

- 9 MAR 1960

25 RUSSELL SQUARE
LONDON, W.C.1.

24, 1959

No. 21 of 1958

IN THE PRIVY COUNCIL

55487

O N A P P E A L

FROM THE WEST INDIAN COURT OF APPEAL

B E T W E E N

ISAAC NEWTON SHILLINGFORD as Business
Trustee of A.C. Shillingford and Co.
(Plaintiff) ... Appellant

and

10 FRANKLIN A. BARON and OCTAVIA MARIA
BARON, Trading as A.A. Baron and Co.
(Defendants) ... Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the judgment of the West Indian Court of Appeal given by the Honourable J.L. Mathieu Perez, Chief Justice of Trinidad and Tobago, the Honourable S.E. Gomes, Chief Justice of Barbados, and the Honourable
20 Kenneth S. Stoby, Acting Chief Justice of British Guiana, given on the 25th October 1957. p.112-124
2. By their judgment the West Indian Court of Appeal varied the judgment of the Honourable Mr. Justice Gordon given in the Supreme Court of the Windward and Leeward Islands on the 1st December 1954. p.124
3. In his judgment, the Honourable Mr. Justice Gordon ordered that judgment be entered for the Appellant (the plaintiff in the action)
30 for \$3929.67 on the claim with costs and also for the Appellant on the Counterclaim with costs. p.102-108
4. The West Indian Court of Appeal varied the aforesaid judgment in that they confirmed the judgment given for the Appellant in the sum p.112-124

RECORD

of \$3929.67 together with costs of the original hearing, but awarded judgment for the Respondents in the sum of \$11,141.27 on the Counterclaim with costs of the original hearing and awarded the Respondents the costs of the Appeal and applied the doctrine of set off to the amounts awarded on the claim and counterclaim.

p.2-3

5. The Appellant's case as contained in his Statement of Claim is that he is entitled to the sum of \$3929.67., such sum being made up as follows: 10

(i) \$5075.77 under an agreement entered into on the 4th July 1952 whereby the Appellant agreed to manufacture Sugar Syrup for the Respondents.

(ii) \$44.40 being the costs of the truckage of sugar.

(iii) \$34.12 being moneys due under a previous transaction. 20

(iv) \$100.00 being the value of an article wrongfully detained by the Respondents.

The total of the above sum is \$5,254.29., but the Appellant in his Claim gives credit for two items namely an amount of sugar and oil at one time in his possession, the property of the Respondents, the value of such items being \$796.25 and \$528.37 respectively, totalling together \$1,324.62. Thus the claim of \$5,254.29 is reduced by \$1,324.62 making the sum of \$3,929.67 as aforesaid. 30

Exhibit
"EPS 2"
p.150

p.67,71,78

6. With regard to the Agreement for the manufacture of the said syrup, (although not pleaded specifically as such) the said Agreement was in fact partly in writing and partly oral. In so far as it was in writing, it was contained in a letter from the Appellant to the Respondents dated the 4th July 1952. In so far as it was oral, it was contained in conversations between Edward Patrick Shillingford, Wilfred Theodore Shillingford and Isaac Newton Shillingford on behalf of the Appellant and Franklyn A. Baron on behalf of the Respondents, to the effect 40

that the said syrup should be delivered to the ship in once used American Whisky casks which the Appellant had in stock. Alternatively, the Respondents at all material times well knew and acquiesced in the use by the Appellant of once used whisky casks.

p.67 1.1-2

10 7. It is the case for the Appellant as contained in his Statement of Claim that the said syrup was in fact manufactured at his premises at Roseau in accordance with the terms of the said agreement and in July 1952 such syrup, in pursuance of the said agreement, was delivered in once used American Whisky casks as aforesaid F.O.B. to the S.S. Planter and S.S. Crispin for the purpose of shipment.

p.2

20 8. The Respondents case as contained in their Defence and Counterclaim is an admission of the minor items contained in paragraph 5 (ii) (iii) (iv) above. They claim that the agreement was contained in the said letter of the 4th July 1952 but that owing to the negligent, improper and unhygienic manufacture of the said syrup they have suffered damage and as a result no sum is due under the said agreement or in respect of the said minor items.

Exhibit
"EPS 2"
p.150

p.4-8

30 9. Further, by their Counterclaim, the Respondents claim that the Appellant was fully aware of the nature of the contract between the Respondents and the Respondents' Consignees in the United Kingdom and quantify their damage as follows:-

p.6

(i) \$11,612.70 - paid by the Respondents for sugar used in manufacture.

(ii) \$1,012.03 paid to Appellant for manufacture of casks.

(iii) \$3,224.36 - Cost of freight to United Kingdom.

(iv) \$4,001.46 - Loss of profit on Contract with Consignee in United Kingdom

40 The Respondents give credit for \$10,381.80 being the sum they received from the Consignee in the United Kingdom thereby reducing the damages claimed under these heads to \$9,468.75

p.6

10. The Respondents ultimately quantify their

RECORD

- p.7 claim for damages in the Counterclaim (after further minor claims and set offs) at \$11,007.15.
- p.8 11. By his Reply, the Appellant admits inter alia knowledge of the nature of the contract with the Respondents' Consignees in the United Kingdom but deny that the said syrup was manufactured negligently or improperly or under unhygienic conditions as alleged. 10
- p.11 12. On the 9th January 1954, a Commission was issued to take evidence of certain matters in England.
- p.11-64 13. On the 28th April 1954, certain evidence was in fact given on Commission before Sir Shirley Worthington-Evans Bart, at No.4 Paper Buildings, Temple, London E.C.4. pursuant to the said order for Commissions:
- p.10 14. By amendment dated the 4th August 1954, the Respondents amended their Counterclaim alleging inter alia failure to manufacture the said syrup in accordance with the said Agreement and provision of packages (meaning thereby casks) which were of bad quality and unfit for the purpose for which they were intended. They further allege by the said amendment, reduction of the amount by leakage and diminished value due to fermentation, caused by negligent, improper and unhygienic manufacture and packaging. 20 30
15. At the hearing before the Supreme Court of the Windward Islands and Leeward Islands on the 9th, 10th and 11th August 1954, evidence was led on behalf of the Appellant to the following effect.
16. Edward Patrick Shillingford on behalf of the Appellant contended in his evidence in chief that: 40
- p.66 1.22-30 (i) On the 4th July 1952 acting on behalf of the Appellant, he agreed with Baron acting on behalf of the Respondents to manufacture some flavoured syrup for them. A copy of the
- p.66 1.31

RECORD

- written part of the Agreement was put in as evidence. Exhibit "EPS 2" p.150
- (ii) The Agreement was partly oral. p.66 1.33-34
- (iii) The syrup was to be delivered to the ship in once used American Whisky casks. This was a term of the contract and Baron appreciated that this was the type of package for which he was contracting at the time of the Agreement. p.66 1.36-39
- 10 (iv) With regard to insurance during transit Baron had previously been informed by the Appellant that the Appellant could not undertake the insurance of this type of commodity, packaged as aforesaid because of the unsatisfactory nature of the casks. p.66 1.1-16 Exhibit "EPS 1" p.149
- 20 (v) It was arranged that Baron or his agent should come to the Appellant's factory once a week to check the sugar content of the syrup. p.67 1.10-11
- (vi) The casks were to be thoroughly sterilised and wax lined. p.67 1.22-23
- (vii) The consignment contracted for was delivered by the Appellant on board the S.S. Planter on the 21st July 1952 and on board the S.S. Crispin on the 31st July 1952. p.67 1.3-9 p.68 1.5
- 30 (viii) When Edward Patrick Shillingford saw Baron later in August 1952, Baron stated that when the syrup had arrived in the United Kingdom fermentation had been discovered and the shipment had been in a leaky condition. Baron stated for the first time that his contract with his Consignees called for new casks. p.68 1.7-17
- (ix) Baron later complained by letter Exhibit "EPS3" p.151
- 40 17. Edward Patrick Shillingford was cross examined upon his evidence but contended that:

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- p.69 1.22-45 (i) Impurities could have entered in transit or at a wharf at the port of discharge or in the warehouse where stored prior to delivery.
- p.69 1.22-45 (ii) Wood could be from portions broken off staves or casks. Straw could be from flagging used in the coopering. Bees could have got in in the United Kingdom.
- p.70 1.3-4 (iii) Leakage is apt to occur in once-used American casks - up to 10
p.70 1.14 20-25% .
- p.70 1.35 (iv) If impurities had been present during manufacture, Baron would have seen them.

18. Wilfred Theodore Shillingford, on behalf of the Appellant, contended in his evidence in chief that:

- p.71 1.40 (i) It was agreed that the syrup should be "put up" in once used American Whisky casks. 20
- p.72 1.23 (ii) Baron inspected each and every batch.
- p.73 1.18-32 (iii) The casks were assembled, cleaned out and filled with water to prevent leakage and then sterilised with live steam and then waxed.
- p.73 1.42-43 (iv) The method of manufacture of the syrup at the factory and the method of transportation to the ship were such that it was not possible at any of the stages for dirt or bees to enter. 30

19. Wilfred Theodore Shillingford was cross-examined upon his evidence but contended that:

- p.74 1.25-42 (i) Adequate precautions were taken to protect the syrup during manufacture
p.75, 76
- p.76 1.39-41 (ii) If, after arrival in the United 40

RECORD

Kingdom the volume of preservative in the casks was less than the Appellant was supposed to put in, he would not be surprised since the preservative which evaporates very quickly, would be the first thing to go.

p.77 1.1-2

(iii) Foreign matter could get into leaking casks.

p.77 1.8

10 20. Isaac Newton Shillingford, on behalf on the Appellant, gave general corroborative evidence and claimed the sum of \$3,929.67 which had not been paid.

p.77 - 80

21. Victor Alleyne Archer gave expert evidence on behalf of the Appellant concerning the nature of the preservative used and stated in his evidence in chief that:

20 (i) The characteristic of the preservative is that it loses its effect in case of leakage and fermentation begins after the preservative has escaped.

P.80 1.27-33

(ii) The process of fermentation involves release of gasses under pressure.

p.81 1.6-7

22. Victor Alleyne Archer was cross-examined upon his evidence and stated inter alia that it is reasonable to expect a small amount of leakage in transit and that such leakage could have effect upon the preservative.

p.82 1.5-10

30 23. William Flanders Harrison on behalf of the Appellant, contended in his evidence in chief that:

(i) He had considerable experience of shipping syrup and on a previous occasion he had in fact refused to ship a consignment of casks which were leaking.

p.83 1.10-13

40 (ii) He inspected the two consignments of syrup delivered by the Appellant on the docks for shipment by S.S. Planter and S.S. Crispin. They appeared to be in order. They showed no signs of leakage

p.83 1.18-24

RECORD

or fermentation and in consequence they were accepted as cargo.

24. At the said hearing, the following evidence was led on behalf of the Respondents.

25. Franklin Andrew Baron on behalf of the Respondents contended in his evidence in chief that:

p.84 1.26-27 (i) His firm entered into a contract with the Appellant for the manufacture of syrup and that exhibit EPS.2. was the contract. 10
Exhibit "EPS 2"
p.150

p.85 1.6-15 (ii) He received a complaint about leakage from his consignees and subsequently a report referring to fermentation. Later a detailed report was received from a Mr. Morgan
Exhibit "FAB 3"
p.153

p.86 1.15-18 (iii) On a visit to the Appellant's factory during manufacture, he found that the sugar percentage was lower than that agreed upon. 20

p.86 1.37 (iv) He went twice to the factory during manufacture.

26. In cross-examination, Franklin Andrew Baron conceded that:

p.87 1.1-10 (i) The contract with his consignees stipulated shipment in new casks but he himself did not enter into a contract with the Appellants for new casks but for "once used packages". 30

p.87 1.39-40 (ii) Casks were waxed lined and Mr. Shillingford asserts the casks were wax lined.

p.88 1.25-39 (iii) There was no evidence of bees or impurities in the syrup during his visit. There were no bees in the sample which he observed being drawn off from the vats. The vats were covered and the bees could not get in anywhere.

p.90 1.5 27. Joseph Reid on behalf of the 40

Respondents contended in his evidence in chief that: If a waxed cask were open, a normal person would be able to see the wax.

28. Thereupon, the evidence taken upon Commission in the United Kingdom was read to the Court. Five witnesses gave evidence in the United Kingdom on behalf of the Respondents.

10 29. Sidney James Billson, a representative of Messrs. Burnell, Hardy Ltd., and called on behalf of the Respondents, contended in his evidence in chief that:

(i) In May 1952, his Company had entered into a contract with the Respondents for the supply of syrup to be conveyed in new casks. The casks were to be strong, clean parafin wax lined and well coopered to prevent leakage. p.12 1.9-24

20 (ii) There were to be two shipments - the first of 50 casks, the second of 250 casks. p.12 1.25-37

(iii) Messrs. Burnell, Hardy Ltd., had themselves entered in contracts for the re-sale of the syrup with purchasers as follows: p.13 1.18-26

1st shipment - sold to MacLennan Beverage Company in Belfast.

30 2nd shipment - 200 casks sold to Cantrell & Cochrane Ltd.
50 casks sold to Compounds & Essences Ltd.

(iv) Messrs. Burnell, Hardy Ltd., received a report that the first shipment was in bad condition when inspected on arrival and were re-coopered by the West India Dock Authorities. Similar action was taken with regard to the second shipment which was also in bad condition and leaking when inspected on arrival, save that in respect of this consignment the re-coopering was done by forwarding agents. p.13 1.29-42

40 p.14 1.21-25

RECORD

- p.18 1.6-7 (v) Out of these two shipments, a total of 258 casks were returned to Messrs. Burnell, Hardy Ltd., by their purchasers and a small sample of syrup was taken out of the casks returned by Messrs. Cantrell & Cochrane for analysis by an analyst, Dr. Morgan.
- p.17 1.8 In consequence of this analysis, the syrup was deemed by Messrs. Burnell, Hardy Ltd., to be unfit for use in the soft drinks trade. 10
- p.17 1.21
- p.18 1.8-9 (vi) In consequence, Messrs. Burnell, Hardy Ltd., arranged for the contents of the 258 casks to be treated.
- Exhibit "D1" (vii) Details of the leakage of the
p.132 consignments were given.
- Exhibit "D2" (viii) The account with the
p.133-138 Respondents was proved.
- Exhibit "D3" p.139
- Exhibit "D4" p.141
- Exhibit "D5" 30. In cross-examination, Sidney James Billson stated that:- 20
p.144
- p.25 1.17 (i) The contract between the Respondents and Burnell, Hardy Ltd., was a C I F contract and the contract documents were accepted by Messrs. Burnell, Hardy Ltd, in respect of the S.S. Planter consignment on the 3rd September 1952, and in respect of the S.S. Crispin consignment on the 9th September 1952.
- p.32 1.25-30
- p.29 1.20 (ii) When they received notification from the Respondents that the Respondents were unable to insure, Messrs. Burnell, Hardy were dubious about the consignment of syrup. 30
31. Victor Trevor Walkley, Chief Chemist of the Cantrell, Cochrane Group contended in his evidence in chief that:
- p.36 1.18-35 (i) He carried out tests on 73 casks of the 200 casks upon delivery at Sunbury on Thames and examined them for fermentation - such examination showed:

(a) Fermentation in 6 to 14 days
in 16 of the casks.

(b) Fermentation within 6 days in
57 of the casks.

(c) Extraneous particles such as
bees, small fragments of straw and
chips of wood.

- (ii) The remaining casks showed leakage p.37 1.21
- 10 (iii) The contents of the casks p.37 1.10
were unfit for the purpose required.
- (iv) The examination took place at the p.35 1.31-35
end of August or at the beginning of
September 1952.
- (v) The amount of preservative varied p.38-39
considerably.
- 20 (vi) He could not decide whether the p.40 1.18-24
casks had been waxed or not, whether
they had been waxed and the waxing had
worn off or whether there was wax still
in the casks. But in fact the condition
of the casks had no bearing on the
condition of the syrup if the
impurities had entered during manufacture
- (vii) His impression was that there had p.41 1.1-11
been negligence in the manufacture of
the syrup on the grounds that one would
not normally expect to find extraneous
particles therein.

30 32. In cross-examination, Victor Trevor
Walkley stated that:

- (i) He tried scraping the inside of p.44 1.17-20
the casks but could come to no definite
conclusion with regard to the waxing.
- (ii) Three casks had 10 or 20 bees p.43 1.35
floating on the surface of the syrup.
- (iii) Much smaller impurities were p.44 1.30
extracted by the sampling tube from the
interior of the syrup.
- (iv) The syrup itself is very viscous p.46 1.31-32

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and thick. Substances which would sink in water would not sink in the syrup. It is something like treacle.

p.47 1.15-19

(v) He did not suggest that the bees got in in transit and had no evidence to suggest that the bees got into the syrup prior to it being put into the barrels.

33. Walter Henry Lambert, a principal in the firm of Perfect Lambert & Co., Insurance Surveyors, contended in his evidence in chief that: 10

p.51 1.1-3

(i) The syrup was dirty; there were large numbers of bees, dirt and wood and straw in it.

p.51 1.11-12

(ii) He found anything up to 100 or 150 bees in some of the casks.

Exhibit "FAB5"
p.159,160,161

He made his examination on or about the 1st October 1952.

34. In cross-examination, Walter Henry Lambert stated that, although they were not in his opinion English bees, their colouring was light yellow and more like the bodies of wasps that you see here. 20

p.55

35. Roy Warren Watridge, the Borough analyst of Southampton called on behalf of the Respondents, gave evidence of fermentation of the syrup but stated that he saw no bees.

p.57 1.4-5

Exhibit "FAB5"
p.162

He made his examination on or about the 7th October 1952. 30

36. Richard Harold Morgan, a consultant chemist called on behalf of the Respondents, stated in his evidence in chief that:

p.59 1.5-6

(i) He had analysed some syrup given to him by Messrs. Cantrell and Cochrane which contained two wasps floating in it.

p,63 1.10

(ii) he concluded that the syrup must

have been exposed to some unhygienic condition "at some stage".

(iii) It was very difficult to say when the contamination occurred, but it was probably during manufacture. He could not envisage a cask being so dirty as to introduce the degree of contamination found in these samples. p.63 1.12-21

10 37. In spite of his oral evidence that the contamination occurred "probably during manufacture", his report which followed shortly upon his examination and was drawn up on or about 13th October 1952 (approximately six months prior to his giving evidence upon Commission) states: p.63 1.12-21

20 "The presence of so much foreign matter such as wasps etc., suggest that the syrup has been exposed to outside contamination after manufacture". Exhibit "FAB3" p.153

38. In his judgment given on the 1st December 1954, the Honourable Mr. Justice Gordon held that the following facts were common ground between the parties: p.102 -108

30 (i) By agreement between the parties, once used whisky casks which the Appellants had in stock were to be used for shipment to the United Kingdom of the syrup, which was to be delivered F.O.B. p.102 1.15

(ii) The shipments of syrup arrived in London on the 6th August and the 18th August 1952 respectively in bad condition with considerable leakage resulting in the re-coopering on the docks of most if not all of the casks sometime after they were landed. p.103 1.12-19

40 (iii) Owing to a mistake in the shipping documents forwarded by the Respondents, Messrs. Burnell, Hardy could not deal with the shipments until the 3rd September and the 9th September respectively. p.103 1.20-25

(iv) Sometime at the end of August or p.103 1.28-38

RECORD

early September, Mr. Walkley of Cantrell-Cochrane examined 73 casks and found:

16 casks showed evidence of fermentation in 6-14 days.
57 casks showed evidence of fermentation in 6 days, together with extraneous particles.

p.103 1.42-43 (v) Mr. Walkley found the syrup to be unsuitable for use in the soft drink trade for human consumption 10

39. The learned Judge then drew the following conclusions from the evidence:

p.106 1.37-42 (i) He accepted the positive evidence given by the Appellant's witnesses as to the manner in which the syrup was manufactured and preferred their evidence to the evidence of the Respondents.

p.105 1.45-48 (ii) In particular the learned Judge accepted that the Respondents evinced far more interest in the syrup during and after processing and before shipment than Baron led the Court to believe. 20

p.105 1.20-22 (iii) The Appellant knew that the syrup was required for human consumption but not for the soft drinks trade.

p.105 1.5 (iv) The casks were in good and sound condition immediately before shipment. 30

p.106 1.11-18 (v) There was no evidence before the Court of the extensive re-coopering by the West India Dock Authorities which was a very important operation. There was no evidence of:

- (a) What was done,
- (b) Where the casks stood during the operation.
- (c) The duration of the operation

p.106 1.19-23 (vi) No evidence was given as to the 40

presence or absence of bees at the London docks:

"Syrup leaking from some 300 casks on a London Dock in Summer time is suggestive of conditions conducive to the attracting of bees etc."

10 "It is the Defendants case that the bees which were found in the syrup got into the syrup in Dominica. This view is supported by the rather casual observations by the chemists that the bees found in the syrup did not resemble English bees". p.106 1.24-28

20 "In the absence of any direct evidence by a person or persons qualified to express an opinion on the type and origin of the bees the Court cannot place any reliance upon the casual observations of these chemists...." p.106 1.29-36

(vii) The Respondents had consequently not discharged the onus upon them when they alleged that the bees found in the syrup in England had got into it fully 4 weeks earlier in Dominica. p.106 1.40-41 p.107 1.1-2

30 (viii) The Court is unable to say to what extent the extensive re-coopering on the docks contributed or did not contribute to the presence of particles of straw and wood in the syrup. p.107 1.10-13

(ix) The leakage of the casks was not abnormal. p.107 1.27-28

(x) The casks were perfectly coopered and waxed. p.107 1.28-29

40. In conclusion, the learned Judge said he was entitled to do

40 (i) In so far as the warranty of fitness of the casks for transportation was concerned held that such warranty was fulfilled. p.107 1.24-29

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p.107 1.30-43
p.108 1.1-20

(ii) In so far as the warranty of fitness for consumption was concerned, considered the effect of delay, extensive re-coopering and extra handling, the failure to adduce any direct evidence of negligence in manufacture, the failure of the Respondents to prove when the extraneous elements entered, the leaky conditions and the time when the chemists said fermentation began and held that the many circumstances which intervened were sufficient to relieve the Appellant of the warranty of fitness and further, they were not negligent. 10

p.108 1.25-30

41. In consequence, he entered Judgment for the Appellant upon the Claim and Counterclaim.

p.109,110,111,
112

42. The Respondents appealed from the decision of the learned Judge and the Grounds of Appeal, as summarized later by the West Indian Court of Appeal, were as follows: 20

p.118

1. The learned trial Judge was wrong in law and/or misdirected himself in imposing too high a standard of proof on Baron.

2. The learned trial Judge failed to appreciate and/or was wrong in law in failing to give effect to:- 30

(a) the uncontradicted (and in many respects admitted) testimony of the witnesses for Baron whose evidence was taken on Commission in England, and

(b) the proper inferences to be drawn from the evidence.

3. The learned trial Judge failed to appreciate or give proper effect to or draw the proper inferences from the evidence as a whole. 40

43. The West Indian Court of Appeal in its Judgment given on the 25th October 1957-

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- (i) Stated the facts of the case p.112,113,114
- (ii) Summarized the evidence of the witnesses who had given evidence on Commission in England. p.114,115,116
- (iii) Summarized the grounds of appeal as set out above. p.118
- (iv) Summarized the two questions that fell for decision by the learned trial Judge, namely: p.119
- 10 (a) Was there a warranty that the once used casks would be fit for transportation of the syrup to England?
- (b) Was there a warranty that the syrup was and would be fit for human consumption on arrival in England?
44. Thereupon, the West Indian Court of Appeal drew the following conclusions:
- 20 (i) With regard to the warranty of the casks the Court of Appeal held:
- (a) Leakage was abnormal p.119 1.40
- (b) The evidence of Wilfred Theodore Shillingford left doubt as to whether he was referring to system or what was in fact done. p.120 1.10-18
- (c) The evidence of Joseph Reid and Walter Henry Lambert was to be accepted, p.120 1.19-32
- 30 and in consequence the Appellant was in breach of this warranty in regard to the casks.
- (ii) With regard to the warranty of the syrup, the Court of Appeal held:
- (a) A scrutiny of the evidence taken upon Commission in England lead to the conclusion that there was manufacture under unhygienic conditions. p.122 1.35-40

RECORD

- p.123 1.19-22 (b) There was no evidence to support the theory that extraneous matter got in in England.
- p.123 1.38-49 (c) The approach of the learned trial Judge was wrong in that he considered it obligatory for him to be satisfied by direct evidence of negligence in the manufacture of the syrup.
- p.123 1.38-49 (d) Being a civil case, the learned trial Judge should have concerned himself with probabilities rather than certainties. 10
- p.124 1.8-16 (e) The warranty of fitness of the syrup and of the casks continued until the time of their arrival in England and for a reasonable time thereafter.
- p.124,1.31-40
p.125 45. In consequence, the West Indian Court of Appeal varied the order of the learned trial Judge and ordered judgment for the Plaintiff in the action (Respondent in the West Indian Court of Appeal) for the sum of \$3,929.67 on the claim with the costs of the Court below and ordered judgment for the Defendants (Appellant in the West Indian Court of Appeal), on the Counterclaim for \$11,007.15 with costs of the Court below and with costs of the Appeal, the doctrine of set off to apply to the amounts so awarded. 20 30
46. On the 25th January 1958, the Appellant was given leave to appeal to the Privy Council.
47. On behalf of the Appellant, it will be contended that the judgment of the learned Judge of First Instance was right and the judgment of the West Indian Court of Appeal was wrong and that the judgment of the learned Judge of First Instance should be upheld and restored for the following and other 40

R E A S O N S

(i) Because there was ample evidence to justify the findings of the learned Judge of First Instance.

10 (ii) Because the learned Judge of First Instance had the advantage of seeing and hearing certain witnesses for both parties who gave oral evidence before him. He substantially accepted the truth and accuracy of the evidence given by the Appellant's witnesses in Dominica, in preference to that given by the Respondents' witnesses in Dominica as he was entitled to do and in consequence held that the system of manufacture was satisfactory.

(iii) Because with regard to the evidence of the witnesses who were called in England, the learned Judge of First Instance gave due consideration to the transcript of their evidence and the exhibits thereto and drew certain inferences as he was entitled to do.

20 (iv) Because in particular the learned Judge of First Instance had before him both Dr. Morgan's report and the transcript of Dr. Morgan's evidence upon commission which were contradictory in that upon Commission he stated that contamination occurred "probably during manufacture", and in his report made six months previously, he stated that exposure to outside contamination occurred "after manufacture".

p.154 Exhibit
"FAB3"
p.63 1.18
p.63 1.18

30 (v) Because the inferences drawn by the learned Judge of First Instance with regard to the evidence of the English witnesses were substantially as follows:

40 (a) There was no evidence as to what happened to the syrup between the arrival of the consignments of syrup in England on the 6th August 1952 and the 18th August 1952 respectively, and the examination by the experts, save that recoopering was effected. No evidence was led as to what was done or where the casks were stood during the operation or the duration of the operation, or the effectiveness of the operation.

p.106 1.10-20

(b) Mr. Walkley was the first expert to examine either of the consignments. p.103 1.35-38

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- p.103 1.20-25 He examined 73 casks from 200 which arrived on the 18th August 1952 but it was unlikely that he examined them before 9th September 1952, which was the date when the corrected shipping documents arrived for this particular consignment - over 3 weeks after arrival.
- p.103 1.35-38 (c) These casks did not show any signs of fermentation immediately, but only after 6-14 days from the inception of the fermentation tests. 10
- (d) Furthermore, the evidence of the other experts referred to examinations made even later, namely;
- Mr. Lambert on the 1st October 1952
Mr. Watridge on the 7th October 1952
Mr. Morgan on the 13th October 1952
- that is to say between 6 weeks and 2 months after the arrival of the consignments. 20
- p.106 1.20-23 (e) Syrup leaking from casks in the London docks in Summer is conducive to attracting bees.
- p.106 1.28-34 (f) The Respondents' case that the bees got in in Dominica is based upon the casual observations of the chemists (none of whom were qualified to express such an opinion) of the type and origin of the bees in the syrup. 30
- p.107 1.28-29 (g) He accepted the oral evidence of Wilfred Theodore Shillingford that the casks were waxed which was supported by the oral admission of Franklyn Baron, as opposed to the evidence of the English witnesses, one of whom (Lambert) said the casks which he examined were not waxed and one of whom (Walkley) was not prepared to commit himself on this point. 40
- p.107 1.24-28 (h) He accepted the oral evidence of Edward Patrick Shillingford and Wilfred Theodore Shillingford (the actual manufacturers of the casks) with regard to

their soundness and the incidence of leakage of such casks, rather than the evidence of persons who examined them a considerable time after arrival in England.

10 (i) He consequently accepted that the casks were in good condition when delivered for shipment at the S.S. Planter and S.S. Crispin in the West Indies. p.105 1.4-5

(vi) Because in consequence, upon due consideration of all the evidence both in Dominica and in England, the learned Judge of First Instance held, as he was fully entitled to do, that:

(a) the warranty of fitness of the casks for transportation was satisfied. p.107 1.25-27

20 (b) the Respondents had not discharged the burden which was upon them of proving: p.107 1.38-40
p.108 1.15-17

(a) negligent manufacture,

(b) breach of warranty of fitness of the syrup for consumption.

(vii) Because the West Indian Court of Appeal was wrong and misdirected itself in drawing the inference that the casks were not waxed.

30 (viii) Because the West Indian Court of Appeal was wrong and misdirected itself in drawing the inference that the evidence of Wilfred Theodore Shillingford on waxing, referred only to system, when the learned Judge of First Instance had in fact heard and accepted the evidence of this witness and as a result accepted that it referred to the consignments in question.

40 (ix) Because the West Indian Court of Appeal was wrong and misdirected itself in holding that the approach of the learned Judge of First Instance was incorrect in that he required "direct

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evidence" and "certain proof" by the Respondents of their case. In fact, the learned Judge of First Instance stated as part of his findings (and as part only) that:

(a) There was no direct evidence of negligence.

(b) The Court could not say with certainty when the extraneous agents entered the syrup. 10

The learned Judge of first instance by stating in his Judgment that it was equally possible for bees to have entered the syrup in England or in Dominica thereby indicated that he was viewing the matter upon a balance of probabilities

(x) Because the West Indian Court of Appeal was wrong and misdirected itself in holding that in deciding the main issue on the Counterclaim, the learned Judge of First Instance demanded too high a standard of proof from the Respondents. 20

(xi) Because the West Indian Court of Appeal stated as follows and relied upon the following contention:

p.123 1.19-26

" There is no evidence to support (Shillingford's) theory that the extraneous matter got into the syrup while in England either while being re-coopered or otherwise and before examination. Re-coopering did not involve the opening of the casks. It is, therefore, difficult if not impossible to see how extraneous matter entered the casks while in England", and in so holding, the West Indian Court of Appeal was wrong and misdirected itself in that: 30 40

(a) The onus was upon the Respondents to show that extraneous matter entered during manufacture of the syrup and not upon the

Appellant to show when, where and how the extraneous matter entered. The onus (if any) was upon the Appellant to show satisfactory manufacture.

10 (b) Mere absence of evidence of what transpired in England prior to examination cannot be relied upon to assist the Respondents to discharge that onus.

(xii) Because the West Indian Court of Appeal was wrong and misdirected itself in holding that if fermentation occurred prior to arrival in England, it supported the Respondents' contentions. There was in fact before the learned Judge of First Instance and before the West Indian Court of Appeal:

20 (a) Evidence of previous leakage when this type of cask was used.

(b) The evidence of Edward Patrick Shillingford as to how this leakage might have occurred.

30 (xiii) Because the West Indian Court of Appeal was wrong and misdirected itself in holding that there was any warranty or warranties, either express or implied, attaching to the agreement between the Appellant and the Respondents, to the effect that the fitness of the syrup and the fitness of the casks would continue until the time of arrival in England and for a reasonable time thereafter.

40 (xiv) Because the West Indian Court of Appeal was wrong and misdirected itself in that it failed to apply the principles of the "F.O.B" contract to the agreement between the Appellant and the Respondents, the only warranty being (if any), that the syrup and the casks should be delivered in good condition on to the ship.

(xv) Because alternatively, if in fact such a contract would normally contain a warranty that the fitness of the syrup and the casks continued until arrival in

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England and for a reasonable time thereafter, the West Indian Court of Appeal was wrong and misdirected itself by failing to take the matters in (xvi) below into account, which would in consequence negative any such warranty attaching to this particular agreement.

(xvi) Because in adjudicating upon the issue of warranty aforesaid, the West Indian Court of Appeal was wrong and misdirected itself in that it failed to give any or sufficient weight to the fact that when the Respondents contracted with the Appellant for second hand American Whisky casks, the Appellant by his agents informed the Respondents that he the Appellant, could not undertake the insurance from Dominica to London as the risks were too great and serious leakage was inevitable owing to the heavy weight of the syrup in the casks. 10
20

(xvii) Because the West Indian Court of Appeal was wrong and misdirected itself and gave too much weight to the evidence of the English witnesses, bearing in mind the lapse of time between delivery of the syrup on the ship and its examination, alternatively between its arrival in England and its examination. 30

(xviii) Because by reason of the aforesaid and by reason of the fact that there was ample evidence upon which the learned Judge of First Instance could base his findings of fact and law, it will be contended on behalf of the Appellant that the West Indian Court of Appeal was wrong and misdirected itself in drawing other inferences from the evidence and in varying the findings of the learned Judge of First Instance and it will be further contended that the Judgment of the learned Judge of the First Instance should be restored. 40

E.F. MONIER-WILLIAMS

No. 21 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE WEST INDIAN COURT
OF APPEAL

B E T W E E N

ISAAC NEWTON SHILLINGFORD
as Business Trustee of A.C.
Shillingford and Co.
(Plaintiff) Appellant

_____ and _____

FRANKLIN A. BARON and OCTAVIA
MARIA BARON, Trading as A.A.
Baron and Co. (Defendants)
... .. Respondents

CASE FOR THE APPELLANT

SIMPSON, PALMER & WINDER,
1, Southwark Street,
LONDON, S.E.1.