

**Kenneth Frederick Pattron (Trading as "The Caribbean
Daily Need Chemical Works")** - - - - *Appellant*

v.

(1) **Colgate Palmolive Limited and**
(2) **Colgate Palmolive (Trinidad) Limited** - - - *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER 1977

Present at the Hearing:

VISCOUNT DILHORNE
LORD EDMUND-DAVIES
LORD SCARMAN

[*Delivered by* LORD EDMUND-DAVIES]

Despite the valiant efforts of learned Counsel, this appeal can only be described as hopeless. It arises from proceedings instituted by the respondents (hereinafter called "the plaintiffs") in the High Court of Justice of Trinidad and Tobago in July 1970, against the appellant ("the defendant") for alleged infringement of registered trade marks and for passing off toothpaste manufactured by him as the goods of the plaintiffs. The learned trial judge (Denis Malone J.) dismissed the plaintiffs' claim, but the Court of Appeal of Trinidad and Tobago reversed that decision, gave judgment in the plaintiffs' favour and granted them the injunction and other relief sought. Against that decision the defendant now appeals by leave of the Court of Appeal.

The plaintiffs are a Canadian company and their Trinidadian subsidiary. The first plaintiffs are the proprietors of two valid and subsisting trade marks registered in Trinidad and Tobago, the earlier one (registered in 1958) consisting of the word "Colgate" and the later one (registered in 1959) consisting of a label containing the word "Colgate" printed in distinctive white script on a bright red background. But long before such registrations, "Colgate" had become well-known locally as denoting toothpaste manufactured by the first plaintiffs. The second plaintiffs are the registered users of the trade marks and since July 1960 they have sold and distributed in Trinidad and Tobago the first plaintiffs' toothpaste in tubes and packages bearing such trade marks. Their business flourished greatly and defendant's Counsel informed us that Colgate toothpaste had gained command over three-fourths of the toothpaste market.

The defendant himself manufactured various toilet products, and in January 1970 he introduced and began to sell in local markets a toothpaste put up in tubes and boxes bearing a label consisting of the word "Tringate" printed in white script against a red background. The plaintiffs took the view that these labels so closely imitated their two registered trade marks that in March, 1970, they instituted proceedings, asserting their infringement by the defendant, and also that he was passing off his toothpaste amongst the trade and general public as having been manufactured by the plaintiffs. The defendant replied that neither the word "Tringate" nor its use on the label already described infringed either trade mark, or was calculated to deceive or had in fact led to the deception of the public.

At the trial the defendant called no evidence, with the result that one of the most striking points of the case, *viz.* his adoption and use of the word "Tringate", was never explained. But as to this the learned trial judge said—

" . . . the average casual purchaser . . . on seeing 'gate' in the name 'Tringate' is, I think, as likely to conclude that the manufacturer thought of 'gate' as the gate that leads to dental health as that it related to 'Colgate'."

And in dismissing the plaintiffs' claim, he said:

"To my mind the first difficulty encountered by the plaintiffs is in the marked dissimilarity of the brand name 'Colgate' to that of the defendant's. To the *eye* 'Tringate' cannot, I think, be confused with 'Colgate' no matter how closely similar may be the scripts in which the two words are printed. To the *ear* the dissimilarity is as marked. The last syllables of each word are to both ear and eye the same. But the first syllables are so far apart that to my mind there can be no confusion. . . . every letter of the first syllable of 'Tringate' is different to the letters of the first syllable in 'Colgate', whilst the very sound of 'Trin' bears no resemblance to 'Col'."

After a detailed consideration of the "get-up" of the tubes and cartons, D. Malone J. concluded:

"To my mind there is no likelihood of confusion or deception resulting. I therefore do not consider that there has been any infringement of the 1st Plaintiff's trade mark relating to his label."

Similarly, in relation to the claim for passing-off, the learned judge said:

" . . . it would seem to me that no confusion or deception can be caused to the eye of the average reasonable person. Nor . . . to the ear of such a person . . . I therefore am satisfied that the allegation of passing-off also fails."

The action gave rise to no disputed issues of primary fact and involved no questions of law. Nor did anything turn on the demeanour of witnesses. The proper outcome of the case depended solely upon the view of the facts formed by the Court, having regard to the long-established use of the plaintiffs' name as manufacturers of toothpaste under the name of "Colgate" marketed in a certain "get-up", and upon the degree of similarity of the defendant's "get-up" and the name "Tringate". Such being the position, the Court of Appeal rightly directed itself in accordance with the House of Lords decision in *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370, where Lord Reid said (at p. 376):

“ . . . 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.”

That the Court of Appeal paid due regard to the reasons given by D. Malone J. for dismissing the plaintiffs' claim is beyond doubt—indeed, the learned Chief Justice, in particular, subjected it to a close analysis. Nevertheless, all three members concluded that the appeal must be allowed.

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.”

Corbin, J.A.:

“ In my view although the trial judge referred to the average purchaser, he approached the question too much from the point of view of an intellectual purchaser who might think of ‘gate’ as being a ‘gateway to health’ and who would have mental processes which I cannot attribute to the average shopper who is accustomed to picking up a tube of Colgate in the familiar red and white box very often in a great haste.

It is not necessary for the [plaintiffs] to establish an intention on the part of the [defendant] to deceive and they have not sought to do so, but I find it difficult to avoid the conclusion that the [defendant] by choosing a word so near to ‘Colgate’ and a design and colour scheme so similar succeeded in conveying the false impression to purchasers that their goods are the product of the [plaintiffs]. The result was that [he] placed [himself] in the position of being able to capitalise on the [plaintiffs'] established reputation in the market.”

Rees, J.A.:

“ I think there is a real probability of ‘Tringate’ toothpaste being regarded as in some way associated with the [plaintiffs'] toothpaste by potential purchasers of an imperfect recollection. I have no hesitation in finding that the [defendant] by adopting the word ‘Tringate’ and the general get-up of the tube and packages for his toothpaste was using means which were calculated to represent falsely to the public that his toothpaste was toothpaste of the [plaintiffs]. For those reasons I would grant the injunction sought.”

If such conclusions were well-founded, it is manifest that they are fatal to this appeal. Recognising this, the Appellant's Case advances several "Reasons" upon the basis of which it is claimed they should be rejected. No disrespect is intended by saying that the only one of those "Reasons" appearing to call for present comment 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 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 p. 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.

They will accordingly dismiss the appeal with costs.



In the Privy Council

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