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THE SEVEN-UP  
COMPANY

v.

REPUBLIC  
(MINISTER  
OF COMMERCE  
AND INDUSTRY  
AND ANOTHER)

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION

THE SEVEN-UP COMPANY,

*Applicant.*

and

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTER OF COMMERCE AND INDUSTRY  
AND ANOTHER,

*Respondents.*

(Case No. 463/71).

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*Trade Marks—Registration—Application to register—"Bubble Up"—Trade marks consisting of "Seven Up", "7Up" and "Up" already registered—Issue whether word "Up" is the exclusive property of the applicants and cannot be used by anybody else—To be decided on the principle of whether there was such resemblance between the mark sought to be registered and the group of trade marks already registered as to be likely to deceive or cause confusion—Registrability and validity of Registration—Section 11 of the Trade Marks Law, Cap. 268—Open to respondent Registrar to disregard evidence and argument thereunder—Issue of resemblance, deception or confusion—Opinion evidence thereon inadmissible—Matter has to be left to the Judge—Section 14 of the Trade Marks Law (supra).*

The facts of this case sufficiently appear in the judgment of the learned Judge of the Supreme Court dismissing the present recourse under Article 146 of the Constitution whereby the applicants challenged the validity of the decision of the respondent Registrar of Companies and Trade Marks to register the interested party's Trade Mark "Bubble Up".

Cases referred to:

*Re Enoch's Application* [1945] 2 All E.R. 637;  
*Bourne v. Swan and Edgar Ltd. In Re Bourne's Trade Marks* [1903] 1 Ch. 211, at p. 224;

*The North Cheshire and Manchester Brewery Co Ltd*  
[1899] A.C. 83, at p 84;

*Payton and Co. Ltd. v. Snelling, Lampard and Co Ltd*  
[1901] A.C. 308, at p. 311.

*Harker Stagg, Limited's Trade Mark* [1954] 71.R.P.C 136.

**Recourse.**

Recourse against the decision of the respondents allowing the registration of the mark "Bubble Up" in Part A of the Register of Trade Marks, Class 32 in respect of non-alcoholic beverages and concentrates of such beverages.

*D. Liveras*, for the applicant.

*L. Loucaides*, Senior Counsel of the Republic,  
for the respondent.

*Cur adv vult*

The following judgment was delivered by:-

L. LOIZOU, J.: By this recourse the applicants challenge the validity of the decision of the Registrar of Trade Marks dated 30th September, 1971, allowing registration of the mark "Bubble Up" in Part A of the Register of Trade Marks, Class 32, in respect of non-alcoholic beverages and concentrates of such beverages and pray for the annulment of the decision of the Registrar and that the entry of the said trade mark be struck off the Register of Trade Marks.

The applicants who oppose the registration are the Seven Up Company of St. Louis, Missouri, in the United States of America.

The grounds of law upon which the applicants base their present application, as set out therein, are as follows:

"1 The words Seven Up, the number 7 and the word 7Up & design and the word Up are duly registered trade marks in Cyprus under Nos. 5775, 9653 and 9655 respectively and belong to the applicants.

2. Any registration of the words Bubble Up as a trade mark in Cyprus is contrary to the Trade Marks Law, Cap. 268, section 14 in view of

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the fact that the words and No. Seven Up 7Up & design and Up were already registered.

3. By the decision of the Registrar of Trade Marks dated 30/9/71 in application No. 11000 by which the registration as a trade mark of the words Bubble Up was allowed in Class 32, the Registrar of Trade Marks erred in the exercise of his discretion and thus the said decision is void.
4. By the said decision the Registrar of Trade Marks made it clear that he wrongly disregarded the affidavit evidence and wrongly exercised his own judgment contrary to the generally accepted principle *judex ne procedat ex officio.*"

The undisputed facts in so far as they are relevant for the purposes of this recourse are as follows :

On the 19th December, 1967, the interested party, Bubble Up International Ltd., a company incorporated under the laws of Illinois, U.S.A., applied for the registration of the words "Bubble Up" contained in a device which looks like two or three bubbles joined together in an oval shape, as a trade mark in Class 32 of the Trade Marks Rules. The application was accepted by the Registrar for registration in Part A of the Register and he communicated his decision to the interested party by letter dated 18th January, 1968; it was advertised in Supplement No. 5 to the Gazette of the 20th December, 1968, under No. 11000.

The applicants opposed the said application by notice of opposition dated 9th January, 1969.

As stated earlier on the opponents—Applicants herein—are the proprietors of trade marks "Seven Up" registered in Cyprus under No. 5775 dated 22nd February, 1958, "7 Up" and device registered under No. 9653 dated 14th January, 1966 and "Up" registered under No. 9655 dated 15th January 1966.

The goods in both instances are of the same description *i.e.* non-alcoholic beverages and concentrates for the preparation of beverages.

The grounds upon which the applicants based their Opposition are the following :

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1. The opponents are the proprietors of trade mark SEVEN UP registered in Cyprus under No. 5775, dated 22.2.58, trade mark 7UP & device registered under No. 9653 dated 14.1.66 and trade mark UP registered under No. 9655 dated 15.1.66.
2. SEVEN UP trade mark is extensively used in Cyprus and use of the other two trade marks is being planned.
3. All the above trade marks are registered in Class 32 which is the same class in respect of which application is being made by the applicants for the same description of goods.
4. Use of the proposed trade mark by the applicants is likely to cause confusion and/or deception with the opponents' own goods.
5. Confusion or deception is likely because —
  - (a) Acoustically the emphasis on all their trade marks is on the word UP,
  - (b) visually the applicants' trade mark shows the word UP in the same way as this word appears on the opponents' trade mark."

The interested party—applicants in the proceedings before the Registrar—filed a counterstatement setting out the following grounds in support of their application :

1. The trade mark 'BUBBLE UP' is composed of the words Bubble and UP whereas that of the opponents consists of the words SEVEN or No. 7 and UP. The word UP is generic and cannot be appropriated by anyone. The comparison should be made between the word Bubble on one hand and Seven on the other and that no phonetic or graphic similarity exists between these two words.
2. Applicants' trade mark is contained in a distinctive device not existing on the opponents' trade mark.

3. Applicants' trade mark is registered in U.S.A. and so is the opponents' trade mark and they are being used side by side, without any confusion."

The facts set out by the applicants in support of their present application are substantially the same as the grounds set out in their Opposition to the application before the Registrar and their complaint appears to be that the use of the trade mark in question is likely to deceive or cause confusion to the consumers to the detriment of the interests of the applicants and contrary to the laws in force.

The decision challenged by the recourse is attached to and forms part of the Opposition. It would appear that in the proceedings before the Registrar counsel appearing for the opponents argued the question of the registrability of the mark "Bubble Up" which was also shortly touched in certain affidavits filed on their behalf. This the Registrar disregarded in view of the fact that no allegation was made in the opposition regarding the registrability of the trade mark in the light of the provisions of section 11 of the Law. In the same way the Registrar disregarded evidence of user adduced by the interested party—applicants before him—in order to show that there was concurrent user in Cyprus of the two trade marks. He considered such evidence irrelevant in view of the fact that user of the said trade mark in Cyprus began in May, 1968, i.e. after the 19th December, 1967 when the application for registration was filed. It is also clear that in reaching his decision the Registrar disregarded opinions expressed by various affiants in affidavits filed by both sides as to the question of whether the trade marks of the parties were confusingly similar or were dissimilar. The Registrar, having considered the case before him, came to the conclusion that there was no merit in the opposition and that the applicants had discharged the onus of proof by satisfying him that their proposed trade mark was not confusingly similar to any of the trade marks of the opponents and that it was registrable. In the result he dismissed the opposition with costs.

As a result the present recourse was filed.

It was contended on the part of the applicants that the decision complained of related to a dispute to which both sections 11 and 14 of the Trade Marks Law were relevant and that the Registrar refused to consider submissions made with regard to section 11; secondly, that the Registrar did not take into consideration the fact that all trade marks the property of the applicants have the common word "Up" and that this fact should operate adversely in the case of an application for the registration of any mark which contains the same word; with regard to this point it was also submitted that as the word "Up" is registered as a separate trade mark by the applicants it is their exclusive property and cannot be used by anybody else either alone or in combination with other words. Lastly, it was contended that the Registrar was wrong in disregarding the opinion of the various affiants as to whether the trade marks in question were confusingly similar or not and in deciding the issue upon his own comparison.

With regard to the first point it has not been denied that it was never raised in the opposition; nor has it been suggested in this Court that the mark was not registrable in view of the provisions of section 11. It is quite clearly stated by the Registrar at p. 4 of the decision complained of that he has in fact disregarded all argument and evidence under section 11 and in my view it was quite open to him to do so for the reasons therein stated. But quite independently of this, as pointed out by learned counsel for the respondent, his refusal to consider the matter in the proceedings before him does not mean that he did not consider at all whether the application for registration of the trade mark of the interested party did not satisfy the requisites set out in section 11. In fact this is the first thing that he has to consider when an application for registration is made and thereafter follows the procedure laid down in section 20 of the Law.

Applicants' second point is presumably based on paragraph 850 of Kerly's Law on Trade Marks and Trade Names, 9th ed., at p. 464 which reads as follows :

"Where there are a 'series' of marks registered or unregistered having a common feature or a

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common syllable or where the marks in such a series belong to an opponent, these are generally circumstances adverse to an application for a mark containing the common feature, since the public might think that such a mark indicated goods coming from the same source. If the marks in the series are owned by different persons, this tends to negative any proprietorial signification of the common feature and so may assist the applicant."

But it is not correct to say that the Registrar did not have in mind this aspect of the case. This clearly appears from p. 5 of his decision where he sets out in full the cited marks and in a subsequent paragraph has this to say: "One making a careful comparison of the respective trade marks can see at once that the only similarity between the respective marks is in the word 'Up' which exists on all the opponents' registered marks and on the applicants' mark. Now does the whole expression 'Bubble Up' resemble to such a degree any of the cited marks as to be likely to cause confusion in the mind of a substantial number of purchasers? And one more thing, such a danger or confusion must be real and tangible according to well-grounded authority."

With regard to the submission that the word "Up" is the exclusive property of the applicants and cannot be used by anybody else either alone or in combination with other words learned counsel for the applicants has not referred me to any authority in support thereof. But there is a line of authorities pointing to the contrary view. I may refer briefly to the case of *Re Enoch's Application* reported in [1945] 2 All E.R. p. 637. The appellants in that case made an application to register a mark consisting of the word "Vivicillin" standing alone. Three trade marks had been registered previously by another company all consisting of the word "Cyllin" with or without additions, in respect of some of the class of goods included in the application. Both the Registrar and Cohen J., as he then was, who heard the case on appeal, decided the case on the principle of whether there was such resemblance between the mark sought to be registered and the group of trade marks already registered as to be likely to deceive or cause confusion. In the course of his judgment the learned judge said

this (at p. 639): "I must consider only the marks side by side, not only when written, but also side by side when spoken, and I must consider whether there is risk of confusion either in sight or in sound."

In this respect useful reference may also be made to the latter part of paragraph 838 in Kerly's text book referred to above.

With regard to the last point the relevant part of the Trade Marks Law is section 14(1) which reads as follows :

"14(1) Subject to the provisions of subsection (2), no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion."

It seems to me to be quite clear, in the light of the authorities that it was quite legitimate for the respondent to take the view that he did on the question of relevancy and admissibility of the opinion evidence of witnesses in a case of this nature where the issue was the resemblance between the marks and the likelihood of confusion and deception. I find it useful to refer to some authorities that have a bearing on this issue.

In *Bourne v. Swan & Edgar Ltd.* In re *Bourne's Trade Marks* [1903] 1 Ch. p. 211 Farwell, J. in the course of his judgment said this (at p. 224) :

"That brings me to the third point, which is of some little interest now having regard to the recent decisions, and that is, what evidence is admissible. You prove neither actual fraud nor actual deception. What, then, have you to prove? It has been ruled by the House of Lords in the case of *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, and I think it must now be taken to be finally settled, that it is not a proper question to put to the witnesses—Is the picture or mark complained of calculated to deceive the public? The house of Lords have put it on the ground, and the Lord

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Chancellor especially has put it on the ground, that that question is the very issue which the Court has to determine. It appears to me that there is also another reason against the admissibility, and that is that I do not see how you can call any individual to give what is in truth expert evidence as to human nature, because what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe. They are not experts in human nature, nor can they be called to give such evidence, and, apart from admissibility, one cannot help feeling that there is a certain proneness in the human mind to think that other people are perhaps more foolish than they really are. I do not think that Carlyle is alone in his estimate of the intelligence of the majority of the inhabitants of these islands. Therefore that is ruled out as a matter of evidence. It only remains, then, to call the evidence of people who can say that they themselves would be deceived. Now, it is obviously extremely difficult to get any such evidence. People are reluctant to admit that they are more foolish than their fellows. The result is that unless it is left to the eyesight of the judge, to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort."

In *The North Cheshire and Manchester Brewery Co. Ltd. v. The Manchester Brewery Co. Ltd.* [1899] A.C. p. 83 to which reference is made in the above case the Lord Chancellor's statement in the House of Lords on this issue is as follows (at p. 84): ".....; but the truth is, that when one comes to see what the real question is, it is in a single sentence. Is this name so nearly resembling the name of another firm as to be likely to deceive? That is a question upon which evidence of course might be given, as to whether or not there was another brewery either in the one place or in the other, or whether there were several breweries nearly resembling it in name; what the state of the trade was and whether there was any trade name: All those are matters which are proper to be dealt with upon evidence; but upon the one question which your Lordships have to decide, whe-

whether the one name is so nearly resembling another as to be calculated to deceive I am of opinion that no witness would be entitled to say that, for this reason: That that is the very question which your Lordships have to decide.”

And in *Payton & Co. Ltd. and Snelling, Lampard & Co. Ltd.* [1901] A.C. p. 308, another House of Lords case, Lord Macnaghten said this at p. 311 :

“One word regard to the evidence I should like to say. I think, as I have said before, that a great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would but that is not a matter for the witnesses; it is for the judge. The judge, looking at the *exhibits* before him and also paying due attention to the evidence adduced must not surrender his own independent judgment to any witness.”

To the same effect is the more recent case of *Harker Stagg, Limited's Trade Mark* [1954] 71 R.P.C. 136.

In conclusion perhaps I should add that, in my view, it is quite apparent from the decision of the Registrar that he never lost sight of the fact that the onus was on the applicants before him—the interested party in the present proceedings—to satisfy him that the trade mark applied for was not likely to deceive or cause confusion: and that in reaching his decision on this issue he applied the legally recognised and approved rules for comparison. (See Halsbury's Laws of England, 3rd ed., vol. 38 at p. 588 et seq.).

In the light of all the foregoing I am clearly of opinion that it was reasonably open to the Registrar of Trade Marks to reach the decision complained of.

In the result this recourse fails and is hereby dismissed.

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In all the circumstances and as the case had to be adjourned once on the application of the respondents I do not propose to make any order for costs.

*Recourse dismissed.*

*No order as to costs.*