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C.A. 120/85

IN THE COURT OF APPEAL OF NEW ZEALAND

**HARVEST BAKERIES  
v KLISSERS**

**(Probs. in Equity)**

*no substantive  
to Cyromid*

BETWEEN HARVEST BAKERIES LIMITED  
First Appellant

AND PARNWELLS BAKERIES LIMITED  
Second Appellant

AND EASTERN BAY BAKERIES LIMITED  
Third Appellant

AND MILLAR LANGE LIMITED  
Fourth Appellant

AND QUALITY BAKERS NEW ZEALAND LIMITED  
Fifth Appellant

AND KLISSERS FARMHOUSE BAKERIES LIMITED  
Respondent

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Judges: Cooke J. (presiding)  
 Somers J.  
 Thorp J.

Hearing: 26 and 27 August 1985

Counsel: B.W.F. Brown for Appellants  
 M.P. Crew and R.A. Bycroft for Respondent

Judgment: 28 August 1985

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JUDGMENT OF THE COURT DELIVERED BY COOKE J.

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The first five defendants in a High Court action commenced on 9 May 1985 appeal from a judgment of the Chief Justice delivered on 15 August 1985 granting the plaintiff (Klissers) certain interim injunctions against alleged passing off. The action is based alternatively on

allegations of breach of copyright but it is not necessary to refer further to these in order to determine the appeal.

The first four defendants carry on baking businesses in Auckland, Tauranga, Whakatane and Invercargill respectively. They are members of the Goodman group of companies. The fifth defendant, a wholly owned subsidiary of the group, licenses the use of packaging to various bakeries throughout New Zealand, including the first four defendants. The bakeries owned or licensed by the Goodman group have collectively a much larger share of the New Zealand bread market than the plaintiff, an independent company based in Auckland. The plaintiff, however, is the largest single bakery in New Zealand. It specialises in bread made by natural fermentation. Its products enjoy a high reputation and it has been increasing its share of the New Zealand market.

The dispute relates to bread packaging. In recent years it has become common practice for manufacturers in New Zealand to market their bread in polythene bags, often tied at one end so as to produce a ponytail or tassel. Parts of the bags are usually transparent, so that the bread is visible, and parts are usually printed with brand and product names, consumer information, the name of the manufacturer, and various devices and decorative features. The printed devices and features are usually brightly coloured. According to the affidavit evidence, Klissers

have a range of 15 breads, all marketed in bags decorated in different coloured checks. On all but one, the sliced Vogel loaf, the check is at both ends of the bag. On the sliced Vogel loaf it is only at one end. The packs are commonly tied as just mentioned.

At various dates in 1985 the first four defendants began marketing white bread in bags featuring check patterns in various bright colours and tied at one end. Four kinds of loaves have been so packed (weekend special medium slice, weekend special toast slice, weekday special medium slice, Vienna special crusty bread) but not all have been so packed by each of the defendants. The defendants claim that all or some of these new bags have been designed with an eye to preserving continuity with waxed paper wrappings, bearing check designs, in which they used to put up similar products. Whether that was the reason, or whether it was a deliberate attempt to copy the plaintiff's packaging, is in issue between the parties.

On the affidavits before him on the plaintiff's application for interim injunctions the Chief Justice found that the plaintiff's allegations of passing off were sufficiently arguable to raise a serious question to be tried. Then he turned to the balance of convenience and found that this lay heavily in favour of the Court's protecting the plaintiff's position until the action is finally heard. Accordingly he granted the interim injunctions as moved.

We granted an urgent fixture for the appeal and heard it on the first two days of this week. The arguments ranged widely but in the end we think that the appeal should be disposed of quite simply. Not merely because the matter is of some urgency, but also because on an interim ruling such as this any expression of views on matters better decided at a trial should be avoided as far as reasonably possible, we set out our reasons briefly.

We do not doubt that there is sufficient evidence in the affidavits suggesting that a particular check pattern has become distinctive of the plaintiff's products, and that some members of the purchasing public may have been misled into thinking that products of the defendants or some of them were the plaintiff's products, to give rise to a serious question to be tried. Apart from the checks, we see little or no evidence that the plaintiff's packaging is distinctive, but we accept that the particular check pattern may create distinctiveness. These views are formed for the purpose only of enabling us to decide whether the Chief Justice was right in holding that there was a serious question to be tried. At trial all questions of distinctiveness will be fully open - including, for instance, any arising from the Tip Top range of packaging. The trial Judge will be in no way fettered by such views as we have expressed. We do not say, nor did the Chief Justice, that the plaintiff has made out a prima facie case. Having regard to what we are about to say as to the balance of convenience, it is not necessary to decide that point.

As to the balance of convenience, the decisive factors in the Chief Justice's view were, first, that the plaintiff has some 65 per cent of its total production in the disputed packaging, whereas the defendants have only a small proportion. At the hearing in this Court counsel for the defendants stated that their proportion was of the order of rather less than five to six per cent. Secondly, in the Chief Justice's own words,

If an interim injunction is not granted at this stage, the defendants and their many associated companies in the Group have the capacity to expand the use of their packaging and to flood the market with product so packed. By the time the action comes to trial, greatly increased damage to the plaintiff could be caused. The plaintiff's packaging has been promoted for six years at a cost in excess of half a million dollars. The defendants' costs to date are small by comparison. Finally under this head, I am left in no doubt that the defendants have gone into this campaign of new packaging with their eyes open.

It was this possibility of a flooding of the market that was the crucial point in the judgment under appeal, as we read it. The argument has satisfied us that the Chief Justice was entitled to give it the weight that he did. Mr Brown for the appellants offered in this Court a set of undertakings designed to preserve the status quo until the hearing of the action. Their intent would be that no defendant or other member or licensee of the Goodman group would use the check packaging in the meantime for any

product for which that defendant, member or licensee is not already using that packaging. The injunctions granted were worded so as to prevent any such increased use.

The fear of increased use had been plainly stated in the first affidavit sworn for the plaintiff by Helen Vivianne Klisser; but that fear was not directly answered by the defendants' affidavits, nor were any undertakings proffered before the Chief Justice. Now that injunctions have been granted against them, we do not think that the defendants should be permitted to put forward a very different case on appeal. On the material before him the Chief Justice was justified in treating the prospect of possibly illegal proliferation before trial as unmistakably turning the scales in a case otherwise fairly even balanced. On this short ground the appeal fails.

On the balance of convenience we add a factor not specifically mentioned by the Chief Justice but which he may have had in mind and which certainly appears to us to be of some weight. The gravamen of the complaint against the defendants is their use of the checks. These could easily be eliminated without any major change in the packaging, by (for instance) using plain colours or different decorative patterns instead of checks - as is done on a number of the other new bags introduced by the defendants for other kinds of bread and not complained of by the plaintiff. In our opinion the ease and smallness of the change is one factor to be taken into account in a case where the whole issue relates to get-up only.

The argument presented by Mr Brown leads us to add some more general observations. In substance he said that an over-mechanical following in the High Court of New Zealand of the two-stage approach enunciated in American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396 has resulted in plaintiffs in passing off and other actions obtaining too easily injunctions which, although nominally interim, have had the effect of putting an end to the litigation. We accept that this is at least a danger against which it is necessary to guard. The American Cyanamid approach has been qualified in the House of Lords itself in N.W.L. Ltd v. Woods [1979] 3 All E.R. 614. In this Court we have drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. See for instance Congoleum Corporation v. Poly-Flor Products Ltd [1979] 2 N.Z.L.R. 560; Consolidated Traders Ltd v. Downes [1981] 2 N.Z.L.R. 247; Villa Maria Wines Ltd v. Montana Wines Ltd [1984] 2 N.Z.L.R. 922; New Zealand Baking Trades Union v. General Foods Corporation Ltd (C.A.104/85; judgment 16 August 1985).

Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the N.W.L. speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an

interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way - as the Chief Justice did here - it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word 'usually' deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.

Very often a prompt hearing of the action itself is preferable to an interlocutory injunction hearing. We hope that the business of the High Court in the various centres can be so organised that the parties in these cases can be offered early fixtures. But a positive application by one of the parties under rule 250B, or the new rule 436, and an offer of speedy compliance with reasonable discovery requirements will be appropriate. We remain unconvinced that, given the necessary determination, the present action could not have been brought to a hearing by now. As is common with interim injunctions, those granted in this case should operate until the further order of the Court and should be drawn up accordingly. This would facilitate any application to the High Court for variation or for rescission in the event of undue delay.



For the reasons already given the appeal is dismissed, with \$1500 costs to the respondent. The seven days allowed by the Chief Justice for compliance with the injunctions will run from the delivery of the present judgment.

R B Coote J.

Solicitors:

Bell Gully Buddle Weir, Wellington, for Appellants  
Chapman Tripp Sheffield Young, Auckland, for Respondent