IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Civil Action No. 499 of 1978

Between:

CASTLE TRADING (SOUTH PACIFIC) LIMITED — Plaintiff

and

WRIGHTCEL (FIJI) LIMITED — Defendant

Mr. A. Kato for the Plaintiff
Mr. F.G. Keil for the Defendant

JUDGMENT

The plaintiff and the defendant are both companies registered in Fiji and based at Suva. The plaintiff, at the relevant time, was engaged in the business of food processing and packaging for local and overseas markets. The defendant is a part of a multinational organisation manufacturing, among other things, cellophane and plastic materials for packaging foods of various kinds. At the relevant time the defendant was the sole manufacturer of such materials in Fiji.

Early in 1977 the plaintiff developed a technique of processing food, new to Fiji. They were going to make "chips" from coconut, taro, tapioca and fish. They discussed their packaging plans with the defendant's representative and in March 1977 obtained from them a small quantity of sample bags. Packaged samples were sent to Australia, Samoa and other countries in the

Pacific area; some were also marketed locally. The response was good and the plaintiff ordered from the defendant 240,000 bags with attractive colourful designs to be printed on the outside. Printing took some time and 127,950 bags were delivered in June 1977. Orders were filled and substantial quantity of "chips" sent out to various firms, both overseas and local. Soon, complaints began to pour in. Chips had failed to retain crispness and turned soggy acquiring an unpleasant smell. Demands for reimbursement and cancellation of orders followed. The plaintiff is no longer in the food processing business. It claims from the defendant damages, both special and general, for supplying packaging bags which were allegedly unmerchantable and unfit for the purpose for which they were required.

The defendant denies liability and states that the plaintiff carried out its own tests before ordering the bags and got exactly what it ordered. The defendant further maintains that the fault, if any, lay not in the bags but in the method of packaging and sealing used by the plaintiff.

On the evidence there is hardly any doubt that the quality of the packaged chips did deteriorate rapidly and that, as a result, the plaintiff has suffered damage. The cause of such deterioration, however, is seriously in dispute, and, so, the main issue for determination. There is also some dispute as to the nature of negotiations leading to the purchase.

Thorpe and Chand who negotiated the sale on behalf of the defendant say that Tan Siawho and Tan Siawheng the directors of the plaintiff company wanted bags in which chips, after packaging, would have a shelf-life of about eight weeks. They, however, wanted to conduct their own tests and took some sample bags recommended by Thorpe and Chand. When satisfied, they ordered more of the same kind but with coloured designs

printed on them. Thorpe said:

> " I took part in the negotiations with the Tans. They told me chips would be similar to potato chips. They wanted bags - not too expensive. They suggested polythene. I advised them against that. They wanted shelf-life of 8 weeks. Polythene would be good for only 2 or 3 days.
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> We showed them the booklet (Ex. 12). Told them that 365 MXXT-A at page 7 was a suitable material for chips. Qualities of this material are given at page 7. I told them this was a good material. I did not tell them to use it. That was for them.
>
> He only asked for some samples. Said he would make his own tests. I offered to have tests done in Melbourne. He said he would do it himself. "

With this Chand substantially agreed. The Tans who gave evidence for the plaintiff denied that Thorpe had taken part in the negotiations or that they were shown the booklet Exhibit 12. Tan Siawho said:

> " We showed them our produce. Emphasised to them that the bags must be of international standard in respect of design etc. Also that the bags keep the chips for at least 8 weeks."

He agreed, however, that the plain sample bags were given to them first so that they themselves could try them out. He said:

> " The plain sample bags were given to us in March. We had 8 weeks for trial - but we tried it with only customers. We did not keep any bags for 8 weeks ourselves because we were anxious and we wanted reaction from customers.
>
> We were the first to develop the technique."

On a balance of probability I accept the evidence of Thorpe on this issue. He said that it was their practice to recommend the most suitable material to their customers. If they gave their produce to the company, it would package and test the material for them. If, on the other hand, they wanted to do their own testing they would give them sample bags for that purpose. I see no reason why the defendant should have deviated from its standard practice in this case. Furthermore, the defendant had developed a new technique and would have been anxious to keep it a secret as far as possible. The Tan brothers had had considerable experience of processing and packaging food and also possessed a certain degree of technical knowledge.

There is also no reason whatever why the defendant would not show them the booklet Exhibit 12 which gives various kinds of material available on the market. I accept that they recommended 365 MXXT/A from page 7 of this book as being suitable, its properties and applications being indicated on the same page for intending customers.

I also find nothing in the evidence to show that this material is unsuitable for the purpose of packaging chips, similar to potato chips, or that, when properly packaged, the shelf-life of such chips should not be more than eight weeks.

Savage, who has been in the industry of cellophane manufacture for 18 years, said that the material used for these bags was quite suitable for packaging chips, equivalent to potato chips, and that the material has been so used in England and Australia for 35 years. He said:

> " If quality of cooking and of product is good and oil is drained off, these bags should be perfectly good for packing. Desirable to pack in airconditioned area if shelf-life up to 12 weeks is desired."

When the plaintiff informed the defendant of customers' complaints some of the bags used for packaging were sent to the defendant's Melbourne Headquarters for testing. The report of the test (Exhibit 7) showed that there was nothing wrong with the bags. Printing on the outside contained minute quantities of alcohol but it could not have penetrated the walls of the bag to affect the chips' odour. The tests were conducted as a part of follow-up service to the customers long before either party had litigation in contemplation. I accept the report as giving a correct assessment of the quality of the material used in making the bags. I find that the material itself is moisture-proof and suitable for the purpose for which it was used.

What then did go wrong? The defendant manufactures bags from this material by folding the ends of a piece and placing two seals, one at the bottom and one vertically, leaving the mouth open. The seals are fairly wide, the bottom one being a double seal.

When complaints were made, Thorpe went to recheck the bags at the defendant's factory. He found 3,000 out of 127,000 bags defective. He said in cross-examination:

> " I found 3,000 bags defective and resealed them. The seal was not holding well and would have been noticeable while packing. 3,000 would be more than 10% of the total. Normally this size of error is not acceptable."

In re-examination he said that the defective bags were such that a person using them for packaging would have easily noticed that the seal had not taken.

The complaint from customers regarding the deterioration of chips, however, was general. It is not suggested that anyone complained of any bag having an obviously defective seal. The manufacturers' seal on the

remaining bags were found by Thorpe to be quite sound. The complaints suggested that chips in almost all the bags remained crisp only for a short period after which they went soggy.

At the plaintiff's suggestion the defendant supplied smaller bags to be placed inside the printed bags to give additional protection against moisture. Even this did not help to prolong the shelf-life of the chips. It is difficult to see how the manufacturers' seals could have been responsible for deterioration in these cases.

Thorpe, who gave his evidence in an extremely forthright manner, stated that he thought the plaintiff's method of manual packaging left too much oil around the mouth of the bags where the packager's seal would be placed. He himself had found oil on some of the bags where seal had been placed by the plaintiff. This would make the seal vulnerable to moisture from outside. According to Thorpe, he even had a chute made for the plaintiff so that potatoes could go straight into the bags without anyone handling the mouth. He could not say if the chute was ever used. The plaintiff denied that any such chute was ever supplied. Tan, however, admitted that their packaging was done manually, one girl holding the mouth of the bag open, the other placing the chips in it.

Savage also said that presence of oil or water on the surface to be sealed would contaminate the seal and allow penetration by moisture. Strength of the seal depended on the width. The defendant's seal at the mouth of the bag was narrow. He, however, thought that it would be effective if not contaminated or broken.

On a balance of probability I find that -

(a) the defendant merely recommended the material considered to be

suitable and the plaintiff relied upon his own ability to do the testing;

(b) the bags supplied to the plaintiff were of the same material as the sample bags supplied for testing;

(c) chips deteriorated due to presence of excessive moisture in the chips themselves or due to penetration of moisture from outside;

(d) there was no penetration of moisture through the walls of the bag. Any such penetration must have been through a broken or a contaminated seal. Of the three seals on the bags the packager's seal at the mouth was the one most likely to be contaminated and unsafe for this purpose;

(e) apart from the 3,000 bags that were detected and resealed, the bags supplied were of merchantable quality.

The plaintiff's claim is therefore dismissed.

The defendant in its counterclaim alleges that it had given the plaintiff a sealer of its own to try out on the bags. This sealer, it says, the plaintiff has refused to return. It claims from the plaintiff $3,468.45 representing its value and the loss of its use.

The defendant's counsel did not mention this sealer at all to Tan Siawho. Tan Siawheng, when asked about it, said:

" Defendants did supply us helix sealer. They did it themselves. Mr. Chand did it. They wanted to prove that our sealing was at fault. We used their sealer. Same result. We have never detained the sealer. I personally rang Chand to take it away. It is still with us."

About this sealer Chand said:

" They still have our sealer. I did get a call last year to collect it but I thought it was for them to send it to us. By that time proceedings had started. Before that I had asked them several times for it."

Chand does not say that they had, at any time, refused to return it. From the evidence it appears doubtful that the plaintiff made much, if any, use of it.

Chand had brought and left it with the plaintiff. On a balance of probability I find that the sealer would have been delivered to him, if he had called for it. He never did, probably because the relationship between the parties did not remain as friendly as they were when the defendant was trying to be helpful. On the evidence I cannot find detention or conversion established. I accept Tan Siawheng's evidence that there never, at any time, was any refusal on the plaintiff's part to give up possession of the sealer.

The counterclaim is, therefore, also dismissed. The sealer is to be returned to the defendant.

As claim and counterclaim have both failed, each party will bear its own costs.

(G. Mishra)
JUDGE

Suva,

15th July 1980