Privy Council Appeal No. 21 *of* 1958

Isaac Newton Shillingford as Business Trustee of A. C. Shillingford & Co. – – – – – – – *Appellant*

v.

Franklyn A. Baron and Octavia Maria Baron trading as A. A. Baron & Co. – – – – – – *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1959

Present at the Hearing:

VISCOUNT SIMONDS
LORD RADCLIFFE
LORD KEITH OF AVONHOLM

[*Delivered by* LORD KEITH OF AVONHOLM]

This is an appeal from a judgment of the West Indian Court of Appeal varying a judgment of the Honourable Mr. Justice Gordon given in the Supreme Court of the Windward and Leeward Islands on 1st December, 1954. These judgments arose out of a claim by the appellant (hereafter called the plaintiff) and a counter-claim by the respondents (hereafter called the defendants) in respect of a contract for the manufacture of sugar syrup.

The particulars of the contract, so far as material, are narrated by the Court of Appeal, in a passage which their Lordships accept, as follows:

> "In July 1952 the Appellant firm [the defendants] entered into a contract with the Respondent [the plaintiff] to manufacture (i.e. that the plaintiff should manufacture) 50 casks of sugar syrup for shipment to England in mid-July, and 250 casks for shipment to the same destination by the end of that month. The sugar to be used in the manufacture of the syrup was to be supplied by the Appellant and the manufactured product was to be shipped in once-used American whisky casks which were to be thoroughly sterilised and wax lined, and was to contain as a preservative 500 parts per million of sulphur dioxide (SO_2). . . . It was well known to the Respondent that the syrup was for export to England and was to be used thereafter for human consumption."

To this statement their Lordships would add that insurance and freight were to be arranged by the defendants and that the syrup was made in the colony of Dominica and shipped at the port of Roseau.

The syrup was delivered at the due dates in two consignments, (1) 50 casks on board S.S. Planter for shipment to the United Kingdom on 21st July, 1952; and (2) 250 casks on board S.S. Crispin for similar shipment on 31st July, 1952. The fate of these shipments may at once be briefly stated for this it was that led to the dispute between the parties. These consignments were for delivery to Messrs. Burnell Hardy Limited, London, to whom they had been sold by the defendants. They arrived at London docks on 6th August and 18th August, respectively. On

arrival the casks of both consignments were found to be in a bad condition and leaking. They consequently had to be recoopered, the 50 casks by the West India Dock authorities for account of the consignees Burnell Hardy, Limited and the 250 casks by Messrs. Weber, Smith & Hoare (Overseas) Limited, the consignees' forwarding agents. There is no evidence as to what was involved in this particular process of recoopering. The only evidence on recoopering generally is to be found in a passage in the evidence of Edward Patrick Shillingford, a witness for the plaintiff, that " recoopering does not normally involve replacing bungs. It involves tightening of staves and metal bands around casks ". Their Lordships cannot therefore assume that the recoopering actually done at the London docks to these consignments involved removing the bungs or the tops of the barrels. After recoopering, the casks were despatched by Burnell Hardy Limited, under contracts of sale, to various manufacturers in the soft drink trade. The first shipment of 50 casks, less one cask which was accidentally lost, went to the MacLennan Beverage Co., Belfast. Of the second consignment 200 casks went to Cantrell & Cochrane Limited at Sunbury-on-Thames and the balance of 50 casks to Compounds & Essences Limited, Southampton. There is some difficulty in fixing the precise date of the delivery of these lots of casks by Burnell Hardy Limited to their respective customers. But the following facts seem established. The original shipping documents under which the casks were consigned from Dominica to London were defective in respect they did not disclose the place of origin of the goods and correct documents were not received by Burnell Hardy Limited till 3rd September for the shipment per S.S. Planter and 9th September for the shipment per S.S. Crispin. Further the casks forwarded to the MacLennan Beverage Co., Belfast, were weighed at Belfast by their agents, on 5th September, 1952. It is possible that the goods might have been forwarded to the respective customers before the arrival of the correct shipping documents, but that would seem to their Lordships to be unlikely and the date of weighing of the Belfast delivery suggests that that delivery was made between the 3rd and the 5th September. There has been produced also a Landing Account dated 4th September, 1952, of the consignment of 250 casks shipped per S.S. Crispin which reached London on 18th August. This also shows the weight of each of the 250 casks and although it is not clear that these were weighed as at the date of the account, it contains the entry " Rent commences 19th August, 1952 " with no note of the date of termination of the rent. The natural inference would be that at 4th September the casks were still in warehouse incurring rent. A witness, Mr. V. T. Walkley, a witness for the defendants, says, however, that of the 200 casks delivered to Cantrell & Cochrane, Limited, at Sunbury-on-Thames some were delivered at the end of August and some at the beginning of September. Mr. Walkley describes himself as chief chemist of the Cantrell Cochrane group and he does not disclose the source of his information about the date of delivery of the 200 casks. His evidence was given more than 18 months after the deliveries concerned. In the absence of any specific findings in the West Indian Courts and on the evidence mentioned their Lordships are prepared to hold that the casks or at least the larger part of them were delivered to the ultimate consignees sometime in the first week of September, a view which is the more favourable to the plaintiff.

With regard to the 49 casks sent to Belfast these were rejected by the buyers and returned to Burnell Hardy Limited. There is little evidence as to the condition of the contents on delivery, but they were subjected to re-treatment after return in the same way as the contents of the other casks. No distinction was made before the Board by plaintiff's counsel with regard to these casks or by the Court of Appeal in their judgment and in their Lordships' view they must be treated as being in like case with the other consignment.

The position with regard to the 250 casks is as follows. Mr. Walkley, to whom reference has already been made, says that on arrival of raw material such as syrup his company carry out a thorough examination, make fermentation tests and give the material a general analysis. He

made a particular examination of the contents of 73 of the 200 casks and a survey of the contents of the others. Recognised fermentation tests of the 73 casks showed evidence of fermentation. He also found in every cask that he examined a large number of extraneous particles such as bees, small fragments of straw and chips of wood. The bees, he says, were not like the bees he had seen in Britain. The contents were obviously in a fairly advanced state of fermentation with a pronounced beer-like smell. The casks other than the 73 showed leakage and signs of pressure indicating fermentation and a smell of fermentation where bungs were opened. Steps were taken to recondition the contents of 29 of the casks for immediate use. Owing to lack of proper facilities and the expense involved the company were unable to recondition any greater quantity. In the contents of all the casks so processed bees were found, Mr. Walkley says from 10 to 20 at least in each cask, as well as dirt, and other matter. Mr. Lambert, an experienced insurance surveyor, also examined some of these casks. The syrup in these was, he says, dirty with a large number of bees, dirt, wood and straw in it and generally in a disgraceful condition. It was obviously fermenting, smelt beery and sour. He found up to 100 or 150 bees in some of the casks and these he did not regard as English bees, for reasons which he particularises in cross-examination. Lastly Dr. Morgan, consulting chemist to the soft drinks industry spoke to a sample of the contents of this consignment sent to him in a 26 oz. bottle by Burnell Hardy Limited after the syrup had been returned to them. He says the sample was dirty, contained pieces of wood and straw, was olive coloured and contained two insects which he regarded as wasps. It was fermented. In consequence of the condition of this consignment 171 casks, being the balance of the 200 casks after allowing for the 29 casks reconditioned and used by Cantrell & Cochrane Limited, were returned to Burnell Hardy Limited after Mr. Lambert's inspection.

The remaining 50 casks sent to Compounds & Essences, Limited, Southampton, were found to be in a similar condition. Mr. Watridge, the borough analyst for Southampton, was called in to inspect the casks. He found 25 of the casks under pressure and fermenting badly and samples taken from other 5 casks and subsequently analysed showed incipient fermentation. Of the consignment of 50 casks 6 of the casks were destroyed by Compounds & Essences Limited, 6 were reconditioned and used by them and 38 were returned to Burnell Hardy, Limited.

Of the total consignment of 300 casks shipped to Burnell Hardy, Limited from Dominica 258 were thus returned to them by their customers in respect of the condition of the contents. With the knowledge, if not at the instigation of, the defendants, in order to minimise any possible claim of damages, Burnell Hardy, Limited arranged to have the contents of the casks reconditioned and they were subsequently resold.

Their Lordships now return to the proceedings initiated by the parties. The plaintiff claimed $3929.67 being balance due and owing by the defendants to the plaintiff on an account which included the item of $5075.77 the cost of manufacturing the sugar syrup. The Supreme Court gave judgment in favour of the plaintiff for this balance of $3929.67. The defendants counterclaimed for a sum of $11,007.15 being balance said to be due them by the plaintiff in respect of a number of items, the chief one being a claim for $9,468.75 as damages in respect of negligent manufacture of the said sugar syrup. The Supreme Court dismissed this counterclaim with costs to the plaintiff. On appeal by the defendants to the West Indian Court of Appeal the Court affirmed the judgment in favour of the plaintiff on his claim, but reversed the judgment against the defendants on the counterclaim and ordered judgment to be entered for the defendants on their counterclaim for the sum of $11,007.15, and costs of the counterclaim in the Court below and costs of the appeal, and ordered that the doctrine of set-off should apply to the amounts awarded on the claim and counterclaim. No question now arises with regard to the items of the counterclaim other than the claim for damages. The defendants also accept the order made against them on the plaintiff's claim and the only question before their Lordships' Board relates to the

claim of damages by the defendants against the plaintiff, who has appealed with leave of the West Indian Court of Appeal to Her Majesty in Council. No question was raised before the Board on the measure or quantum of the damages included in the counterclaim of the defendants in the event of the plaintiff failing in this appeal.

The contract between the plaintiff and the defendants was a contract by the plaintiff to manufacture sugar syrup for account of the defendants, in which the sugar used in the manufacture was supplied by the defendants. It is not in dispute that the plaintiff knew that the syrup was to be sold by the defendants for human consumption and that he impliedly warranted that it would be fit for that purpose. The counterclaim as originally made was laid on negligent manufacture of the syrup. By their amended counterclaim the defendants later raised also the question of the fitness of the casks supplied by the plaintiff for the transportation of the syrup. The Court of Appeal stated the questions that fell for decision by the trial judge to be:

> (*a*) was there a warranty of fitness that the once-used casks when assembled and treated would be fit for transportation of the syrup to England ; and
>
> (*b*) was there a warranty that the syrup was and would be suitable for human consumption on arrival in England.

The issues between the parties were so argued by counsel before the Board but it is impossible in their Lordships' view to isolate the second of these from the question of negligent manufacture of the syrup for the purpose for which it was intended. The Court of Appeal and counsel before the Board did not, indeed, attempt to do so.

Their Lordships would first refer to the question of the fitness of the casks. Messrs. Burnell Hardy, Limited had stipulated in their contract with the defendants that the syrup was to be transported in new casks free of charge, the casks to be new, strong, clean, paraffin-wax lined and well coopered to prevent leakage. The defendants did not, however, carry forward this stipulation about new casks into their contract with the plaintiff. This caused subsequent difficulties to the defendants with their insurers with which their Lordships are not concerned. The casks used by the plaintiff, with the knowledge of the defendants, were once used American whisky casks. These were imported by the plaintiff from the U.S.A. in " shook form ", i.e. broken down into their component parts, and assembled and coopered by the plaintiff in Dominica. There would seem to have been considerable leakage from the casks between the time of their having been put on board at Dominica and being weighed in London. There was a shortage of 23,509 lbs. which may have been about a fifth of the total contents of the casks.

On this branch of the case, the defendants are faced with certain difficulties. Some leakage from once used casks during a voyage to the port of destination is usual. This likelihood is less when new casks are used. The defendants were in breach of their contract with Burnell Hardy, Limited, in not consigning the syrup in new American casks and cannot charge the plaintiff with a loss due to their own breach of contract. To overcome this difficulty the defendants, in their Lordships' view, would have at least to prove that the leakage was clearly due to carelessness in the manufacture and preparation of the casks by the plaintiff for the purpose for which they were intended and not to other and extraneous causes unconnected with the making of the casks. Their Lordships would hesitate, on the evidence in the case, to hold that such a case was established. On the evidence the casks were accepted for shipment at Roseau as in apparent sound condition, with no signs of leakage or fermentation, by shipping agents who were well aware of the possibilities of such risks. No evidence was given on the nature of the voyages and the processes of unloading thereafter. Their Lordships find it however unnecessary to consider the evidence in this connection or the legal issues that may arise therefrom, for on the other issue formulated by the Court of Appeal they consider that that Court came to a right decision.

Their Lordships have already referred to the evidence on the condition of the syrup after it arrived in England. This evidence was taken on

commission in London and was given by witnesses for the defendants whom necessarily the trial judge had no opportunity of seeing and hearing. The evidence for the plaintiff was all heard by the trial judge in Dominica with in addition the evidence of two witnesses for the defendants. Evidence was given for the plaintiff of a general character on how the sugar was melted in vats, allowed to cool and thereafter strained into casks. It was said that it was not possible for dirt, bees, bits of wood or straw to get into the syrup during the process of making or casking. According to Mr. Wilfred Theodore Shillingford there were a good many bees around. The Judge's notes record this witness as saying: "We were careful and took precautions against bees getting in the syrup. If we were not careful one would expect to find bees in the syrup". It was suggested by the plaintiff that impurities such as dirt, bits of wood or straw and bees could have got in in transit, or on wharf at port of discharge, or in warehouse where stored at port of discharge before delivery. Mr. F. A. Baron, managing partner of the defendants, said that on a visit to the plaintiff's factory he saw bees around. Bees, he said, could get in anywhere. There was no wire mesh for keeping out bees or flies as he had at his own factory which he said was insect proof. Their Lordships would refer to one point in the evidence of some importance. It is necessary to add to the syrup in cask a preservative such as sulphur dioxide (S.O.2) as a preventative against fermentation. This was in fact stipulated for in the contract between the plaintiff and the defendants to the extent of 500 parts of S.O.2 per million. With leakage of the casks this preservative which is very volatile readily escapes and on examination of a number of casks by Mr. Walkley no proportion so high as 500 was found. Leakage may thus be regarded as a contributory cause of fermentation and it is conceivable might in some cases be regarded as the main cause. If this were so in the present case it might be necessary to examine more closely the question of responsibility for the leakage or the extent of the warranty of the sufficiency of the casks. But in their Lordships' view this does not arise. Mr. Walkley applied tests of recognised accuracy to nine of the fermented casks sent to Cantrell & Cochrane and in four of these found the quantity of S.O.2 to be respectively 320, 361, 362 and 385 parts per million. A Mr. Archer, B.Sc. M'Gill University, M.Sc. Toronto University, Fellow of the Royal Institute of Chemistry (Canada), and a Fellow of the Royal Institute of Chemistry (Great Britain), who gave evidence for the plaintiff in Dominica with particular reference to S.O.2 as a preservative, said in cross-examination that if he found syrup which had fermented with 350 parts S.O.2 per million he would conclude that some extraordinary sort of contamination had taken place. This places the fermentation fairly and squarely on contamination and not on loss by leakage of S.O.2. That extraordinary contamination was present is evident if the evidence of the English witnesses taken on commission be accepted, as in their Lordships' opinion it must be, of the dirt, bees and other extraneous matter found in the casks. The presence of bees is an important factor, for the evidence is that fermentation is due to the presence of yeast cells and that bees are carriers of such cells. The crux of the case, in their Lordships' view, is where and how did this contamination take place.

It will be convenient to set out at length, as the Court of Appeal did, the views of the learned trial judge on this part of the case. He expressed himself as follows:—

> "(*a*) Having regard to the many intervening incidents which took place between the shipment of the syrup in apparently good condition and the time when the syrup was found to be unfit, viz.:—
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> (i) delay at London Docks,
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> (ii) extensive recoopering,
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> (iii) extra handling involved in shipping to different points;
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> (*b*) the fact that the Defendants have failed to prove by any direct evidence that the Plaintiffs were in any way negligent in the manufacture of the syrup but rely for this proof on a series of conjectures and suppositions;

(*c*) the fact that the Court is unable to say with any certainty when those extraneous agents which brought about fermentation did enter the syrup ;

(*d*) the fact that the leaky conditions increased the likelihood of the preservative escaping and rendering the syrup more susceptible to fermentation ;

(*e*) the time when the chemists said that fermentation began.

The Court is forced to the conclusion that the many circumstances which intervened are sufficient to relieve the Plaintiffs of that absolute warranty of fitness which fell on them.

The Court is not satisfied that the Defendants have proved any negligence on the part of the Plaintiffs. Indeed it is satisfied that the Plaintiffs manufactured the sugar syrup to the best of their skill and ability and in keeping with their contract ; that when the shipment was made the packages were sound and the contents equally so.

The Court is unable, having regard to all the circumstances before it, to say with any certainty at what stage the shipment went bad, nor is it able to attribute the deterioration of the syrup to any particular cause."

Their Lordships agree with the following comments by the Court of Appeal on this part of the learned judge's judgment where they say:

" We are of opinion that the Judge's approach to the case was not the correct one in that among other matters he seems to have considered it obligatory on the Appellants to satisfy him by direct evidence that the Respondent was negligent in the manufacture of the syrup, and that it was necessary for him to come to conclusions with some certainty. Being a civil case he should have concerned himself with probabilities rather than certainties, and especially so, as the fact is there was some evidence on the one hand and conjecture only on the other.

While fully conscious of the advantage enjoyed by the Judge in hearing the witnesses who gave evidence here, he did not have the opportunity of seeing or hearing the witnesses who gave evidence on commission, evidence of a vital nature to which, for reasons we have already mentioned, he did not give due consideration."

In their Lordships' view this case turns on whether there was negligence in manufacture rather than on whether there was breach of warranty. If the fermentation was due to contamination after shipment there would be no ground for saying that there was breach of warranty by the plaintiff of fitness for human consumption. In face of the undoubted contamination it would be impossible to say that there would have been fermentation if there had been no contamination. On the other hand if the contamination arose before shipment it could only have done so, in their Lordships' opinion, through negligence in the course of manufacture. If so the fermentation which undoubtedly existed at the time the casks reached Burnell Hardy Limited's customers in England must, on the evidence, be attributed to the contamination. Where two possible causes exist to explain the unfitness for human consumption, for one of which the plaintiff is in no way responsible, no simple question of breach of warranty can arise. The origin of the unfitness must be examined. Questions of onus of proof may arise but in the present case their Lordships are content to accept it that the onus here is on the defendants who allege that the unfitness was due to negligence of manufacture.

The Court of Appeal considered that the whole of the evidence led to the conclusion that the syrup was manufactured under unhygienic conditions which rendered it unfit for the purposes intended. Their Lordships agree with this view. They are not impressed with the suggestion, unsupported by any real evidence, that the casks could have become contaminated after shipment at Dominica. The contamination and the fermentation were so widespread as to point to some common cause. The suggestion that the cause originated at the London docks in the process

of recoopering finds no support in the evidence and does not appear credible. The fact that fermentation was found in two separate shipments is in itself significant, as well as the fact that bees were found in large numbers in the casks which were not recognisable as British bees. Their Lordships would only refer to one further point that was pressed by learned counsel for the appellant who presented his case with great force and clarity. Mr. Morgan, who made a report dated 13th October, 1952, on the sample of syrup examined by him, said in that report: "The presence of so much foreign matter such as wasps etc. suggest that the syrup has been exposed to outside contamination *after* manufacture". In his evidence he said: "It is very difficult to say when the contamination occurred but it was probably *during* manufacture. I cannot envisage a cask being so dirty as to introduce the degree of contamination which I found in these samples". Counsel pointed to the apparent inconsistency in these statements. But the inconsistency seems to their Lordships to be more apparent than real. Mr. Morgan was not questioned on the supposed inconsistency nor did he know anything of the evidence in Dominica, which was taken after his report and after the date of his evidence on commission. Everything turns on what he meant by manufacture. If manufacture in his report meant the mere mixing and boiling of the ingredients the contamination could happen after this, during cooling and before casking. In his evidence on the other hand it would seem from the context that by manufacture he meant everything up to and including casking. In any event this inconsistency, if inconsistency there be, is quite insufficient to destroy what their Lordships regard as the general effect of the evidence taken as a whole.

Their Lordships were referred to the case of *Beer* v. *Walker* 1877, 37 L.T. (N.S.) 278 and other authority for the proposition that a warranty of fitness implied in a contract for delivery of goods must last for a reasonable time. For the reasons already indicated their Lordships find it unnecessary to examine this line of authority. As Grove, J., observed in the case cited the unfitness must have arisen in the ordinary course of nature without the intervention of extraneous causes.

For these reasons their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the appeal.

(39945) Wt. 8078—37 100 12/59 D.L.

In the Privy Council

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FRANKLYN A. BARON AND
OCTAVIA MARIA BARON
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DELIVERED BY
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