

1979 December 12

[A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

GENERAL BISCUIT CO. G.B. CO.,  
*Appellants-Plaintiffs,*

v.

GEO. M. HADJIKYRIAKOS LTD.,  
*Respondents-Defendants.*

(Civil Appeal No. 5503).

*Passing off—Imitation of get up of salted crackers—Appellants' crackers wrapped in yellow paper with a blue patch bearing in white the word TUC—Respondents using same yellow colour with a patch identical in shape and size as that of the plaintiffs but red in colour with the word TRU in white—Ingredients of the wrong —Reputation and likelihood of deception—As there is no question of credibility of witnesses and the only issue is the proper inferences to be drawn from proved facts, Court of Appeal in as good a position to evaluate the evidence as the trial Court—Finding of trial Court that there was no likelihood of deception and that plaintiffs proved no reputation set aside on appeal—Proper verdict on the balance of probabilities is that appellants established a case of passing off against the respondents.*

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*Court of Appeal—Inferences to be drawn from primary facts where there is no question of credibility or reliability of witnesses— Court of Appeal in as good a position as the trial Judge to draw such inferences.*

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The appellants-plaintiffs were biscuit manufacturers, with their head office in Belgium, whose products, which included salted chackers marked and known under the name TUC, were been imported and distributed in Cyprus through local representatives. The respondents-defendants were manufacturers of biscuits in Cyprus, which were marketed under the general name FROU-FROU and included salted crackers known under the name TRU.

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The appellants' TUC crackers were packed standing up in

cellophane wrapper and at both ends of the packet the wrapper was bonded together and had a dented appearance; this sort of packing was known in the trade as the flow pack system. Each biscuit was of rectangular shape with the corners chopped off. The predominant colour of the wrapper was bright lemon yellow with clear longitudinal strips through which the contents were showing. On the right of all sides of the packet there was a trapezoidal compartment with rounded corners coloured in royal blue with the word TUC printed in thick white letters.

The respondents' TRU crackers were also packed standing up in a cellophane wrapper but the sides were glued flat on the packet as opposed to the flow pack system adopted by the appellants. Each biscuit was of the same shape as those of the appellants but slightly longer and thinner. The packet was also lower and longer containing 20 instead of 17 crackers. The predominant colour of the wrapper was bright lemon yellow with clear longitudinal strips through which the contents were showing. On the right of all sides there was a trapezoidal compartment of the same shape and dimensions as that used by the appellants but its colour was red instead of blue. On this red back-ground the word TRU appeared in thick white print.

The appellants-plaintiffs brought an action for passing off complaining that the general get up of the respondents' salted crackers was so similar to their own that it was likely to lead the average purchaser to mistaking or confusing the latter's said category of goods with those of their own and buy TRU cream crackers with the impression that they were in fact buying TUC crackers.

The trial Court dismissed the action having come to the conclusion that the plaintiffs failed to prove reputation of their get-up. The trial Court, further, having proceeded on the assumption that such reputation was in fact established examined the likelihood of deception and found that "even if the plaintiffs acquired a reputation of their get-up, the defendants' mode of presenting their TRU biscuits was not such, even if there was some sinister motive, as to create a likelihood of deception".

Upon appeal the plaintiffs challenged the inferences drawn by the trial Court on the evidence adduced, oral, documentary and real there arising no question of credibility of the witnesses.

*Held*, (1) that though this Court on appeal is very reluctant to disturb findings of fact made by a trial Court unless there are strong reasons for doing so in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to evaluate the evidence as the trial Judge, and draw such inferences; and that in view of the circumstances of the case and the very nature of the *exhibits*, the appearance of which is so relevant and material to the inferences to be drawn, especially regarding their similarities and the likelihood of deception, this Court is in as good a position to evaluate that evidence as the trial Court was.

(2) That the evidence adduced established that the get-up of the appellants' goods has become distinctive of these goods and that it was associated or identified with them; that the appellants established that in the circumstances there was not only a probability of confusion between their goods and those of the respondents but there were instances of actual deception; that the conduct of the respondents was calculated to pass off their goods as those of the appellants or at least to produce such confusion in the minds of probable customers or purchasers and that it was likely to make people buy their goods instead of those of the appellants; that what the respondents did, in the present case, was to take the most outstanding features from the packages of the appellants and its label and use them on their own packages in such a way as the ordinary purchaser with ordinary memory, purchasing with ordinary caution, could not "be expected to make the close and careful side by side examination of the two products which the learned Judge (the Full Court in this case) obviously made to identify and highlight the differences which he enumerated" (see *Colgate-Palmolive Ltd. and Another v. Patron* [1978] R.P.C. 662); that, therefore, the proper verdict on the balance of probabilities is that the appellants established a case of passing off against the respondents; and that, accordingly, the appeal must be allowed.

*Appeal allowed.*

Cases referred to:

- Constantinou v. Katsouris* (1975) 1 C.L.R. 188 at p. 192;  
*Koudellaris v. Christoforou and Others* (1975) 1 C.L.R. 366 at p. 374;

*Ioannis Kokkalos and Sons Ltd. v. Karayiannis* (1975) 1 C.L.R. 377;

*Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326;

*Colgate-Palmolive Ltd. and Another v. Pattron* [1978] R.P.C. 662.

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### Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoulos, S.D.J.) dated the 10th September, 1975, (Action No. 4488/74) whereby their action for passing off was dismissed.

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*A. Dikigoropoulos*, for the appellants-plaintiffs.

*K. Michaelides*, for the respondents-defendants.

*Cur. adv. vult.*

*A. LOIZOU J.* read the following judgment of the Court. This is an appeal from the judgment of the Full District Court of Nicosia by which the action of the appellants for passing off was dismissed. The trial Court, however, made no order as to costs, "in view", as it said, "of the similarities in the defendants' get-up and of their questionable motives".

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The appellants are biscuit manufacturers, with their head office in Belgium, and their products have been imported and distributed in Cyprus through local representatives. Among their products are salted crackers marked and known under the name TUC.

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The respondents are manufacturers of biscuits in Cyprus since 1965 which are marketed under the general name FROU-FROU and among their products are salted crackers known under the name TRU.

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The complaint of the appellants has been that the general get up of the respondents' salted crackers is so similar to their own that is likely to lead the average purchaser to mistaking or confusing the latter's said category of goods with those of their own and buy TRU cream crackers with the impression that they are in fact buying TUC crackers.

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The get up of the biscuits in question has been most satisfactorily described by the trial Court and we see no reason to

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attempt their description with words of our own, once having looked at the *exhibits* we find ourselves in agreement with it.

*“Plaintiffs’ goods:*

The plaintiffs’ TUC crackers are packed standing up in cellophane wrapper and at both ends of the packet the wrapper is bonded together and has a dented appearance; this sort of packing is known in the trade as the flow pack system. Each biscuit is of rectangular shape with the corners chopped off. The predominant colour of the wrapper is bright lemon yellow with clear longitudinal strips through which the contents are showing.

On the right of all sides of the packet there is a trapezoidal compartment with rounded corners coloured in royal blue with the word TUC printed in thick white letters. The size of this compartment varies according to the size of each side; i.e., the smaller the side, the smaller the size of the compartment. On the left top corner of each of the four main sides, there is another compartment rectangular in shape, coloured in red with the word PAREIN printed in white letters surrounded by a white line broken up in the shape of an elongated hexagon.

*Defendants’ goods:*

The defendants’ TRU crackers are also packed standing up in a cellophane wrapper but the sides are glued flat on the packet as opposed to the flow pack system adopted by the plaintiffs. Each biscuit is of the same shape as those of the plaintiffs but slightly longer and thinner. The packet is also lower and longer containing 20 instead of 17 crackers.

The predominant colour of the wrapper is bright lemon yellow with clear longitudinal strips through which the contents are shown. On the right of all sides there is a trapezoidal compartment of the same shape and dimensions as that used by the plaintiffs but its colour is red instead of blue. On this red background the word TRU appears in thick white print. The size of this compartment varies, same as on the plaintiffs’ wrappers, according to the size of the side.

On the left top corner of four of the main sides, the trade mark of the defendants appears, which consists of the words Frou Frou in white capital letters set on a dark blue-black background, having the shape of an asymmetrical four petal flower design. The words Frou Frou are superimposed and in between the words 'superb quality biscuits' are shown in white capital of much smaller print."

The trial Court came to the conclusion that as the appellants failed to prove reputation of their get-up it could dismiss the action on that ground alone. It is true that the burden of proof of reputation is on the plaintiff who relies upon a get-up for his case. In that respect a plaintiff must prove that the distinctiveness of his goods lies in the get-up and not for example in his name or trade-marks, if they appear on the goods. Whilst on this point it should be pointed out that as stated in Kerly's Law of Trade Marks and Trade Names, 10th Edition, Chapter 16-70, p. 422: "No case can be made merely by showing an imitation of the parts of the get-up of goods which are common to the trade. But very little evidence of user may be sufficient to establish distinctiveness where the get-up is not only novel but striking, even though it consists of a combination of commonly used parts. The case is then analogous to that of a 'fancy word'".

The trial Court, however, did not rest at that. It went on and proceeded on the assumption that such reputation was in fact established and examined the likelihood of deception. It directed correctly its mind on the Law pertaining to the proof of likelihood of deception by referring to what is stated in Kerly's (*supra*) paragraph 16-73 where it is stated:

"The Court must be satisfied that the defendant's conduct is calculated to pass off other goods as those of the plaintiff, or, at least, to produce such confusion in the minds of probable customers or purchasers or other persons with whom the plaintiff has business relations as would be likely to lead to the other goods being bought and sold for his. This is the foundation of the action.

The onus of proving deception is upon the plaintiff.

The question of likelihood of deception is for the Court

(not the witnesses) to decide 'looking at the documents and evidence before him.' Evidence may be called on the point, but is not essential except in cases of doubt, and the assistance it gives to the Court will be of a limited nature unless it includes evidence of actual deception." 5

In this respect it examined, the motives of the defendants, the instances of deception and the test as to the resemblance of the get-up. With regard to the latter it quoted from Halsbury's Laws of England, third edition volume 38 para. 1018 which reads: 10

"In considering whether the resemblance of the get-up of different goods is such as to cause deception, the proper test is whether the get up of the defendants' goods would be likely to deceive a purchaser who is acquainted with the plaintiffs' get-up but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods and that they will be shown fairly to him without distinguishing marks being concealed." 15

With regard to the motives of the appellants the trial Court had this to say on the facts before it: 20

"However the manner and method of packing may be coincidental, but the same cannot be said for the choice of the yellow colour and the identical in shape and size of the trapezoidal compartment within which the word is printed. This could not have been coincidental but the result of a careful copy of the plaintiffs' wrappers and the same applies to the lettering used for the word TRU. 25

These similarities create strong suspicions of guilty motive on the part of the defendants which, however, are weakened to the extent of nullification by the equally strong and deliberate steps taken by the defendants to mark their products as their own by displaying on every side of the packet clearly and in a different background colour, the word TRU and also by exhibiting clearly their trade mark which is completely different from that of the plaintiffs, both in words, design and colour. Also, the dimensions of the packet of the plaintiffs are, to a person accustomed to the size of the plaintiffs' goods, noticeably different." 30 35

It then concluded by saying the following:

“ In view of the above, we feel that the plaintiffs failed to prove intention but even if we are wrong in our conclusion and such fraudulent intention is inferrable, we shall proceed, at a later stage of our judgment, to examine the case in general on this assumption.”

Fraudulent, of course, motive by itself does not constitute a cause of action. The plaintiffs' claim depends on the injury, actual or probable to his good-will and not on the wickedness of the defendants. (Halsbury's Laws of England, third edition volume 38 paragraph 1019). Such motive, however, if established makes the proof of likelihood to deceive easier.

In conclusion the trial Court had this to say:

“ For all the above reasons, we find that even if the plaintiffs acquired a reputation of their get-up, the defendants' mode of presenting their TRU biscuits was not such even if there was some sinister motive as to create a likelihood of deception.

Finally and without touching the credibility or motives of the three purported deceived purchasers, the instances of deception were not, to our satisfaction, sufficiently strong as to render the likelihood of the deception any lesser hard to prove.”

By this appeal the appellants challenge the inferences drawn by the trial Court on the evidence adduced, oral, documentary and real, the latter of course refers to the packages of biscuits which have been made *exhibits* in the case. It was the case for the appellants that because of the close similarity of the get-up of their biscuits with those of the respondents, witnesses were misled into purchasing the defendants' biscuits believing they were purchasing those of the plaintiff. It was further argued that the trial Court failed to appreciate and evaluate properly the significance of the uncontested evidence adduced as to the increased sales of the appellants goods between 1962-1972, and that the appellants had established thereby the reputation and or distinctiveness of the plaintiff's goods and or get-up in question. Also that the trial Court went wrongly out of its



way to underline minor dissimilarities between the wrappers of the goods of the parties and failed to evaluate fully their overwhelming similarities.

It is true that when faced with complaints against findings of fact made by a trial Court, this Court on appeal is very reluctant to disturb such findings unless there are strong reasons justifying same. There is, however, less reluctance to interfere with inferences drawn from proved facts in such a case. It has been repeatedly stressed that this Court is in as good a position as a trial Court to draw such inferences (see *Constantinou v. Katsouris* (1975) 1 C.L.R. p. 188 at p. 192; *Koudellaris v. Christoforou and others* (1975) 1 C.L.R. 366 at p. 374; *Ioannis Kokkalos and Sons Ltd., v. Karayannis* (1975) 1 C.L.R. p. 377). 5 10

With regard to the attitude of an appellate Court in matters where no question of the credibility or reliability of any witness arises and where the point in dispute is the proper inference to be drawn from proved facts, reference may be made to the case of *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326 (referred to also in *Constantinou case (supra)* ) where Lord Reid at p. 329 had this to say:- 15 20

“ But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion.” 25

In the present case as already stated no question as to the credibility of witnesses arises. The only issues with which we are faced are what are the proper inferences that should be drawn from proved facts. We feel that in view of the circumstances of the case and the very nature of the *exhibits*, the appearance of which is so relevant and material to the inferences to be drawn, especially regarding their similarities and the likelihood of deception, we are in as good a position to evaluate that evidence as the trial Court was. 30 35

Lord Edmund-Davies in delivering the opinion of the Privy Council in the case of *Colgate-Palmolive Ltd. and another v.*

*Patron* [1978] R.P.C. 662 which was an appeal to the Privy Council from the judgment of the Court of Appeal of Trinidad and Tobago and which has many similarities to the one before us, had this to say at p. 664 after referring to the *Benmax* case (supra):

“ It is not, their Lordships think, necessary to consider in detail the reasons which led to this unanimous conclusion, and it should suffice to select some typical passages from the judgments: Hyatali, C.J., after considering defence submissions regarding differences between the ‘get-up’ of the plaintiffs’ and the defendant’s goods, continued:—

‘ I am not however impressed with the significance of, or the conclusion drawn from these differences, and for two reasons. Firstly, because it is clear to me from the evidence and my examination of all the packages that what the (defendant) really did was to borrow features from the packages, tubes and label of the (plaintiffs), and to knit them together, as it were, into the name and label which he used as a trade mark; and secondly, because the ordinary purchaser of ordinary memory purchasing with ordinary caution could not be expected to make the close and careful side by side examination of the two products which the learned Judge obviously made to identify and highlight the differences which he enumerated.’ ”

And then after referring to what other members of the Court of Appeal said it concluded as follows:

“.....one of those ‘Reasons’ appearing to call for present comments is that in which it is asserted that:

‘All the learned members of the Court of Appeal were in error in holding that the average prospective purchaser of toothpaste would conclude that the word ‘Tringate’ implied Colgate made in Trinidad because there was no evidence that such persons would be likely to reach such a conclusion.’

It is true that no such evidence was called. But its absence

is neither surprising nor significant, for proceedings were instituted by the plaintiffs within a matter of weeks after the defendant first put 'Tringate' on the market, and the periodical market research enquiries which they regularly conducted were purely statistical and related solely to marketing trends. The absence of such evidence was certainly drawn to the attention of the Court of Appeal and it is impossible to think that they did not have it in mind. Even so, it is not the law that its lack renders impermissible the conclusion which the Court of Appeal arrived at. For, as Lord Devlin said in *Parker-Knoll Ltd. v. Knoll International Ltd.* [1962] R.P.C. 265, at page 291 (dissenting, but not on this point):

'.....what the Judge has to decide in a passing off case is whether the public at large is likely to be deceived. What would the effect of the representation be upon the reasonable prospective purchaser? Instances of actual deception may be useful as examples, and evidence of persons experienced in the ways of purchasers of a particular class of goods will assist the Judge. But his decision does not depend solely or even primarily on the evaluation of such evidence. The Court must in the end trust to its own perception into the mind of the reasonable man. This is in accordance with the dictum of *Lord Parker of Waddington in Spalding v. Gamage* [1915] 32 R.P.C. 273 at 286.'

Approaching the matter in this way, on the body of undisputed evidence—oral, documentary, and 'real' (in the shape of the toothpaste cartons and tubes)—which had to be evaluated, it is in their Lordships' judgment impossible to hold that the Court of Appeal were disentitled to arrive at the conclusions they did. On the contrary, these were, in the words of Viscount Simonds in *Benmax v. Austin* (ante, at p. 373), '.....inferences from facts specifically found,' and the process of 'perception and evaluation' of which he spoke was conducted by the Court of Appeal in relation to a body of evidence which abundantly supported those conclusions. Indeed, had this appeal come direct to this Board from the learned trial Judge, their Lordships would have formed exactly the same view".

Guided by the Law applicable to this case as above set out and having considered the totality of the uncontested facts as they emanate from the evidence, and without going into its details, we have come to the conclusion that the proper verdict on the  
5 balance of probabilities is that the appellants established a case of passing off against the respondents.

The evidence adduced established that the get-up of the appellants' goods has become distinctive of these goods and that it was associated or identified with them. We are also satisfied  
10 that the conduct of the respondents was calculated to pass off their goods as those of the appellant. The respondents themselves in response to the letter of counsel for the appellants dated the 11th August, 1973, asking them whether they were willing to withdraw the above product from the market voluntarily,  
15 expressed, *inter alia*, their regret that the packet of their TRU biscuits happened to be similar to that of TUC and further assured them that when placing an order in future, they would ask their suppliers of wrappings such changes and combinations of colours and generally in its printing, so that the wrapping of  
20 TUC would not be similar to that of TRU.

Furthermore, we are satisfied that the appellants established that in the circumstances there was not only a probability of confusion between their goods and those of the respondents but there were instances of actual deception. The conduct of the  
25 respondents was calculated to pass off their goods as those of the appellants or at least to produce such confusion in the minds of probable customers or purchasers and that it was likely to make people buy their goods instead of those of the appellants. The intention of the respondents was obvious,  
30 a mere examination of the two get-ups shows same and that there was a likelihood of deception. What the respondents did, in the present case, was to take the most outstanding features from the packages of the appellants and its label and use them on their own packages in such a way as the ordinary purchaser  
35 with ordinary memory purchasing with ordinary caution could not as Hyatali C.J., in the *Colgate case (supra)* put it, "be expected to make the close and careful side by side examination of the two products which the learned Judge (the Full Court in our case) obviously made to identify and highlight the differences  
40 which he enumerated."

For all the above reasons this appeal is allowed, the judgment of the trial Court is set aside and we grant the injunction as per paragraph (A) of the prayer for relief as set out in the statement of claim and other claims of the evidence for accounts etc., having been withdrawn.

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We further order that the costs of the appellant before the trial Court and before this Court should be born by the respondents.

*Appeal allowed with costs.*