

1979 June 8

[TRIANTAFYLLIDES, P., MALACHTOS, SAVVIDES, JJ.]

GEO. M. HADJIKYRIACOS CO. LTD.,  
AND OTHERS,

*Appellants-Defendants,*

v.

UNITED BISCUITS (UK) LTD.,

*Respondents-Plaintiffs.*

(Civil Appeal No. 5916).

*Injunction—Interlocutory injunction—Evidence—May be given by affidavit—Right of either party to seek cross-examination of affiant—Whether affidavit can be sworn by person other than the applicant for the injunction—Passing off action—Interlocutory injunction pending determination of—Prerequisites specified in section 32 of the Courts of Justice Law, 1960 (14/60)—Trial Court correctly found that they have been established to exist—Test of balance of convenience—Discretion of trial Court—Principles on which Court of Appeal will interfere with exercise of—Not a proper case in which Court of Appeal will interfere with the interlocutory injunction.*

*Passing off—Passing off action—Questions of law arising—Plaintiffs the manufactures of biscuits under name “Penguin” which has not lost its distinctiveness—Defendants using same name in relation to similar products—Plaintiffs entitled to institute action even though said name was, also, being used by subsidiary companies.*

On December 6, 1978 the respondents-plaintiffs filed an action against the appellants-defendants seeking, *inter alia*, an order of the Court restraining the appellants from selling or offering for sale biscuits by the name of “Penguin” or “Penguins” and/or with the device of “Penguin” which biscuits were not manufactured by them. On the same day the respondents applied *ex-parte* and obtained an interim injunction whereby the appellants were restrained from selling or offering for sale the biscuits or other similar products in a wrapper bearing the

words "Penguin" or "Penguins" and with the device of that bird. It was the allegation of the respondents that the appellants were committing the tort of passing off. In granting the afore-said injunction the Court relied on two affidavits in support of the *ex-parte* application: the one was by a certain Stelios Charitakis a grocer and the other by Andreas Economides one of the Directors of Tryphon Distributors Ltd. Charitakis stated\* that Tryphon Distributors Ltd., was a company representing the respondents and which provided the market and himself with the chocolate biscuits known as "Penguin"; and that he recently noticed that the consumers were buying "Penguin" biscuits which were not manufactured by the respondents but by the appellants and which biscuits were placed in the market only recently. Economides stated\*\* that his company was representing the respondents and they were importing for a number of years the biscuits known as "Penguin" biscuits in the wrapper bearing the word "Penguin", which were placed in the market by the respondents.

The above order was made returnable on December 19, 1978 and on December 27, 1978 the Court directed that it should remain in force until the hearing of the action or until the making of another order.

Upon appeal against the latter order Counsel for the appellants-defendants contended:

- (a) That the injunction was granted on the basis of evidence, by way of affidavits, which was adduced by the respondents in an irregular and in an insufficient manner; that the said affidavits were not sworn properly by persons having sufficient knowledge of the facts and that they should have been sworn by the respondents or an explanation ought to have been given why the respondents did not swear such affidavits.
- (b) That it was not sufficiently established that the respondents were entitled to institute the action in question as plaintiffs, since it appeared from the contents of the affidavit of Economides that the name "Penguin" was being used, also, in relation to similar

\* See details of his affidavit at pp. 694-5 *post*.

\*\* See details of his affidavit at pp. 695-6 *post*.

products of other companies such as "Macdonald" and "McVities's" which are legal entities separate from the respondents, even assuming that these companies were the subsidiaries of the respondents.

5 (c) That the prerequisites specified in section 32\* of the Courts of Justice Law, 1960 (14/60) for the making of an interim injunction in a case of this nature have not been established to exist.

10 (d) That on the basis of the test of the balance of convenience the interim injunction must not be allowed to remain in force.

15 *Held*, (1) that in an application for an injunction evidence may be given by affidavit but, on the application of any party, the Court may order the attendance for cross-examination of the person making the affidavit (see Halsbury's Laws of England, 4th ed. vol. 24 pp. 590-591); that at no stage, during the proceedings leading up to the appealed from ruling, have the appellants applied for an order that the two affiants whose affidavits were sworn in support of the *ex-parte* application for the interim injunction should be made available for cross-examination; that though the Trial Court stated that the contentions of counsel that the affidavits should have been sworn by the respondents raised serious points of law, they are actually arguments which on closer examination cannot be upheld as being well-founded, because though the two affiants concerned were not employees of the respondents, they nevertheless could properly be regarded as persons having sufficient knowledge of the facts which had to be deposed to in order to create the substratum of evidence which was required for the purpose of justifying the granting *ex-parte* of the interim injunction in question; that, moreover, it was not sought to cross-examine either of them in order to test the sufficiency of his relevant knowledge; and that, accordingly, contention (a) must fail.

35 (2)(a) That though it is correct that under the ordinary rules of law a parent company and a subsidiary company, even a hundred per cent subsidiary company, are distinct legal entities a plaintiff in a passing-off action need not show that the badge

\* Quoted in full at pp. 696-7 *post*.

the defendant has taken denotes his goods or business exclusively if the defendant has no right to use it all; that it is enough for him to show that he is one of those who are entitled to use it and who consequently suffers damage from its misuse (see Kerly's Law of Trade Marks and Trade Names 10th ed. p. 384 para. 16-29 and *Birmingham Vinegar Brewery Co. Ltd. v. Powell* [1897] A.C. 710). 5

(2)(b) That the respondents are producers of chocolate biscuits in relation to which they use the name of "Penguin" is something which appears, on the basis of the material before the Court, to be indisputable; that it cannot be said that it has been established that the name "Penguin" has lost its distinctiveness and has come to be a mere name for chocolate biscuits regardless of trade origin (see *Kerly's, supra*, p. 390 para. 16-35). 10

(2)(c) That, moreover, this does not appear to be, in the light of all relevant circumstances, an instance in which the appellants are using the name "Penguin" in a field different from that occupied by the relevant products of the respondents, so that the likelihood of confusion to arise is not sufficiently great as to render the use by the appellants of the name "Penguin" an invasion of the respondent's rights, because "there are numerous cases in which the Court has refused relief on the ground that the plaintiff's and the defendant's production occupied different fields of the trade in question" (see *Norman Kark Publications Ltd., v. Odhams Press, Ltd.*, [1962] 1 All E.R. 636 at p. 646); and that, accordingly, the respondents were entitled to institute the action in question as plaintiffs. 15 20 25

(3) That it cannot be accepted that the contention, regarding the existence of the prerequisites specified in section 32 of Law 14/60, is a correct one inasmuch as on the strength of what has been placed before this Court it is satisfied that it was correctly found by the trial Court that there are serious questions to be tried at the hearing of the action, that there is a probability that the respondents, as plaintiffs, are entitled to relief, and that unless an interlocutory injunction was granted it would be difficult or impossible to do complete justice at a later stage. 30 35

(4) That there do not exist any one of the factors (see *Kerly's, supra*, p. 337, para. 15-65) which could lead this Court to the conclusion that by applying the test of the balance of convenience it should proceed to decide this appeal in favour of the appellants. 40

(5) That in the light of all the foregoing and bearing in mind the principles which should guide this Court in deciding as to whether or not it should interfere with the exercise of the discretionary powers of the trial Court in a matter of this nature (see, *inter alia*, *Constantinides v. Makriyiorghou and Another* (1978) 1 C.L.R. 585) it has reached the conclusion that this is not a proper case in which it can interfere with the interlocutory injunction granted by the trial Court; and that, accordingly, this appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Cases referred to:

- Karydas Taxi Co. Ltd. v. Komodikis* (1975) 1 C.L.R. 321;  
*Acropol Shipping Company Ltd. and Others v. Rossis* (1976) 1 C.L.R. 38;  
*Constantinides v. Makriyiorghou and Another* (1978) 1 C.L.R. 585;  
*R. v. South Wales Traffic Licensing Authority. Ex parte Ebbw Vale Urban District Council* [1951] 1 All E.R. 806 at p. 808.;  
*Dent v. Turpin, Tucker v. Turpin* [1861] 4 L.T. 637;  
*Birmingham Vinegar Brewery Co. Ltd. v. Powell* [1897] A.C. 710 at pp. 711-712;  
*Norman Kark Publications Ltd. v. Odhams Press, Ltd.*, [1962] 1 All E.R. 636 at p. 646,  
*Tavener Rutledge Ltd., v. Speyers Ltd*, [1957] R.P.C. 498;  
*Salaried Persons Postal Loan Ltd. v. Postal and Salaried Loans of Glasgow Ltd.* [1966] R.P.C. 24;  
*Mothercare Ltd., v. Robson Books Ltd.*, (decided by the Chancery Division of the High Court of Justice in England on March 6, 1979 and reported in a summary form in the *New Law Journal*, 1979, vol. 129, pp. 317-318).

**Appeal.**

Appeal by defendants against the order of the District Court of Nicosia (Papadoupoulos, S.D.J. and Stavrinides, Ag. D.J.) dated the 27th December, 1978 (Action No. 4910/78) whereby an interim injunction, granted on an *ex parte* application, was to remain in force until the hearing of the action or until the making of another order.

*K. Michaelides*, for the appellants.

*G. Nicolaidis*, for the respondents.

*Cur. adv. vult.*

TRIANAFYLLIDES P. read the following judgment of the Court. In this case the appellants, who are the defendants in action No. 4910/78, in the District Court of Nicosia, appeal against the order in that action, made on December 27, 1978, by virtue of which an interim injunction granted on December 6, 1978, on an *ex parte* application of the respondents, who are the plaintiffs in the said action, is to remain in force until the hearing of the action or until the making of another order. 5

It is useful to quote in full the following part of the relevant ruling which was given by the trial Court on December 27, 1978:— 10

“ On 6.12.78 the plaintiffs—applicants filed an action against the defendants seeking, among other remedies, an order of the Court restraining the defendants, their servants or agents from selling or offering for sale biscuits by the name of ‘Penguin’ or ‘Penguins’ and/or with the device of ‘Penguin’ which biscuits are not manufactured by them. 15

On the same day the plaintiffs—applicants filed an *ex-parte* application seeking an interim injunction by which the defendants would be restrained from selling or offering for sale the biscuits or other similar products in a wrapper bearing the words ‘Penguin’ or ‘Penguins’ and with the device of that bird. It was the allegation of the plaintiffs—applicants that the respondents—defendants were committing the tort of ‘passing-off’. The order was given by the Court on condition that the plaintiffs filed a security for £2,000.— and it was made returnable on 19.12.78. 20 25

In granting the interlocutory injunction on 6.12.78 the Court was based on two affidavits in support of the *ex-parte* application: the one was by a certain Stelios Charitakis and the other by a certain Andreas Economides. 30

Stelios Charitakis seems to be a grocer who has a shop at Prodromos Street, No. 37, Strovolos. In his affidavit he states that Tryfon Distributors Ltd. is a company representing the plaintiffs in Cyprus and who provides the market as well as himself for a period of over 10 years with the chocolate biscuits known as ‘Penguin’ biscuits which are of great demand and enjoy an excellent reputation. He further states that these biscuits are very well known as 35

the 'Penguin' biscuits because of the efficacy of the bird 'Penguin' and the word 'Penguin' on the wrapper and they are asked for and they are bought and they are traded under that name. He recently noticed that the consumers, mainly children who are the main purchasers of these products, were buying 'Penguin' biscuits which were not manufactured by the plaintiffs but by the defendants—respondents and which biscuits were placed in the market by the defendants only recently.

Mr. Andreas Economides in his affidavit in support of the application states that he is one of the directors of the provisions department Tryfon Distributors Ltd. company and it is his allegation that this company is representing the plaintiffs and they are importing for a number of years the biscuits known as 'Penguin' biscuits in the wrapper bearing the word 'Penguin' and the device of the bird Penguin in certain combinations of colours as distinctive of the products of the plaintiffs. Mr. Economides states that the plaintiffs and/or their subsidiary companies have been trading as McDonald, McVitie's, McFarlane, William Crawford, etc., and placing in the market these products with the said distinctive characteristics and which products were sold in great quantities in the Cyprus market. They are known all over Cyprus as 'Penguin' products and as such are distinctive products of the plaintiffs. Grocers and consumers have always called these products as 'Penguin' products and they were asked for and traded in Cyprus as such.

Mr. Economides also attached to his affidavit *exhibits* Nos. 1 and 2. *Exhibit* No. 1 is a sample of the products of the plaintiffs with their wrappers whilst *exhibit* No. 2 is the product which is now placed in the market by the defendants and for which there is an allegation that the defendants are passing-off as the goods of the plaintiffs; in other words, that they are committing the tort of passing-off.

In paragraph 10 of the affidavit of Mr. Economides there is an allegation that the defendants propose to continue the sale and trading of these products, unless they are restrained from doing so by the Court. He further states in paragraph 11 that if the order applied for is not

granted by the Court, the plaintiffs will suffer irreparable damage, the damages will not be possible to assess and the good name and reputation of the products of the plaintiffs will be impaired.

The case came up for hearing on 19.12.78 when the interlocutory injunction was made returnable. In the meantime the respondents filed a notice of opposition and this notice was supported by an affidavit of defendant No. 3 who is also a director of defendants No. 1.

In his affidavit Mr. Hadjikyriacos stated among other things that his company manufactures the well known chocolate biscuits by the name of 'Penguin'. Their appearance and wrapping are characteristics of the biscuits of the defendant company. Their biscuits are different to the biscuits of the plaintiffs in shape, wrapping, the existence of two penguins, the name, the mode of wrapping, the obvious of their Cyprus origin, the name of the manufacturers' trademark 'Frou-Frou' and generally their get-up. He further alleged that the name 'Penguin' is descriptive in the sense that it simply indicates a particular type of biscuits. He alleged that the defendants were not passing-off their biscuits for those of the plaintiffs and there could be no confusion. He denied all the allegations of the affiants in support of the application. He alleged that their company would suffer irreparable damage by the interlocutory injunction as their biscuits would remain unsold because of the interlocutory injunction. He further stated that he had legal advice that the injunction should not be granted on an *ex-parte* application."

It is common ground that the interim injunction was granted under section 32 of the Courts of Justice Law, 1960 (Law 14/60), which reads as follows:-

"(1) Subject to any Rules of Court every Court, in the exercise of its civil jurisdiction, may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do, notwithstanding that no compensation or other relief is claimed or granted together therewith:



5 Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage.

10 (2) Any interlocutory order made under subsection (1) may be made under such terms and conditions as the Court thinks just, and the Court may at any time, on reasonable cause shown, discharge or vary any such order.

15 (3) If it appears to the Court that any interlocutory order made under subsection (1) was applied for on insufficient grounds, or if the plaintiff's action fails, or judgment is given against him by default or otherwise, and it appears to the Court that there was no probable ground for his bringing the action, the Court may, if it thinks fit, on the application of the defendant, order the plaintiff to pay to the defendant such amount as appears to the Court to be a reasonable compensation to the defendant for the expense and injury occasioned to him by the execution of the order.

20 Payment of compensation under this subsection shall be a bar to any action for damages in respect of anything done in pursuance of the order; and any such action, if begun, shall be stayed by the Court in such manner and on such terms as the Court thinks just".

25 The application of section 32, above, has been considered recently by our Supreme Court in, *inter alia*, *Karydas Taxi Co. Ltd. v. Komodikis*, (1975) 1 C.L.R. 321, *Acropol Shipping Company Ltd. and others v. Rossis*, (1976) 1 C.L.R. 38, and *Constantinides v. Makriyiorghou and another*, (1978) 1 C.L.R. 585.

35 The first set of grounds of appeal on the basis of which counsel for the appellants has invited us to set aside the interim injunction, which is complained of in this appeal, amount in effect to the contention that the injunction was granted on the basis of evidence, by way of affidavits, which was adduced by the respondents in an irregular and in an insufficient manner.

In Halsbury's Laws of England, 4th ed., vol 24, pp. 590-591, there are stated the following:-

"1057. Evidence generally. Upon a motion or summons for an injunction evidence may be given by affidavit, but, on the application of any party, the Court may order the attendance for cross-examination of the person making the affidavit and where, after such an order has been made, the person in question does not attend, his affidavit may not be used as evidence without the leave of the Court. On a motion for judgment in default of appearance an injunction may be granted without evidence if damages are not claimed or a claim for damages is waived." 5 10

"1059. Affidavit. The affidavit on an application for an injunction may be made by any person having sufficient knowledge of the facts. It is usually made by the applicant and if no sufficient reason is assigned for no such affidavit being filed the order may be refused. On an *ex parte* application, if the affidavit is not sufficiently positive, notice of the application may be ordered to be given. The affidavit should not, as a rule, be sworn until after the issue of the writ, but in exceptional cases the Court may grant an interim order even though the affidavit was sworn before the issue of the writ. In such cases the Court now requires the affidavit to be resworn and filed and the plaintiff is required to give an undertaking to have this done." 15 20 25

*It is common ground that at no stage, during the proceedings leading up to the appealed from ruling of the trial Court, have the appellants applied for an order that the two affiants, whose affidavits were sworn in support of the ex parte application for the interim injunction, namely Charitakis and Economides, should be made available for cross-examination.* 30

In relation to the contentions of counsel for the appellants that the aforesaid two affidavits were not sworn properly by persons having sufficient knowledge of the facts and that they should have been sworn by the respondents, or an explanation ought to have been given why the respondents did not swear such affidavits, we are of the view that, though the trial Court stated in its ruling that these contentions of counsel for the appellants raised serious points of law, they are actually arguments which on closer examination cannot be upheld as being 35 40

well-founded, because though the two affiants concerned, Charitakis and Economides, were not employees of the respondents, they nevertheless could properly be regarded as persons having sufficient knowledge of the facts which had to be deposed  
5 to in order to create the substratum of evidence which was required for the purpose of justifying the granting *ex parte* of the interim injunction in question; and, as already pointed out, it was not sought to cross-examine either of them in order to test the sufficiency of his relevant knowledge.

10 We, therefore, find no merit in the aforementioned first set of grounds of appeal.

Counsel for the appellants has argued, next, that, by means of the evidence, by way of affidavits, which has been adduced, it was not sufficiently established that the respondents were entitled  
15 to institute the action in question as plaintiffs, since it appears from the contents of the affidavit of Economides that the name "Penguin" is being used, also, in relation to similar products of other companies such as "Macdonald" and "McVitie's", which are legal entities separate from the respondents, even assuming  
20 that these companies are the subsidiaries of the respondents.

It is quite correct that as has been stressed by Cohen L.J. in *R. v. South Wales Traffic Licensing Authority. Ex parte Ebbw Vale Urban District Council*, [1951] 1 All E.R. 806 (at p. 808):—

25 " Under the ordinary rules of law a parent company and a subsidiary company, even a hundred per cent. subsidiary company, are distinct legal entities, and in the absence of a contract of agency between the two companies one cannot be said to be the agent of the other. That seems to me to  
30 be clearly established by *Salomon v. Salomon & Co.*<sup>1</sup>, and by the observations of Tomlin, J., in *British Thomson-Houston Co. v. Sterling Accessories, Ltd.*<sup>2</sup>."

But, "the plaintiff in a passing-off action need not show that the badge the defendant has taken denotes his goods or business  
35 exclusively if the defendant has no right to use it at all: it is enough for him to show that he is one of those who are entitled

1. [1897] A.C. 22.

2. [1924] 2 Ch. 33.

to use it and who consequently suffers damage from its misuse.” (See Kerly’s Law of Trade Marks and Trade Names, 10th ed., p. 384, para. 16–29, as well as the cases referred to in this connection in Kerly’s, *supra*, one of which is *Dent v. Turpin, Tucker v. Turpin*, [1861] 4 L.T. 637).

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That the respondents are producers of chocolate biscuits in relation to which they use the name of “Penguin” is something which appears, on the basis of the material at present before us, to be indisputable, not only because this has been deposed to by affiant Economides, but, also, because this appears to be admitted in the affidavit of Hadjikyriacos which was sworn, in support of the opposition to the interim injunction, on December 11, 1978; and it is to be noted that this affidavit was sworn after it had emerged from the contents of the affidavit of Economides that other companies were, also, using the name “Penguin” in relation to chocolate biscuits produced by them; and yet it was not sought to cross-examine Economides as regards this or any other part of his affidavit.

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In Kerly’s, *supra*, there appears, also, the following passage, at p. 385, para. 16–30:–

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“ It is not necessary to show that the customers who knew the goods of the plaintiff’s firm by a particular name or get-up knew anything whatever about the plaintiff. It is immaterial that they did not even know his name, for it is sufficient to prove that purchasers of his goods recognised, by the use of the marks in question in connection with them, that they were goods of a particular class, and to show that such class is, in fact, constituted by his goods.”

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In *The Birmingham Vinegar Brewery Co. Ltd. v. Powell*, [1897] A.C. 710, which is one of the cases referred to in Kerly’s, *supra*, Lord Halsbury L.C. said (at pp. 711–712):–

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“ The proposition of law is one which has been accepted by the highest judicial authority and acted upon for a great number of years. It is that of Turner L.J., who says in *Burgess v. Burgess*<sup>1</sup>: ‘No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the

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<sup>1</sup> [1853] 3 D.M. & G. 204.

defendant is selling his own goods as the goods of another.' That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Turner L.J. is if he were to say in terms, 'These are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public. In each case it comes to be a question whether or not there is the statement made; and if the statement is made there can be no doubt of the legal conclusion that he must be strained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have read from Turner L.J."

Also, in the same case, Lord Herschell stated (at pp. 715-716) the following:-

"I think that the fallacy of the appellants' argument rests on this: that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shewn that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case it seems to me that 'Yorkshire Relish' meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular

manufacture, and that when a person sold 'Yorkshire Relish', as the defendants did, by selling it as 'Yorkshire Relish' and calling it 'Yorkshire Relish', they represented to the public that it was that manufacture which was known as and by the name of 'Yorkshire Relish'. 5

It was said on behalf of the appellants that they had a right to sell what they manufactured, and to call it 'Yorkshire Relish', because 'Yorkshire Relish' had come to be merely the name of a particular sauce with a particular flavour. I do not think that that is an answer which can in point of fact be set up in the present case. I do not enter upon the question whether it would have been sufficient in point of law if it had been established in point of fact. But here what they sell and put on the market is not 'Yorkshire Relish' in the sense in which those words had been used down to that time and would be understood by anybody. It may have been something very like it—a 'good match', and so on—but it was not 'Yorkshire Relish.' When, therefore, they sold their goods as 'Yorkshire Relish', they sold them as the plaintiff's manufacture when they were not the plaintiff's manufacture, nor the article which he manufactured and sold under that name". 10 15 20

In the present case it cannot be said that, on the basis of the material before us, it has been established that the name "Penguin" has lost its distinctiveness and has come to be a mere name for chocolate biscuits regardless of trade origin (See Kerly's, *supra*, p. 390 para. 16-35). 25

Moreover, this does not appear to be, in the light of all relevant circumstances, an instance in which the appellants are using the name "Penguin" in a field different from that occupied by the relevant products of the respondents, so that the likelihood of confusion to arise is not sufficiently great as to render the use by the appellants of the name "Penguin" an invasion of the respondents' rights; because, as rightly pointed out by Wilberforce J. in *Norman Kark Publications Ltd., v. Odhams Press, Ltd.*, [1962] 1 All E.R. 636 (at p. 646), "There are numerous cases in which the Court has refused relief on the ground that the plaintiff's and the defendant's production occupied different fields of the trade in question." 30 35

Counsel for the appellants has argued that the prerequisites 40

specified in section 32 of Law 14/60 for the making of an interim injunction in a case of this nature have not been established to exist. We cannot accept that this is a correct submission, inasmuch as on the strength of what has been placed before us  
5 we are satisfied that it was correctly found by the trial Court that there are serious questions to be tried at the hearing of the action in question, that there is a probability that the respondents, as plaintiffs, are entitled to relief, and that unless an interlocutory injunction was granted it would be difficult  
10 or impossible to do complete justice at a later stage.

It has been urged during the hearing of this appeal that on the basis of the test of the balance of convenience the interim injunction granted by the trial Court must not be allowed to remain in force; we are not, however, of the view what there  
15 exists any one of the factors (see Kerly's, *supra*, p. 337, para. 15-65) which could lead us to the conclusion that by applying the aforesaid test we should proceed to decide this appeal in favour of the appellants; and, in this respect, the cases of *Tavener Rutledge Ltd., v. Specters Ltd.*, [1957] R.P.C. 498 and *Salaried  
20 Persons Postal Loan Ltd., v. Postal and Salaried Loans of Glasgow Ltd.*, [1966] R.P.C. 24, which have been cited to us by counsel for the appellants, appear to us, as at present advised, to be clearly distinguishable from the present case.

A recent case to which we might usefully refer is *Mothercare  
25 Ltd., v. Robson Books Ltd.*, which was decided by the Chancery Division of the High Court of Justice in England on March 6, 1979, and of which the report, in a summary form, as found in the *New Law Journal*, 1979, vol. 129, pp. 317-318, reads as follows:-

30 " M Ltd applied for an interlocutory injunction to restrain R Ltd from publishing a book called 'Mother Care' under that title or any other colourable imitation of the name 'Mothercare'. M Ltd had been established for many years and now had 177 branches in Great Britain, all  
35 bearing the name 'Mothercare', and all trading in a wide range of clothing and other goods for expectant mothers and young children. It published a number of books mainly for children, and in October 1978, in conjunction with the Reader's Digest Association Ltd, a book called  
40 'Reader's Digest Mothercare Book'. R Ltd was a small

publishing firm, which began five or six years ago. It proposed to publish the book 'Mother Care' which had already been published in the USA and Canada. M Ltd's book was about 8 inches square and had a hard illustrated cover with a dominant green colour with its title on the front and on the spine. The initial letter of the word 'Mothercare' was shown with the space between the second and third vertical strokes mainly occupied by a diagrammatic silhouette of the head and trunk of a child. R Ltd's book was about 6 inches wide and nearly 9 inches tall, and was very largely addressed to the subject of looking after the mother before and after the birth of the child whereas M Ltd's book was concerned with the child rather than the mother.

It was held (Oliver J): that an interlocutory injunction would be granted. M Ltd had shown that the action was not frivolous or vexatious, that there was a serious question to be tried and that there was a real prospect of success. An award of damages would not compensate M Ltd if it won at the trial after failing to get an interlocutory injunction. On the other hand, if an interlocutory injunction were granted, but R Ltd succeeded at the trial, there was a substantially greater prospect of damages proving an adequate recompense. Further, if an interlocutory injunction were granted the injury to R Ltd would mainly be merely one of delay. (*American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All E.R. 504, applied.)

In the light of all the foregoing, and bearing in mind the principles which should guide us in deciding as to whether or not we should interfere with the exercise of the discretionary powers of the trial Court in a matter of this nature (see, *inter alia*, the *Karydas* case, *supra*, at pp. 327-328, and the *Constantinides* case, *supra*, at p. 596), we have reached the conclusion that this is not a proper case in which we can interfere with the interlocutory injunction granted by the trial Court and that, accordingly, this appeal has to be dismissed with costs.

*Appeal dismissed with costs.*