

NWLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/97

BEFORE: THE HON. MR. JUSTICE FORTE, JA
THE HON. MR. JUSTICE GORDON, J.A.
THE HON MR. JUSTICE PATTERSON J.A.

BETWEEN	KAY MART LTD.	FIRST DEFENDANT/APPELLANT
AND	STEVE KHEMLANI	SECOND DEFENDANT/APPELLANT
AND	RAJU KHEMLANI	THIRD DEFENDANT/APPELLANT
AND	K-MART CORPORATION	PLAINTIFF/RESPONDENT

Dr. Lloyd Barnett instructed by Priya Levers for Appellants

Sandra Minott-Phillips with Nicole Lambert for Respondent instructed by Myers
Fletcher & Gordon

27th, 28th, 29th May, and 1st, 2nd 4th June and 23rd November, 1998

FORTE J.A.

This appeal comes to us from an Order made in the Supreme Court on the 27th
June, 1997 by Theobalds J in which he granted the following order:

"1. Until the trial of this action the Defendants, their servants,
agents, directors, officers and each or any of them or otherwise
howsoever be restrained:

- a) from using upon any tag, sign, banner advertisement
or other article whether at the Defendants' store
situated at Manor Centre, 195 Constant Spring Road,
Kingston 8 in the parish of Saint Andrew, or

elsewhere, the name 'Kmart' or 'Kmart Corporation';
or ;

- b) from using upon any tag, sign, banner, advertisement or other article used in connection with any business carried on by the Defendants or any of them, the name, mark, sign, style or title 'Kmart', 'Kmart Corporation' or any imitation thereof; or
- c) from passing off, or attempting to pass-off any business carried on by the Defendants or any of them, as the business of the Plaintiff or doing any act to infringe the Plaintiff's trademark or any of them, or any other trademark of the plaintiff, or from in any manner representing that the Defendant's business whether at Manor Centre, 195 Constant Spring Road, Kingston 8 in the parish of Saint Andrew or elsewhere is connected to or associated with the Plaintiff or from doing any act which may mislead the public or any member thereof into believing that there is any such connection or association."

2. The Plaintiff gives the usual undertaking as to damages".

This order is consistent with the application made in paragraph 2 of the notice of motion dated 30th November, 1995. The motion arose out of a statement of claim filed against the appellants by the respondent corporation which is a corporation organised under the laws of the State of Michigan in the United States of America and which is the proprietor of several trade-marks registered in Jamaica in respect of its logo and designs comprising the letter and word "K" and "KMart". In its statement of claim, the respondent alleges that it has used the tradename and trademarks "KMART" in block letters and in various logo forms since March, 1962. It alleges that its name, style and trademarks, are well known in Jamaica and internationally and that it has exclusive reputation and good - will in Jamaica as a result of:

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- a) the large number of stores it operates worldwide;
 - b) the fact that many residents of Jamaica purchase goods at the plaintiff's stores and/or purchase goods in Jamaica and elsewhere which bears the plaintiff's name and trademarks;
 - c) the fact that many persons who have resided in the countries where the plaintiff operate stores now reside in Jamaica; and
 - d) its marketing and advertising using various media which disseminate its message throughout the USA and to many countries worldwide including Jamaica.

It thereafter alleges, that the appellants operate a general merchandising business at a 5-storey retail store styled as "KMART" located within the Manor Centre Shopping Centre at 195 Constant Spring Road in the parish of St. Andrew. That commencing on or about November 1994 the appellants have passed off and attempted to pass off the appellants' business as being the business of the respondent and have infringed the respondent's trademark.

The appellants filed and argued eleven (11) grounds of appeal, most of which in my view are matters better decided at trial when the evidence on both sides have been tendered and tested. As the matter before us concerns the granting of an interlocutory injunction, I am constrained to approach the arguments in this case, on the background of the principles so well stated by Lord Diplock in the case of *American Cyanamid v Ethicon* [1975] 1 All E.R. 504. In exercising its discretion whether or not to grant an interlocutory injunction, Lord Diplock states (at pg. 510) that the Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried. He continues as follows:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing (*Wakefield v Duke of Buccleuch*) (1865) 12LT 628 at 62. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".

The questions to be decided in such an application therefore are as follows:

- 1) Is there a serious question to be tried viz. does the plaintiff have a real prospect of succeeding in his claim for a permanent injunction; and
- 2) If the answer to (1) is in the affirmative, then the court should consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

IS THERE A SERIOUS QUESTION TO BE TRIED?

It is evident from the lengthy submissions and the wealth of authorities cited by each party in support of their respective case, that the issue to be tried is one which has been the subject of several judicial decisions not all of which are consistent in their conclusions. One of the questions which call for decision in this appeal is whether a

Corporation which carries on no business in Jamaica, but has developed a reputation and goodwill in Jamaica, can successfully bring an action for passing off against another party who has invaded, its right of property in that reputation and goodwill, by misrepresentations made in passing off the goods or business of that party as that of the Corporation.

In *Star Industrial Co. Ltd. v Yap Huie Kor* F.S.P. Law Report [1976] 256 at pg. 269 Lord Diplock speaking in the Judicial Committee of the Privy Council, used the following words, which on face would be directly against the submissions of the respondent:

“Whatever doubts there may have previously been as to the legal nature of the rights which were entitled to protection by an action for ‘passing-off’ in courts of law or equity, these were laid to rest more than 60 years ago by the speech of Lord Parker of Waddington in *A.G. Spaulding & Bros v A. W. Gamage Ltd.* [1915] 32 R.P.C. 273 (“the Gamage Case”) with which the other members of the House of Lords agreed. A passing-off action is a remedy for the invasion of a right of property not in the mark, name or get-up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing-off one person’s goods as the goods of another. Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. It is local in character and divisible; if the business is carried on in several countries a separate goodwill attaches to it in each. So when the business is abandoned in one country in which it has acquired a goodwill the goodwill in that country perishes with it although the business may continue to be carried on in other countries”. (emphasis added).

As early as the beginning of this century, Lord MacNaghten said in *Inland Revenue Commissioners v Muller & Co.'s Margarine Ltd.* [1901] A.C. 217 at pages 223-224:

"I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However, widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade...

For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For good will has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt where the reputation of a business is very widely spread or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill". (emphasis added).

Since the above dicta of Lord Diplock and Lord MacNaghten were spoken, the advancement in technology in the field of communication which makes it easy for global contact, has given the opportunity for reputation and goodwill to spread from one country to another without difficulty. But even a year after Lord Diplock's opinion

was given Graham J in the case of *Baskin Robbins Ice Cream Co. v Gutman* [1977] FSR 545, sought to give an explanation of the words used by Lord Diplock which meets with our approval. He said (at pg. 547):

"This being so, I do not see how we can properly lay down artificial limits as to the geographical areas over which reputation and goodwill can or cannot extend nor state rules as to what a trader must or must do to prove the existence of such reputation. Being questions of fact the court must be guided, and guided only by what the proved facts establish. In attempting to refute this proposition [counsel for the defendants] cited *Star* and relied upon the words of Lord Diplock at 269... What is said there is of course, obviously sound sense and in any event binds this court but it is not right - I am sure, to read the phrase 'it is local in character' in the narrowest territorial sense automatically limiting goodwill to the boundaries of the country where the particular business is registered or established". (emphasis added)

The words underlined in the passage from Lord MacNaghten in *Inland Revenue Commissioners v Muller & Co.* (supra) indicate that the learned Law Lord recognised, that the goodwill of a business given its wide-spread reputation, could be difficult to localise and consequently could cross borders. This would be in keeping with Graham's J interpretation of the dicta of Lord Diplock in the *Star Industrial* case (supra).

Many cases have been cited to us by both sides in support of their contention, the majority of which are cases from the English jurisdiction. As this is an appeal against an order for interlocutory injunction, there is no necessity, to decide upon the difficult question of law which will arise for decision at the trial of these issues and consequently we will refrain from making any definitive statement in this regard.

However, the exhaustive and very comprehensive judgment of Lockhart J in the Federal Court of Australia in the case of *Conagra Inc. v McCain Foods (Australia) Pty Ltd.* [1992] I.P.R. 193 is very helpful. Having thoroughly examined the cases in England, he makes reference to the following dicta of Lord Oliver in *Rickett-Coleman Products Ltd. v Borden Inc.* [1990] 1 WLR 491 at pg. 498:

"... this is not a branch of law in which reference to other cases is of any real assistance except analogically. It has been observed more than once that the questions which arise are, in general questions of fact. .. The law of passing off can be summarised in one 'short' general proposition - no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling and packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. For example, if the public is accustomed to rely upon a particular brand name in purchasing goods of a particular description, it matters not at all that there is little or no public awareness of the identity of the proprietor of the brand name. Thirdly, he must demonstrate that he suffers or, in *quia timet* action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods

or services is the same as the source of those offered by the plaintiff”.

It should be observed as Lockhart J, later noted in his judgment, that “in describing the elements of the tort of passing off, their Lordships [In the House of Lords in *Rickett & Coleman* case (supra)] made no reference to a requirement of local business activities”.

In his conclusion after his examination of the English cases, Lockhart J (at pg. 232) summarises in our view accurately the present status of the English Law on this subject. He states:

“In the United Kingdom there are two opposed lines of authority on the question of whether the tort will protect a plaintiff’s business, goodwill or reputation where there is no business carried on in the United Kingdom. The ‘hard line’ cases require, in addition to any reputation in the United Kingdom, a form of business presence or activity within the jurisdiction or some use of that reputation. However, even within the “hard line” authorities there is inconsistency on the question of the extent or degree of use...

The “softer” line of cases do not require an actual place of business or business activity or the presence of customers within the jurisdiction. The rationale for the protection of a trader’s business and reputation was explained by Graham J, *Baskin - Robbins* at pg. 547-8 (passages cited earlier by me) who stressed that it is impossible to prescribe artificial limits as to geographical areas over which reputation and goodwill can or cannot extend and to state rules as to what a trader must or must not do to prove the existence of his reputation and goodwill; these are questions of fact in each case”.

He then summed up his conclusion:

“The test for whether a foreign plaintiff may succeed in a passing off action is according to most of the more recent

English cases, not that he must have business activities or a place of business in the United Kingdom; but whether, as a question of fact, his business has goodwill or a reputation in England. This is a broader, though more uncertain and elastic, concept than its predecessors."

A reading of the English cases establishes in our view, that the law is not clearly settled in England and that there are as Lockhart J describes them - the 'hard' line and the 'softer' line cases. That being so it is difficult not to accept the arguments of the respondents in this appeal i.e. that there is in this case a serious question of law to be tried.

Here in Jamaica, following as we do the dictates of the common-law as adumbrated by the English Law Lords we will have to state in the context of a trial where evidence has been tested, and conclusions on facts, arrived at, how we perceive the common-law on this subject. However, this Court has indicated in the context of an appeal similar to this i.e. at the stage of an interlocutory judgment, the likely approach that we would take. As the expressions of Rattray P. in the case of *McDonalds Corporation v MacDonalds Corporation Ltd.* SCCA 69/96 delivered 20th December 20,1996 (unreported) are in keeping with our opinion. We cite them here with approval.

"... in my view the law has moved in more recent times from a concept of good -will and reputation being annexed to the carrying on of the business in a specific location to an appreciation of the fact that in an age of satellite communication television imagery and easy communication and movement of persons between countries, goodwill and reputation can attach to a business, not only in its locality, but likewise in other countries if the relevant factors are established . Particularly if this is so in the Jamaican locality and specifically in relation to the

United States of America a few hundred miles to our north where large numbers of Jamaicans reside who travel home to Jamaica from time to time. Furthermore, we are a country which is the beneficiary of a continuously expanding tourism industry fuelled with increasing frequency by large numbers of United States residents. In practical terms the many airline flights daily between Kingston and Miami, the constant traffic of Jamaicans on holidays and business to that United States city and vice versa can almost be said to make each an extension of the other. I prefer in our jurisdiction to move away from the decision of Pennycuik J in *Alain Bernadin v Pavilion Properties Ltd.* [1967] R.P.C. 581, (the *Crazy Horse* case) which wedded goodwill and reputation to the location of the business to subsequent cases like *Baskin-Robbins Ice Cream v Gutman* [1976] 2 F.S.R. 545; *Maxim Ltd. v Dye* [1978] of All E.R. 55 and *Pete Waterman Ltd. v CBS UK Ltd.* [1993] EMLR 107, which switched the focus away from location and concentrated on the question of the existence of goodwill and reputation which in every case is a question of fact."

The practicality of the heavy traffic of persons moving between the United States of America and Jamaica and the consequent familiarity and knowledge of the respondent's business will be as relevant to this case as it appears to have been in the *McDonald* case (supra). There is an abundance of evidence in the affidavits of both parties which speak to the factual issues such as those described in the judgment of Rattray J (supra). In the event that on an analysis of the law and the facts, the trial judge determines that in Jamaica the softer approach, apparently preferred by the more recent cases, is correct, then there will of course be a requirement to determine also, based on the evidence, whether in spite of the fact that the respondent has no business in Jamaica, it nevertheless enjoys goodwill and reputation in Jamaica to which the appellants' actions have caused damage. For those reasons we would conclude that

in respect of the claim of passing off, there is a serious question to be tried and that the respondent has a real chance of success in his claim for a permanent injunction.

Before dealing with the question of the balance of convenience, we must however, address one other substantial point which the appellant advanced.

It was argued that as the appellants did not offer for sale goods specifically identifiable as the goods produced by the respondent, no action for passing off would arise. The evidence upon which the respondent relies, relates to the adoption by the appellants of its logo not only in its advertisements, and on the face of its store, but also on its price-tags attached on items of goods.

With that background, this complaint in our view is answered in the dicta of Buckley L.J in *H.P. Bulmer Ltd. & Showerings Ltd. v J. Bollinger SA and Champagne Lanson Pere ET FILS* [1978] R.P.C. 79 at pg 93:

"A man who engages in commercial activities may acquire a valuable reputation in respect of the goods in which he deals, or of the services which he performs, or of his business as an entity. The law regards such a reputation as an incorporeal piece of property, the integrity of which the owner is entitled to protect. This does not, of course, mean that he is entitled to protection against legitimate competition in the market. If A's goods have acquired a reputation on the market connected with a particular name, mark or get-up, A cannot complain if the value of that reputation is depreciated by B coming on to the market with similar goods which acquire a reputation which owes nothing to the name, mark or get-up associated with A's goods. A can, however, complain if B in the course of his operations uses in connection with his goods the name, mark or get-up associated with A's goods or one so closely resembling it as to be likely to lead to confusion on the market between the goods of A and those of B. By

so doing B wrongfully appropriates to himself part of the reputation belonging to A and so infringes the integrity of A's property in that reputation". emphasis added).

The underlined words in the foregoing passage, shows that if the contentions of the respondent are accepted as factual at the trial, then the respondent would be entitled to protection against the consequent threat to the integrity of its business as an entity. For that reason, this point is without merit.

We now turn to the other question that calls for an answer, that is, where does the balance of convenience lie?

BALANCE OF CONVENIENCE

In the *Cyanamid* case (supra) Lord Diplock stated the considerations to be applied in determining this question. He said (at pg. 510):

"...the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage. If, however, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would

be adequately compensated under the plaintiff's undertakings as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction".

A perusal of the judgment of the learned judge does not disclose any treatment by him as to the question of the balance of convenience and consequently having found that there is a serious question to be tried it is now open to this Court to determine whether the balance of convenience rested in the respondent's favour as the learned trial judge's decision would indicate.

In order to determine any damages that may occur to the appellant, it would have to be determined on the basis of the appellants' case, that an order to restrain them from using the logo 'KMar', would result in loss of business. In my view any damage which may result to the appellant as a result of the interlocutory injunction during the period for which it is restrained would be measurable. On the other hand the respondent company alleges that if the appellant company is not prevented from trading under the logo 'KMar' it is likely to cause damage to its reputation and goodwill, the measure of which would be very difficult, if not impossible to ascertain. We find that the respondent is correct in its contention and conclude that the balance of convenience is with the respondent for the reason that the damage that would result would not be measurable in damages, whereas if the interlocutory injunction remains, any damage to the appellant, would be in measurable terms, and could be covered by the undertaking.

For those reasons the order of the learned judge, granting the interlocutory injunction on the basis of the claim for passing-off is correct.

INFRINGEMENT OF TRADEMARK

The appellant also appeals against the interlocutory injunction as it may have been based on an allegation of an infringement of trademarks which related to the first two grounds in paragraph 2 of the motion. There were several submissions advanced in this regard, many of which depend on questions of fact in relation e.g. to the description of the goods sold by the appellant as opposed to those sold in the respondent's business. As it is undisputed that the respondent has the proprietary right in the trademark 'Kmart', the main issue which arises, relates to whether :

The logo etc. used by the appellant could be said to be same or similar to that of the respondent so that it would be likely to deceive or cause confusion or be taken as indicating a connection in the course of trade between the appellant's goods and the respondent who is the proprietor of the trademark.

The respondent's uncontested claim is that it is the proprietor of several trademarks registered in Jamaica in respect of its logo and designs comprising the letter and work "K" and "Mart". The predominant forms of KMART logos used by the plaintiff are:-

- (a) the slanted 'K' logo comprised of a slanted capital letter 'K' followed by the word 'Mart' to its right on a unique font; and

(b) the 'K' logo consisting of a hand-drawn letter 'K' with a hand-drawn cursive word 'K' with a hand-drawn cursive word 'Mart' running from the lower left to the upper right.

The respondent then alleges that the defendants/appellants operate a general merchandising business retail store styled "KMART". In affidavits filed in support of its case, the respondents tendered photographs showing the logo used by the appellant bearing the letter 'K' and the word 'Mart'. The appellants nevertheless contend that in respect of the trademarks, they were all issued with the following disclaimer:

"Registration of this Trademark shall give no right to the exclusive use of the 'K'."

The respondent's claim however, is not merely in relation to the letter 'K', but to a combination of the letter 'K' and the word 'Mart', a combination which the appellants also used to describe their business.

The trademark of the respondent was registered in Part B of the Register. The relevant provisions in this regard appears in Section 7 (1) of the Trade Marks Act ("the Act") which reads:-

"7.--(1) Except as provided by subsection (2), the registration of a person in Part B of the Register as proprietor of a trademark in respect of any goods shall, if valid, give or be deemed to have given to that person the like right in relation to those goods as if the registration had been in Part A of the Register, and the provisions of section 6 shall have effect in like manner in relation to a trademark registered in Part B of the Register as they have effect in relation to a trade mark registered in Part A of the Register".

In order to determine the effect of Section 7 (1), it is necessary to look at the provisions of Section 6(1) which states:

"6.--(1) Subject to the provisions of this Section, and of sections 9 and 10, the registration of a person in Part A of the Register as proprietor of a trademark (other than a certification trade mark) in respect of any goods shall, if valid give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods and without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either --

(a) as being use as a trade mark; or

(b) in a case in which use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade".

The respondent has exhibited several affidavits which seek to support its allegation that the logo used by Kay Mart Ltd, on its store front and on its tags, have satisfied the provisions of Section 6 (1) that is to say - that the appellants have been using a mark either identical to, or so nearly resembling it as to be likely to deceive or

cause confusion in the course of trade. Indeed the evidence disclosed in the affidavits if believed, would in fact support that allegation. It is to be noted that where a person applies for an injunction in an action for infringement of the right to the use of a trademark, the Act puts the onus on the defendant who wishes to avoid the injunction to establish that the use by the defendants is not likely to deceive or cause confusion.

Section 7 (2) states:

“7---(2) In any action for infringement of the right to the use of a trade mark given by registration as aforesaid in Part B of the Register, otherwise than by an act that is deemed to be an infringement by virtue of section 8, no injunction or other relief shall be granted to the plaintiff if the defendant establishes to the satisfaction of the Court that the use of which the plaintiff complains is not likely to deceive or cause confusion or to be taken as indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the trade mark”.

The question that would have to be answered at trial is whether the provisions of Section 7(2) would be satisfied given the content of the evidence for the respective parties in this regard. Consequently, we also find that this is a serious question which will have to be decided at trial.

In so far as the balance of convenience is concerned, the fact that the respondent is the proprietor of the trade mark must also be a matter to be considered in determining the balance of convenience, (see the *McDonald* case (supra) at pg. 9) and were the issues in this appeal only related to the infringement of the trademark, we

would nevertheless find that the learned judge was correct in ordering the interlocutory injunction.

On the basis of both allegations made in the respondents complaint, the appeal is dismissed and the order of the Court below affirmed. Costs to the respondent to be taxed if not agreed.

For the record, it should be recognised that before his death, Gordon, J.A had approved this judgment in draft.