

Ottawa  
1966  
June 30  
July 28

BETWEEN:

UNDERBERG G.m.b.H. . . . . PLAINTIFF;

AND

BONEKAMP CORPORATION LTD. . . . . DEFENDANT.

*Trade marks—Expungement—Consent judgment—Corporate defendant wrongly described in proceedings—Reg. no. of trade mark incorrectly stated—Amendment of judgment—Clerical error—Exchequer R. 175B*

In 1958 a trade mark was registered in the name of Bonekamp Corporation under reg. no. 109596, but in proceedings brought by plaintiff to expunge the mark defendant was incorrectly described as Bonecamp Corporation Ltd. and the registration number incorrectly given as 109566 and these errors were repeated in documents filed by defendant's solicitors. In October 1963, on the filing of a consent executed by Bonekamp Corporation, countersigned by its secretary and bearing its corporate seal, judgment was delivered for the expungement of trade mark reg. no. 109566. On a subsequent motion by plaintiff to substitute the correct registration number in the judgment this Court ordered that reg. no. 109566 be struck out. Plaintiff moved to substitute the correct reg. no. 109596, in the judgment and filed a consent executed by Bonekamp Corporation countersigned by its secretary but not bearing its corporate seal.

*Held*, upon filing evidence, that defendant is not represented by a solicitor and a properly executed consent by defendant, the Court will order that the pleadings and judgment be corrected to correct obvious clerical errors, viz. the name of defendant and the trade mark's reg. no.

*Note*, however, that under the new Exchequer Court Rule 175B the practice of acting on a consent signed by the consenting party is no longer acceptable.

## MOTION.

*James D. Kokonis* for plaintiff.

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JACKETT P.:—This is an application by the plaintiff for an order correcting the consent judgment delivered herein on October 17, 1963.

As established by the filing of a certified copy of the record of registration, it appears that, on March 7, 1958, there was registered in the name of Bonekamp Corporation of 6990 Marseille Street, Montreal, the trade mark “Underbergsche” under Registration No. 109,596.

The Statement of Claim in this action, as amended on October 14, 1960, wherein the defendant is described as “Bonekamp Corporation Ltd.” of 7705 18th Avenue in the Town of Ville St. Michel in the Province of Quebec, alleges that the defendant registered as a trade mark the word “Underbergsche” under Registration No. 109,566 on March 20, 1958, in respect of “alcoholic cordials, alcoholic extracts and flavors for food”, the wares referred to in the record of registration already referred to. The Prayer for Relief sought *inter alia* an order that trade mark registration No. 109,566 on the register of trade marks maintained under the *Trade Marks Act* be struck out.

On November 28, 1960, a Statement of Defence was filed by Gregory Charlap of counsel for “the Defendant” and on July 7, 1961, an affidavit was filed that had been sworn by Charles H. Caprarie-Melville, who swore that he was a Director and General Manager of “Bonekamp Corporation Ltd.”, the “Defendant in the present action”. An affidavit of documents was filed on September 22, 1961, in which the same gentleman again made the same statement. The first of these affidavits purports to come from the office of Slapack & Charlap, Barristers & Solicitors, of Montreal.

On October 16, 1963, a consent was filed purporting to be signed by “C. H. Caprarie-Melville” as “Secretary” and sealed with a seal bearing the name “Bonekamp Corporation” and the words “Incorporated 1956”. This consent appears to have been prepared in the offices of Messrs. Smart & Biggar, who are solicitors for the plaintiff, and says simply that

The undersigned defendant hereby consents to judgment in this action in terms of the attached draft.

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The "attached draft" contains *inter alia* a clause providing that "the defendant's trade mark Registrations No. 109,566 and No. 112,218 on the Register of Trade Marks . . . be struck out".

Judgment was delivered in accordance with that Consent on October 17, 1963.

According to a certified copy of the record of registration of trade mark Registration No. 109,566, it is a registration in the name of Isotope Products Limited of the trade mark "Aquatel".

On June 28, 1966, there was filed a "Consent" signed "Bonekamp Corporation C.H.C. Melville Secretary" (and not sealed by any corporate seal), reading as follows:

The undersigned, the defendant in this action, when it executed the consent to judgment herein filed in this Honourable Court on October 16th, 1963, intended to consent to a judgment striking out not only its registration No. 112,218 of the word UNDERBERG, but also its registration No. 109,596 of the word UNDERBERGSCHE.

The defendant recognizes that the reference throughout the proceedings in this action to the registration of UNDERBERGSCHE as No. 109,566 was a clerical error and that the correct number of its registration of the said word is and always was 109,596.

The defendant accordingly consents to the making of an order correcting the judgment herein by inserting, on the second line of the first paragraph on page 2 of the said judgment, the number 109,596 in place of the number 109,566.

DATED at St. Michel this 18th day of March, 1966.

On January 11, 1966, a motion was made in this matter for an order correcting a clerical error in the judgment "by changing the first registration number on the second line of page 2 from 109,566 to 109,596" and my brother Thurlow made an order that the judgment be amended by striking out the reference therein to trade mark Registration No. 109,566. This order has not been taken out by the solicitors for the plaintiff and the Registrar has not completed it as contemplated by paragraph 2 of Rule 172.

The present application is for an order correcting the judgment by "inserting, on the second line of the first paragraph on page 2 of the said judgment, the number 109,596".

Counsel for the plaintiff undertook, at my request, to prepare and file a memorandum of authorities. This he has now done and I wish to express my appreciation for a very well prepared and useful review of the relevant authorities.

The explanation for the delay in the application to correct the judgment apparently arises from the fact that the judgment was not presented to the Trade Mark Office to implement the expungement order until comparatively recently. When this was done, it was obvious that the order for the expungement of Registration No. 109,566 was the result of a mistake. My brother Thurlow recognized, when the matter came before him, that the judgment was obviously founded in error in so far as it ordered expungement of Registration No. 109,566 and accordingly deleted the reference thereto from the judgment.

The question as to whether the proceedings can be corrected so as to provide for the expungement of Registration No. 109,596 is more difficult.

There are four matters that cause me concern, namely,

- (a) the owner of Registration No. 109,596 is "Bonekamp Corporation" of one address, while the defendant in this action is described as "Bonekamp Corporation Ltd." of another address;
- (b) the registration number in the pleadings, in the Consent on which the judgment is based and in the judgment is 109,566 and not 109,596, which is the correct number for the trade mark "Underbergsche";
- (c) the Consent upon which I am now asked to make the correcting order is not signed by the solicitors who were acting for the defendant at least as late as May 1, 1962, the date of the examination for discovery, there is no evidence on file that such solicitors have ceased to act for the defendant, there is no evidence of any solicitor having advised the defendant in connection with the Consent, and the defendant has not appeared, by its proper officers before the Court personally;
- (d) the Consent upon which I am being asked to make the correcting order has not<sup>1</sup> been executed by the defendant corporation in the normal manner by the affixing of the corporate seal witnessed by the President and Secretary or other officers duly authorized by a resolution of the directors, evidence of which has been filed in the form of a copy of such resolution certified by the Secretary over the company seal.

<sup>1</sup> By inadvertence the word *not* was omitted from the judgment of JACKETT P. as originally filed in the Court records—FD

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My recollection is that counsel indicated to me that the defendant had ceased to be represented by solicitors some time before the consent judgment was delivered. Presumably, evidence of this can be placed on the Court file. If this is done, I am prepared to adopt, for the purpose of this application, the practice that was being followed when the consent judgment was delivered, of acting on a Consent signed by the consenting party although, for the future at least, under Rule 175B of our Rules, as amended recently, this will not be an acceptable practice.

So far as the defendant's execution of the Consent filed on June 28 last is concerned, this is not acceptable and it will be necessary to have the Consent properly executed.

So far as the description of the defendant and the registration number are concerned, I am satisfied by a reading of the pleadings and other material referred to above that there has been obvious error in the pleadings and the Consent filed on October 16, 1963, which has led to an error in the judgment delivered by this Court. It is perfectly clear that the intention throughout is to refer to the registration in the name of "Bonekamp Corporation" of "Underbergsche" being Registration No. 109,596 and not Registration No. 109,566, which is a registration completely unrelated to the parties or pleading in this action.

After considering Mr. Kokonis' review of the authorities, which are

*Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*,  
 [1934] S.C.R. 186,

*Prevost v. Bedard*, (1915) 51 S.C.R. 629,

*In re Blackwell*, (1886) W.N. 97,

*Preston Banking Co. v. William Allsup & Sons*, [1895]  
 1 Ch. 141 (C.A.),

*MacCarthy v. Agard*, [1933] 2 K.B. 417 (C.A.),

*Thynne v. Thynne*, [1955] P. 272 (C.A.),

*Fawell v. Andrew*, (1917) 10 Sask. L.R. 320 (en banc),

*Hatton v Harris*, [1892] A.C. 547,

*McDougald v. Mullins*, (1897) 30 N.S.R. 313,

*Pearlman (Veneers) S.A. (Pty.) Ltd. v. Bartels*,  
 [1954] 3 All E.R. 659 (C.A.),

*Re Wright*, [1949] O.W.N. 113,

*Lewis v. Chatham Gas Co.*, (1918) 42 O.L.R., 102 at 103-4, at 115,

*Ainsworth v. Wilding*, [1896] 1 Ch. 673,

*Huddersfield Banking Co. Ltd. v. Henry Lister & Co., Ltd.*, [1895] 2 Ch. 273 (C.A.)

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I am satisfied that these errors have resulted in an error in the judgment in expressing the manifest intention of the Court and I am therefore satisfied that the necessary correcting action can be taken.

Upon the filing of evidence that the defendant is not represented by a solicitor and a properly executed Consent, I am prepared to make an order directing that the pleadings and the judgment be amended by substituting "Bonekamp Corporation" for "Bonekamp Corporation Ltd." in the style of cause and by substituting No. 109,596 for No. 109,566 wherever the latter number appears therein.