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IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0026 OF 1999  
(High Court Civil Action No.HBC0207/99L)

Between:

FLOUR MILLS OF FIJI LIMITED  
a limited liability company having  
its registered office at Suva

Appellant  
(Original Plaintiff)

and

PUNJA & SONS LIMITED  
a limited liability company having its  
registered office at Lautoka

Respondent  
(Original Defendant)

Coram: The Hon. Justice Devendra Pathik  
Justice of Appeal

Counsel: Mr. S. Lateef for the Appellant  
Mr. B.C. Patel for the Respondent

Date of hearing: Monday 19 July 1999

Date of Decision: Friday 19 November 1999

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DECISION

(On application for injunctive relief)

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The nature of application

By a motion dated 6 July 1999 Flour Mills of Fiji Limited (the 'appellant') seeks an interlocutory injunctive relief against Punja & Sons Limited (the 'respondent') pursuant to the provisions of Section 20(f) of Court of Appeal Act (the 'Act').

**Relief sought**

The appellant seeks the following relief (as per motion):

1. That the respondent be **restrained** by themselves, their directors, servants or agents from packaging flour in 10, 25 and 50 Kg. bags which they are now using and which is similar to that of the appellant.
2. That the respondent **remove** all its 10, 25 and 50 Kg bags of flour packaged similarly to that of the appellant from all outlets in Fiji forthwith.

**The facts**

A civil action between the parties being Action No. HBC 207 of 1999L was instituted in the High Court at Lautoka by the appellant wherein injunction was sought praying for identical relief as in the present application. On 25 June 1999 Madraiwiwi J dissolved the interim injunction which he granted ex parte on 18 June 1999 against the respondent.

Written reasons dissolving the said injunction was given by his Lordship on 2 July 1999.

The appellant filed Notice of Appeal dated 6 July 1999 against the said decision. The **Grounds of Appeal** are:

1. *The learned trial judge erred in law in coming to the conclusion that damages would be an adequate remedy for the Appellant.*
2. *The learned trial judge erred in law in not realising that in a "passing off" case of this type it would be impossible to work out the damages sustained by the Appellant should the Appellant be successful in its substantive action.*

The nature of the business which each party carries on is amply set out in the submission of counsel hereafter appearing, suffice it to say here that the respondent is a relative newcomer to the market and a competitor of the

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appellant. They both do extensive advertising. The main thrust of the appellant's argument is that the respondent's flour bags i.e. their 'get up' is so similar to its that it causes confusion in the minds of the consuming public.

The respondent has refused to desist from "passing off" its goods as those of the appellant. Hence the proceedings commenced before the High Court at Lautoka; and now before me the appellant is in effect seeking an interlocutory injunction under the said section 20(f) of the Act.

**The application**

The application before me is under s20(f) of the Court of Appeal Act under the caption 'Power of a single judge of appeal' which provides inter alia as follows:

20. The powers of the Court under this part-

(a) to (e) .....

(f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;

(g) .....

may be exercised by any judge of Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act."

Before the arguments were presented on this motion, after some discussion it was agreed that this Court has jurisdiction to entertain an application of this nature under the said section 20(f) "to prevent prejudice to the claims" of the appellant "pending an appeal". Mr. Patel says that the

criteria is the same for a 'stay' as well as for an application to 'prevent prejudice to the claims' pending an appeal. He further stated that "a single judge of appeal has no original jurisdiction to grant the interim injunction unless a case is made out under 20(f) or (e) of the Court of Appeal Act. We say no such case has been made out."

#### Appellant's submission

Mr. Lateef submits that this Court has jurisdiction to entertain this application under the said section not as an appellate Court but in its original jurisdiction sitting as a single judge despite the said decision of Madraiwiwi J.

In support of his argument he has referred the Court to the following passage from the judgment in the Fiji Court of Appeal case of *The National Farmers' Union v Sugar Industry Tribunal, The Fiji Sugar Corporation and The Sugar Cane Growers' Council* (Civ. App. No. 8A of 1990) where at page 13 it is stated:

*"If the Applicant desired the continuance of the injunction or other similar interim measures in so far as the "other grounds" were concerned it was open to the Applicant to have moved this Court or a single Judge of the Court of Appeal soon after the order of Byrne J. under Section 20(f) of the Court of Appeal Act "to make any interim Order to prevent prejudice to the claims of any party pending an appeal".*

Mr. Lateef says that it is in accordance with this principle that the present application is made. He has summarised the appellant's case in his written submission which reads as follows:

- a. The Applicant will be greatly injured in its commercial repute and may suffer irreparable damages as it has been manufacturing and selling flour in Fiji for over 18 years. Without the benefit of an injunction the Applicant is being prejudiced pending hearing of the substantive matter.

- b. The points of law involved in the appeal are not only novel but are also of great general public importance especially to the commercial community. Furthermore the appeal is clearly arguable and is neither wholly unmeritorious nor wholly unlikely to succeed.
- c. Damages in cases of this nature ("passing off") is not an adequate remedy as it is difficult to ascertain the loss suffered.
- d. Balance of convenience lies in favour of the Applicant.
- e. Serious issue to be tried. The Applicant's reputation is at stake and irreparable and unquantifiable damage is likely to occur to the Applicant.
- f. Whilst the Applicant has lodged an appeal the outcome of the appeal even if in favour of the Applicant will be nugatory as the appeal is against the decision of the dissolution of the injunction and not "passing-off" per se. Substantive matter cannot be heard till all pleadings are complete.

Whilst the Applicant understands that this Court is acting in its jurisdiction as an Original Court and not an Appellate Court there is necessity for some reference to be made to the learned judge's decision in the High Court as he ruled that damages was an adequate remedy and the balance of convenience lay in favour of the Respondent. In most cases in Fiji on passing off, interim injunction has been granted as long as there is a prima facie case.

Mr. Lateef submitted that the learned Judge was wrong in principle in exercising his discretion when he dissolved the interim injunction. He further argued that the Appellant has been "using the get up for the last 18 years in this country from Flour manufactured in this country and therefore the same get up is distinctive to the Appellant's goods and any other similar get up would cause likelihood of confusion."

Mr. Lateef then goes on and deals with the principles involved in a passing off action and he referred the Court to a number of cases on the subject of 'passing off' and injunction such as *Dairy Farm Company Ltd and Others v Dairy Farm Ice Cream Company Ltd* (1981) FLR 28, *Flour Mills of Fiji*

Limited v Gurbachan's Foodtown Ltd Civ. Action No. 507/95; Osertli AG v Bowman (1959) R.P.C. 388 referred to in ITT Sheraton Corporation of America v Sheraton Hotel Ltd & Ors (1974) FLR 261, Lees Trading Company Ltd v. Universal Printing Press Ltd & Ors. Civ. Action No. 547/92, Flour Mills of Fiji Ltd v Visama Atta Mills Ltd Civ. Action No. 559/93, Reckitt and Coleman Properties Ltd v Boredon Inc. (1990) WLR 491, American Cynamid Co. v. Ethicon Ltd (1975) AC 346 and Bryan Charles Ferrier-Watson, Dennis Allan McElrath and David William Zundel the Executors or Trustees of the Estate of Norma Athol Ferrier-Watson Civ. App. No. 8 of 1991.

Mr. Lateef is seeking an order as in Ferrier-Watson (supra) where it is stated:

"the Applicant is likely to suffer the greater prejudice if its application were to be refused. Although the Respondent is, in general, entitled to enjoy the fruits of their victory without any delay it does appear to me that if the stay is not granted the Applicant's appeal, if successful, is likely to be rendered nugatory or substantially nugatory."

The appellant for these reasons seeks orders as in the motion.

**Respondent's submission**

The respondent opposes the application on the following grounds:

- (a) a single Judge of Appeal has no original jurisdiction to grant an interim injunction unless a case is made out under s.20(f) of the Court of Appeal Act, and no such case has been made out.
- (b) In any event no new facts or evidence has been put before this Court to justify a review of the earlier decision of the learned Judge who correctly exercised his discretion to dissolve the injunction on the grounds that damages would be an adequate remedy and that the balance of justice favoured the respondent.

- (c) if injunction is granted the appellant will obtain its substantive relief and that is likely to determine the whole proceeding.
- (d) competition should not be stifled.

At the outset Mr. Patel submits that the Appeal which is against the exercise of a discretion, this Court is not required in this application to decide on the merits of that Appeal.

The facts which are relevant to this application have been outlined by Mr. Patel as follows:-

- (a) Both the appellant and the respondent are substantial companies and there is no issue as to either's ability to meet its undertaking or cross undertaking given as to damages.
- (b) The respondent has been importing Australian flour since about late September 1998.
- (c) The "offending" packaging has been in use since February 1999 yet the appellant took no action until early June 1999.
- (d) The get-up of the appellant's packaging is different from that of the respondent's; the products are sold at different prices and both the appellant and the respondent extensively advertise their respective products, one as "FMF Flour" and the other as "Punja's Flour".
- (e) No evidence of actual confusion or loss of goodwill has been put forward by the appellant. The letters attached to the appellant's affidavit in reply is the result of the respondent raising this aspect in its affidavit in opposition and lacks credibility.

On the application of s20(f) Mr. Patel argues that before the Court can make any 'interim order' the appellant must show that its claims would be prejudiced between now and the appeal hearing if an order is not made. He says that the criteria for such order to prevent prejudice "should be the same as that applicable for a stay application". He says that the Court must determine if by refusal of an interim order the Appellant is likely to be prejudiced to such an

extent that the Appeal would be rendered nugatory. (Halsbury 4th Ed. Vol 10 para 899, Wilson v Church [1879] 11 Ch.D 576, Polini v Gray [1879] 12 Ch.D 438).

In this case he says that the appellant can be adequately compensated in damages for loss of sales resulting from the respondent's continued presence in the market place. He says that the loss can be ascertained without much difficulty and that there is also no issue of the respondent's ability to pay the damages. He submits that the only real damage, which is the case here, is likely to be loss of sales, such damage will be quantifiable and injunctive relief will be refused (John Wyeth v M & A Pharmachem [1988] FSR '26 at 32-33. This was a case based on 'get-up'.

Mr. Patel's second argument is that there is no new material or evidence before the Court to justify a review of Madraiwiwi J's decision. He submits that his Lordship has correctly exercised his discretion and that it is not for this Court, at this stage, to substitute its own decision for that of the Court below.

The third argument which Mr. Patel advances is that if an injunction is granted the appellant will obtain its substantive relief in the action and that may effectively determine the proceeding. He says that:

*The injunction will force the respondent, if he wants to continue in the flour business, to change its get-up and packaging. As they will then acquire goodwill in the new get up and packaging it will then not be worth their while to fight the action to establish the justice of their claim. In such circumstances the plaintiff must do somewhat better than establish merely an arguable case. (Parnass/Pelly Limited v Hodges [1982] FSR 329).*

Mr. Patel further argues:

*It is submitted that where there was only a possible risk of unquantifiable damage to the plaintiff if relief was refused but a certainty of unquantifiable damage to the*

defendant if it was granted, then an interlocutory injunction should be refused. (John Walker & Sons Limited v Rothmans International Limited and John Sinclair Limited [1978] FSR 357 at 362/363 and Management Publications Ltd v Blenheim Exhibitions Group Plc and Anor. [1991] FSR 348).

Finally, Mr. Patel submits on the subject of 'competition', and states that the appellant's case at this stage is based solely on the likelihood of confusion. He says that "mere possibility of confusion however, is not sufficient" (John Hayter Motor Underwriting Agencies Limited v R.B.H.S. Agencies Ltd [1977] F.S.R. 285 at 295 and 299 C.A., [1977] 2 Lloyd's Rep.105). He says. that public interest supports competition (Fair Trading Decree, 5.9, 27). It is the respondent's submission that the appellant's get-up is very different from the respondent's. Furthermore, the two products are sold at different prices and that the parties are extensively advertising their own products which must distinguish them among the consuming public and that there is no credible evidence of actual confusion.

The learned Counsel submits that for these reasons the appellant's application should be dismissed.

**Determination of the motion**

The issue before me is whether I ought to grant the orders sought on the facts and circumstances of this case.

I have for my consideration both oral and comprehensive written submissions from both counsel and I have given due weight to them. I also have an affidavit each from each of the parties in support and reply to the motion herein.

The reliefs sought by the appellant are in identical terms to the reliefs applied for in the said ex parte injunction when an order was made and which was later dissolved by Madraiwiwi J in the High Court at Lautoka. Now

after filing Notice of Appeal against the said decision, the appellant is seeking in effect an interlocutory injunctive relief under section 20(f) of the Act pending the hearing and determination of the Appeal.

**Section 20(f) of Court of Appeal Act**

**(i) Stay**

I consider that this application is akin to a wolf in sheep's clothing and which tantamounts to having a second bite at the cherry in the guise of a 'stay'. However, evidently the said s20(f) under the Act does allow for an application to be made and the Court may either 'stay execution' or 'make any interim Order to prevent prejudice' pending the appeal.

In the substantive action (being action No. 207/99 Lautoka High Court) the main relief sought by the appellant is an injunction. I consider that if this application was granted the appellant would have achieved its purpose in an indirect way by way of application for an injunction and that perhaps gives the appellant the whole of the relief which it claims in the writ and makes it unlikely that there will be a trial. This is also one of the arguments put forward by Mr. Patel and this he submits is not the function of this Court in this application, with which I agree.

At the outset, I would like to state that I find that there is nothing for me to 'stay'. The simple fact is that the application for injunction was dismissed and an appeal is pending in the Court of Appeal from the said decision. That appeal is for the full Court of Appeal to decide and it is not in my province as a single Judge of this court to go into the merits of the appeal or on this application even to delve into the principles of law governing a 'passing off' action which this action is all about and which Mr. Lateef wants me to do by referring to the cases he made reference to in his submission.

Hence, in my view, all the arguments advanced by both counsel in the matter of 'stay' have no relevance to the application in this case particularly bearing in mind the nature of the order made by Madraiwiwi J, namely, dissolving the interim injunction which he granted ex parte. In any case if stay was intended to be sought then it should have been made to the trial Judge but this was not done. However, there may be cases where a 'stay' could be granted under s20(f) but this to my mind is not the type of case where such an order could be made.

(ii) Interim Order - injunction under s20(f)

However, under the second limb of s20(f) the court could consider making "*an interim order to prevent prejudice to the claims*" of the appellant pending an appeal.

Mr. Lateef submits, inter alia, that the appeal is arguable. In my view that could mean that it is as likely to fail as to succeed and that falls short of the standard required for the grant of an interlocutory injunction. In this regard I refer to Parnass/Pelly (supra) per Whitford J which is authority for the proposition that in an application for an interlocutory injunction the plaintiff in a passing off action must show more than that there is an arguable case, because the defendant will often adopt a different name in order to continue in business once the injunction is granted and the injunction will be final in effect and not in name. In a situation such as this the dilemma that the Court faces has been summed up well by Hoffmann J in *Films Rover International Ltd & Ors v Cannon Film Sales Ltd* [1987] 1 W.L.R. 670 (Ch.D) at 680 as follows and which I adopt:-

*"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails*

to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle." (emphasis added)

The appellant has to demonstrate that it will suffer 'prejudice' as a result of the actions of the respondent. The appellant says that there are serious issues to be tried on Appeal (as stated in its grounds); but those are for the Appeal Court to decide. But the appellant argues that if this Court does not grant the relief sought then irreparable harm not compensable in damages will be suffered by it. It argues that it is the appellant's position in this regard that the Court has to give its foremost consideration.

The elements required to be established in a 'passing off' action are questions of fact as held by the House of Lords in *Reckitt & Colman Products Ltd and Borden Inc. and Others* [1990] 1 W.L.R. 490 at 492. There Lord Oliver of Ayl Merton said that 'this is not a branch of the law in which reference to other cases is of any real assistance except analogically'. In considering the issue before me I have borne in mind the following passage from the judgment of Lord Oliver (*supra*) at 499 which is apt:

"It has been observed more than once that the questions which arise are, in general, questions of fact. Neither the appellants nor the respondents contend that the principles of law are in any doubt. 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 or (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 a 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." (emphasis added)

As stated earlier I am not to attempt at making a final and definite decision on the issues in the appeal or in the writ. As far as I can see there is no serious question to be tried on appeal, rather it is an appeal against Madraiwiji J's exercise of discretion when in exercising that discretion he decided that damages would be an adequate remedy. He must have taken other considerations into account such as where the balance of convenience lies, whether each side will be able to meet any damages which might be ordered at trial and the relevant strength of the parties' cases and came to the decision stated above.

The appellant has in its writ pleaded 'passing off' which requires actual or anticipated misrepresentation of something by a defendant. One need not enter into that cause of action as that is for determination in the substantive action. However, by referring to the numerous cases on the subject, Mr. Lateef is expecting me to go into the merits of the case.

But without in any way encroaching into the grounds of Appeal by looking at the whole of the facts as presented to me and the arguments put forward by both counsel, I would go to the extent of saying, for the purposes of this application only, that both parties have some important points, but on which side the scale tips in the end is to be decided in the substantive action.

In view of the peculiar nature of the appellant's claim vis a vis the present application and the view that I hold on the appropriateness of granting interlocutory injunctive relief I am not satisfied that the appellant will be prejudiced in its claims in terms of s20(f) of the Act to enable the Court to make an interim order.

(iii) No serious issue

In a case similar to the present Brightman J in Fisons Ltd v Godwin (E.J.) (Peat Industries) Ltd [1976] R.P.C. 653 at 657 held that there was no serious issue to be tried. The facts in Fison were:-

*"The plaintiffs manufactured plastic "growing bags" partly overprinted with horticultural decoration, instructions and the mark "Fisons Gro-bag." Growing bags similar in function and size had been manufactured by others for some time. The defendants, peat merchants, obtained a plastic bag identical in size to those of the plaintiffs and marked "Godwin's Crop-bag" and bearing similar instructions and decorations. The plaintiffs had always relied on prominent display of their name on their products and the defendants' bags had yet to be marketed."*

Brightman J at 657 stated as follows and this is pertinent to the case before me and I adopt same:

*"I am of course aware of the guidelines laid down in recent cases by the House of Lords and the Court of Appeal for the proper approach to an interlocutory application of this sort and of the important part*

played by balance of convenience. In all the circumstances, I have reached the conclusion that this motion ought to be dismissed. There is a great volume of evidence before me, some of it admissible and some obviously inadmissible, as to the probability or improbability of confusion. I prefer to trust to my own eyes. There are obvious similarities between the two bags, but it seems to me inconceivable that anyone seeing a growing bag described in very bold letters as 'Godwin's Crop-bag' could possibly suppose that it was a 'Gro-bag' produced by Fisons, or that anyone buying a growing bag of the Fison design could fail to observe that it was a Fison product, so prominently displayed is the name 'Fisons.' If the Fison 'Gro-bag' had been so prominently displayed, I might well have reached a different conclusion, but I doubt whether the defendants could have done much more to signify to a buyer that he was looking at a product of Godwins and not at a product of Fisons. I suspect that the deponents who have professed to discern a possibility of confusion have been directing their minds to similarities in design and neglecting the clear message conveyed by the dissimilarity of the two names. I am wholly unconvinced on the evidence presented to me and the arguments so far deployed, that any buyer of normal mental capacity with the remotest conception of what he was seeking to purchase could be misled." (emphasis added)

Since the matter has come to me in the form of an application under s20(f), 'I prefer to trust to my own eyes' on the aspect of confusion bearing in mind all the arguments put forward by both sides. I therefore propose not to discuss the merits of the case suffice it to say that I do not find any likelihood of prejudice to the appellant's claims to enable me to make an interim order.

(iv) Damages

The appellant's counsel laboured the point that if injunction were refused the appellant will suffer irreparable damage and that damages will not be an adequate compensation. On this aspect of the application I adopt the importance and reasoning behind the following passage from the judgment of Brightman J in that there would be a large element of unquantifiable damage as far as the respondent is concerned:

"The effect of an injunction will be that the defendant will have to stop marketing Red Label cigarettes in their existing pack. They will then have a choice. They can drop the proposed product until the conclusion of the trial of the action or they can continue with the product but adopt a different name and/or design. If they adopt the first course they will suffer an unquantifiable loss of profits pending the lifting of the injunction at the conclusion of the action, because of course the hypothesis is that the injunction goes. If they adopt the second course they will suffer an unquantifiable loss of profit pending the launch of the cigarette under its new mark. At the end of the action, which ex hypothesi the defendants have won, they will have to choose whether to abandon the new mark and revert to the Red Label mark, involving more expense and unquantifiable loss of profit, or they will stick to the new mark which is not the mark of their choice and which may well be less advantageous to them commercially. I reach the conclusion in the face of these imponderables that the defendants' potential loss, if an interim injunction is granted but if they succeed at trial, is not capable of being adequately measured by any monetary award." (John Walker & Sons Ltd v. Rothmans International Ltd and John Sinclair Ltd [1978] F.S.R. 357, per Brightman J).

The factors which Brightman J at 363 held weighed against an injunction were as follows and the same would apply in the case before me as the appellant will suffer a small risk of damage:

"If the plaintiffs are refused an injunction but succeed at the trial they will in the meantime run only a risk, and not a certainty, of damage and it is a risk which in the short term appears to me somewhat remote, having regard to the reputation of the Rothman Group of Companies. Per contra, if the plaintiffs are granted an injunction but fail at the trial the defendants incur the certainty of unquantifiable damage." (emphasis mine)

He continued and stated that on merits:

"Furthermore, I suspect that the defendants will in practice be permanently deprived of their Red Label mark in relation to this particular product and it is likely that they will be compelled to market the

cigarette in the meantime under a different mark in order to catch the low tar market which they now have the opportunity to exploit."

In Fison (supra) the balance of convenience was against the grant of an injunction. Similarly, in this case under s.20(f) the making of an interim Order is not appropriate on the basis of the reasoning of Brightman J in Fison (supra) at 657 which is as follows:

"The issue which I must decide is whether on the balance of convenience, the use by the defendants of Godwin's 'Crop-bag' ought to be restrained pending trial of the action, because there is an appreciable possibility or a likelihood of confusion resulting. Fisons' present design of bag was extensively marketed in 1975 and will, I am told, be marketed in 1976. It has no doubt acquired a get-up reputation. The defendants' bag has not yet been marketed to the public, but it has been shown extensively to retailers who have put in orders on the faith of it. It would, no doubt, be possible for the defendants' bag to be redesigned. It would take perhaps four to eight weeks, or maybe a little more, for a different bag to be produced. If that were done it would be possible for the defendants to catch at least a part, and perhaps a major part, of the 1976 market from the point of view of time, but I think that there is no doubt that the defendants' sales to retailers would be disrupted and that loss would be occasioned to them which might be very difficult to assess."

Conclusion

To conclude, for the above reasons, 'trusting to my own eyes' (to use the words of Brightman J. supra) on the 'get-up' of the flour bags, I do not consider that the appellant is entitled to an interim order under s.20(f) of the Court of Appeal Act, to prevent alleged prejudice to its claims.

This application indeed is in effect a second attempt to obtain an injunction which it is not possible to grant on the special facts and circumstances of this case without

interfering with the subject-matter of the application in respect of which an appeal is pending.

It appears to me that the better course for the appellant would be to see that the pleadings are closed and expedite the entry of action for trial thereafter.

Finally, I conclude this aspect of the matter with the following words of Buckley L.J in John Hyter (supra 1977, 2 Lloyd's Rep. 105 at 114) which are apt and I adopt them here:

"Not only does the evidence indicate (as I think it does) that the plaintiffs have no reasonable prospect of succeeding in obtaining a permanent injunction at the trial; it also indicates, in my judgment, that, even if that were for any reason thought to be putting the matter too highly, there is no reasonable and substantial prospect of the plaintiffs suffering loss of business or other damage to their goodwill in consequence of any confusion resulting from such similarity as exists between the names under which the parties respectively carry on their businesses during the limited period until trial. The injunction which is sought would undoubtedly, I think, inhibit the defendants severely in the conduct of their business and accordingly, if the balance of convenience were here a relevant consideration, as it seems to me, the circumstances do not warrant the grant of interlocutory relief to avoid injury to the plaintiffs during the interlocutory period...."

The motion is therefore dismissed with costs which is to be taxed unless agreed.



*D. Pathik*  
D. Pathik

Judge of Appeal