence raised in this case seem to have been raised in that case, i.e. the course of conduct of the Breweries, the question of estoppel, etc..

B Counsel for the defendant has urged that the *New Zealand Breweries* case, and the *Curtis* cases are irrelevant to these proceedings, but I cannot agree, they were highly relevant and fully support the plaintiff's claim.

C The only case cited on behalf of the defendant which might afford him any sort of counter to the cases cited on behalf of the plaintiff is *William Leitch & Co. Limited v. Leydon* (1931) A.C. 90. But that case was distinguished in the *New Zealand Breweries* case and it can be similarly distinguished in this case. In the *Leitch* case it was not a question of whether the plaintiffs title was valid against that of the defendant. The defendant never claimed any right or title to the bottles. Customers would bring their own bottles for the defendant to fill with soft drinks, and the defendant would merely fill whatever bottles. The decision of the court was in effect that in the circumstances of that case the defendant was under no obligation to make enquiries as to the ownership of the bottles brought by customers. The plaintiffs title to the bottles was fully accepted.

D In this case the plaintiff has clearly shown that the defendant is in possession of a large number of bottles embossed with the plaintiff's trade mark and words indicating that the bottles remain the property of the plaintiff. The exact number is not clear but the plaintiff is entitled to ask for an account from the defendant. The plaintiff has not relinquished ownership to these bottles and is entitled on demand having been made to have them returned to it. It will of course be a condition of the return
E that the plaintiff will pay to the defendant a reward at the currently stipulated rate for returned bottles. I therefore make the following orders prayed for:

- (a) The defendant shall account to the plaintiff for all such bottles in its possession.
- (b) The defendant shall be restrained from using such bottles in its own
F business and shall return them to the plaintiff, on the understanding that it shall be rewarded at the current rate for returned bottles.
- (c) Costs to be agreed or taxed.

It seems to me that I cannot grant an injunction to restrain the defendant from acquiring and using similar bottles in the future, since it is only on demand that the defendant can be obliged to return bottles, but no doubt after this judgment the
G defendant will be more careful in the future about bottles it acquires from bottle collectors, and in resisting any legitimate demands made by the plaintiff.

Judgment for the plaintiff.