

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE
JURISDICTION

BETWEEN:

THE B. MANISCHEWITZ COM- }
PANY OF CANADA LIMITED. . }

PLAINTIFF;

1951
Feb. 1, 8

AND

MAX HARTSTONE and BENJA- }
MIN RICHMAN, trading under the }
firm name and style of Crown }
Bread Company, and the said }
CROWN BREAD COMPANY ... }

DEFENDANTS.

1952
Dec. 23

*Trade Marks—Infringement—Passing off—“Tam Tam”—“Some Tam”—
The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 2(l),
3(c), 11(b)—Tests of similarity of wares—Tests of similarity of marks
—Onus on plaintiff in infringement action to show reasonable proba-
bility of confusion—Similarity of word marks a matter of first im-
pression—Evidence of actual confusion helpful in determining
likelihood of confusion—Onus on plaintiff in passing off action to show
reasonable apprehension of likelihood of confusion—Evidence of actual
confusion strong evidence of probability of confusion.*

The plaintiff claimed that the defendants' use of their word mark "Some Tam" on their farfel was an infringement of the plaintiff's word mark "Tam Tam" as applied to its biscuits and that the defendants' conduct in using the word mark Some Tam and also the Star of David and the six-branched candelabrum amounted to passing off the defendants' farfel as a product of the plaintiff's.

Held: That the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares.

2. That in an action for infringement the plaintiff must show that the use of the word marks "Some Tam" and "Tam Tam" at the same time and in the same area in association with similar goods is likely to result in confusion. The onus is on the plaintiff to show reasonable probability of such confusion.

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3. That the answer to the question whether two words are similar must be answered by the judge on whom the responsibility lies as a matter of first impression.
 4. That in an action for infringement evidence of actual confusion is not necessary but is helpful in determining likelihood of confusion.
 5. That where there is evidence of actual confusion it cannot fairly be held that there was no reasonable probability of confusion.
 6. That the word marks "Some Tam" and "Tam Tam" are similar marks.
 7. That there can be infringement through the use of similar marks on similar wares.
 8. That the plaintiff in a passing off action need not prove that the defendant's course of conduct was likely to create confusion. All that need be shown is a reasonable apprehension of such likelihood.
 9. That while it is not necessary in an action for passing off to prove actual confusion the fact of its actual occurrence is strong evidence of the probability of its occurrence.

ACTION for infringement and passing off.

The action was tried before the President of the Court at Ottawa.

J. Rudner and G. I. Harris for plaintiff.

R. M. W. Chitty Q.C. and J. Friedman for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (December 23, 1952) delivered the following judgment.

This is an action for infringement of the plaintiff's trade mark Tam Tam and for passing off the defendants' goods as those of the plaintiff.

The plaintiff is the wholly owned Canadian subsidiary of The B. Manischewitz Company, which was incorporated under the laws of the State of Ohio, one of the United States of America, and has offices in Jersey City, New Jersey, and Cincinnati, Ohio. The parent Company is engaged in the business of manufacturing and selling Kosher food products and especially bakery products including matzos, matzo meal, matzo farfel, biscuits and crackers. It has for many years carried on an extensive business in the United States and, prior to the incorporation of the plaintiff, also in Canada. It is the largest matzo bakery in the world and perhaps also the largest manufacturer of Kosher bakery products generally. All its products are Kosher products. This means that they are

clean according to the requirements of the Jewish dietary laws and have been manufactured under rabbinical supervision.

In 1944 The B. Manischewitz Company brought out a new product in the form of crackers and first used the words Tam Tam as a trade mark in association with its crackers on or about August 30, 1944. On March 14, 1945, it applied for registration of the words as a word mark and it was registered in its name on March 22, 1945, as Trade Mark No. N. S. 20652, Register 79, for use in association with crackers and biscuits.

On February 13, 1948, the plaintiff was incorporated under the laws of Canada as a private company for the purpose of carrying on the Canadian business of The B. Manischewitz Company and acting as the Canadian distributor of its products and on April 13, 1948, the parent Company transferred and assigned to the plaintiff all its Canadian business and assets including the good will of its Canadian business and its trade marks including the word mark Tam Tam. The assignment of the mark was duly recorded in the Trade Mark Office on April 14, 1948, under N. S. No. 7988, and since that date the plaintiff has been its registered owner and has used it continuously in association with the crackers which it distributes in Canada for its parent company which has continued to manufacture them in the United States.

The defendants, a Toronto firm, are engaged in the business of manufacturing and selling food products and especially bakery products including bread, rolls and noodles. On September 1, 1949, they adopted the words Some Tam as a trade mark for use on their baked noodles and on September 14, 1949, applied for registration of the words as a word mark and it was registered in their name on September 17, 1949, as Trade Mark No. N. S. 33258, Register 130, for use in association with baked noodles of all types.

The defendants have put out a farfel under their word mark Some Tam and distributed it in Montreal and Toronto to retail stores many of which also sell the various Manischewitz products including the plaintiff's Tam Tam crackers. In addition to using the word mark Some Tam

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on the containers in which they sold their farfel the defendants also put a representation of the Star of David and a representation of a six-branched candelabrum on the package. Both of these symbols have long been used by The B. Manischewitz Company and, since its incorporation, by the plaintiff.

These were the circumstances under which the plaintiff brought its action. I shall deal first with its claim for infringement. It was contended that the defendants' word mark Some Tam was confusingly similar to the plaintiff's word mark Tam Tam and constituted an infringement of it. The claim is based on section 3(c) of The Unfair Competition Act, 1932, Statutes of Canada 1932, chapter 38, which provides:

3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or distinguishing guise which

- (a) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares; or
- (c) is similar to any trade mark or distinguishing guise in use, or in use and known as aforesaid.

The evidence establishes that the defendants had knowledge of the plaintiff's word mark Tam Tam a considerable time before they adopted Some Tam as their word mark.

The next enquiry is whether the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares within the meaning of section 2(l) of the Act, which provides as follows:

2. In this Act unless the context otherwise requires:—

- (l) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

In my opinion, the wares meet the tests of similarity thus laid down. The defendants' farfel and the plaintiff's crackers have common characteristics in that both are bakery products. Their ingredients are essentially the same. The farfel is made of flour, eggs, a little salt and

a little shortening and the crackers of flour, vegetable shortening, sugar, malt, salt and leavening. The difference in the ingredients is not sufficient to make the products dissimilar. Both the farfel and the crackers are baked in a hot oven. The evidence also proves that the classes of persons by whom they were ordinarily dealt in or used correspond. Both products are sold through the same channels by distributors to retail grocery stores, principally in Montreal and Toronto, although distribution of the plaintiff's product is much more widespread. The farfel and the crackers are primarily intended for Jewish consumption. It is true, of course, that the products are also bought by Gentiles but to a much greater extent in the case of the Tam Tam crackers than in that of the Some Tam farfel. The evidence is that 95 per cent of the latter is sold to Jewish people whereas the sale of the former to Gentiles actually exceeds in volume its sale to Jews because of the large number of non-Jewish outlets for its distribution. Finally, there is similarity in the manner and circumstances of the use of the two products. The Some Tam farfel is used for soups, as a side dish and for stuffing poultry. The Tam Tam crackers are also used for soup and as a base for canapes. They are also broken up and used for stuffing poultry. The primary use of both is for soups. On the evidence and having regard to the tests of similarity set by section 2(*l*) of the Act, I am satisfied that the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares within the meaning of the Act.

I now come to the question whether the word marks are similar within the meaning of section 2(*k*) of the Act which provides as follows:

2. In this Act, unless the context otherwise requires:—

(*k*) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they are produced, or for their place of origin.

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To succeed in its action for infringement the plaintiff must show that the use of the word marks Some Tam and Tam Tam at the same time and in the same area in association with the wares mentioned is likely to result in the confusion mentioned in the definition. The onus is on the plaintiff to show reasonable probability of such confusion: *vide Pepsi-Cola Company of Canada Limited v. Coca-Cola Company of Canada Limited* (1).

Before I refer to the tests of similarity mentioned in the cases I should state that the words Tam Tam are coined or invented words. The evidence of Mr. D. B. Manischewitz is that when The B. Manischewitz Company developed its new crackers it thought it would be helpful to have a contest for the name of its new product and the judges selected Tam Tam as a name which would be likely to be favourably received. The word Tam was catchy and had the advantage of repeating itself. By itself it has no meaning in Yiddish or in Hebrew. There is no contradiction of this evidence.

On the conclusion of the plaintiff's case counsel for the defendants moved for a non-suit in conformity with the practice of this Court that such a motion is to be entertained only after counsel has informed the Court that he does not intend to adduce any evidence in reply to the case put for the plaintiff. Counsel argued that the word marks Some Tam and Tam Tam should not be considered to be similar. He submitted that there was a difference between them not only in the vowels of the two words Some and Tam but also in their initial consonants and that this difference made the two word marks dissimilar. On the other hand, counsel for the plaintiff argued that the marks were phonetically similar and that there was a similarity in the ideas conveyed by them.

The tests of similarity of trade marks have been dealt with in many cases, one of the latest in this Court being *Freed & Freed Ltd. v. Registrar of Trade Marks et al* (2), where several of the leading cases were referred to. There it was stated that it is not a proper approach to the determination of whether trade marks are similar to break them up into their elements, concentrate attention upon the

(1) (1940) S.C.R. 17 at 32.

(2) (1950) Ex. C.R. 431.

elements that are different and conclude that, because there are differences in such elements the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. In the same case it was also stated that it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself. If such a person would be likely to think that the goods on which the later mark appears are put out by the same person as the goods sold under the former mark of which he has only a general and not a precise recollection the Court may properly conclude that the marks are similar. These propositions are based on leading English cases: *vide Re Christiansen's Trade Mark* (1); *Sandow Ld's Application* (2). As was pointed out in the *Freed & Freed Ltd. case (supra)*, the reasons for such a view is clear. Careful analysis of the marks with a view to ascertaining the differences between them merely serves the purpose of pointing out the differences in the marks but does not answer the question whether they are similar. It is always important to remember that marks may be similar although there are differences between them. Indeed, they cannot be similar unless there is some difference. Similarity connotes difference for if there were no difference there would be identity, not similarity.

In the *Freed & Freed Ld. case (supra)* it was also stated that the proper test to be applied has been laid down by high authority and reference was made *inter alia* to *Aristoc, Ld. v. Rysta, Ld.* (3) in which the House of Lords decided that the question whether two marks are similar must be

(1) (1886) 3 R.P.C. 54.

(2) (1914) 31 R.P.C. 196.

(3) (1945) A.C. 68.

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answered by the judge on whom the responsibility lies as a matter of first impression. They adopted as a fair statement of the duty cast upon the Court the following passage from the dissenting judgment of Luxmoore L.J. in the Court of Appeal (1):

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.

The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

Lord Luxmoore's statement was expressly approved by Kerwin J., giving the judgment of the Supreme Court of Canada, in *Battle Pharmaceuticals v. The British Drug Houses Ltd.* (2) and must be regarded as the leading authority on the subject. While it may be easier to apply the test of first impression to single words, such as those in question in the *Aristoc* case (*supra*), than to word marks consisting of more than one word, the principle is the same.

In the *British Drug Houses Ltd. v. Battle Pharmaceuticals* (3) I expressed the opinion that on a motion to expunge a word mark on the ground that it was confusingly similar to a previously registered word mark it was not necessary that there should be any evidence of actual confusion since the issue was not whether there had been confusion but whether confusion was likely to occur but, on the other hand, when there is evidence of actual confusion such evidence is helpful in determining whether there would be likelihood of confusion. The same principle applies in an action for infringement.

In the present case there was evidence of actual confusion between the defendants' Some Tam farfel and the plaintiff's products on the part of users of the wares. This evidence was given by Mr. M. Lifshitz, an independent grocer who operates a store on St. Lawrence Boulevard in

(1) (1943) 60 R.P.C. 87 at 108. (2) (1946) S.C.R. 50 at 53.

(3) (1944) Ex. C.R. 239 at 244.

Montreal. Most of his customers are Jewish. He had dealt in the various Manischewitz products that I have mentioned, including their matzo farfel and their Tam Tam crackers for many years and also carried the defendants' Some Tam farfel. He kept this on his shelves together with the other noodle and farfel products. He also kept the plaintiff's Tam Tam crackers. When Mr. Lifshitz was asked what impression he got when he first saw the defendants' package of Some Tam farfel he said that he thought it was another new Manischewitz product. Some Tam appeared to him like a Tam Tam product. I mention this evidence now for it has more bearing on the issue of passing off than on that of infringement although it is also relevant to it. His evidence as to the confusion of his customers is more important. But before I set it out I have some comments to make. In the course of his evidence I made some adverse comments to the effect that he was inconsistent in what he had said and that it was he rather than his customers that had been confused. I made a notation in my note book that he was confused but I thought he was truthful. Since then I have carefully read the transcript of his evidence several times and I must now say that while his evidence was not quite as clear as it might have been he was not inconsistent and was not confused. Having said this in fairness to him, I now summarize his evidence as I find it. He had a delivery service and took orders over the telephone. After he started carrying the defendants' Some Tam farfel some of his customers called for it by different names. They sometimes asked for Manischewitz farfel or Manischewitz baked farfel or Manischewitz Tam farfel or Tam Tam farfel when what they really meant was the defendants' Some Tam farfel. Mr. Lifshitz knew this because when such a call had been made he had sometimes sent the customer a Manischewitz farfel since he had asked for that and the customer had returned it to the store and asked for the Some Tam farfel as the farfel he wanted. It was not a case of giving the customer something different from what he had asked for but rather a case of the customer asking for a Manischewitz product when he really meant the defendants' product. Even when customers came to the store and saw the defendants' Some Tam farfel on the shelves they sometimes called it by a variety of names,

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such as Tam farfel, Manischewitz Tam Tam farfel or Manischewitz baked farfel. When they asked for a Manischewitz Tam farfel they indicated the defendants' Some Tam farfel. Likewise, when they asked for a Manischewitz Tam Tam farfel they did the same thing. As Mr. Lifshitz gave particulars of what had happened his evidence became clearer. When customers came to his store and asked for a farfel or a baked farfel he gave them the defendants' Some Tam farfel for that was the only baked farfel he had in the store. Similarly, when a customer asked for Tam Tam farfel he gave her the defendants' Some Tam farfel because that was what she wanted. If she asked for Manischewitz farfel he gave her a package of Manischewitz matzo farfel. When customers telephoned and asked for a Manischewitz Tam farfel he sent out the defendants' Some Tam farfel. If they asked for a Manischewitz farfel he sent them the Manischewitz matzo farfel. But even in such cases he quite often got the package back because what the customer wanted was the Some Tam farfel. Incidents such as this had happened quite often since he started carrying the defendants' Some Tam farfel. Mr. Lifshitz was not able to give the name of any customer who had wanted the defendants' Some Tam farfel but had asked for it by a different name. Notwithstanding this fact, I am satisfied that he was telling the truth and I accept his evidence. I believe there has been confusion in the minds of some of his customers between the defendants' Some Tam farfel and the plaintiff's products. Indeed, it is easy to see that customers who knew the trade mark Tam Tam and associated it with a Manischewitz product would be quite likely to think of Some Tam farfel as another Manischewitz product.

Having in mind the tests of similarity that have been referred to and the evidence of actual confusion I have no difficulty in finding that the defendants' word mark Some Tam is confusingly similar to the plaintiff's word mark Tam Tam within the meaning of section 2(k) of the Act. In my opinion, this finding could have been fairly made without any evidence of actual confusion. And in view of the evidence of actual confusion that has been adduced I do not see how it could fairly be held that there was no reasonable probability of confusion.

Counsel for the defendants urged that there could not be infringement in the case of similar trade marks being used on similar wares but I am unable to accept this submission. Consequently, I find that since the wares are similar and the marks are similar, within the meaning of the statutory definitions, the plaintiff has made out a case of infringement.

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I now come to the claim for passing off. This is made under section 11(b) of The Unfair Competition Act, 1932, which provides as follows:

11. No person shall, in the course of his business,
 (b) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion between his wares and those of a competitor;

This statutory cause of action is the equivalent of the common law action for passing off. The onus on the plaintiff in this action is not quite the same as in an infringement action. He need not prove that the defendants' course of conduct was likely to create confusion. All that need be shown is a reasonable apprehension of such likelihood.

It has already been stated that the plaintiff carried a large range of bakery products intended primarily for Jewish consumption. All of these were Kosher and, therefore, fit for daily use by professing Jews but some of them were also Kosher for passover use. This meant that they complied with the special Kosher requirements for passover over and above those for daily use. Its matzos were sheets of unleavened bread. It also carried two forms of matzo farfel. The farfel was a bakery product in sheets like biscuits and then broken up and crumbled so that the individual pieces were uniform in size. One form of matzo farfel was Kosher for daily use and the other Kosher for passover. One difference was that there could not be any salt in the farfel for passover. There were other differences. Finally, the plaintiff carried its Tam Tam crackers, which were Kosher for daily use but not for passover since they included leavening. The evidence shows that the words Tam Tam had become adapted to distinguish the crackers in association with which they were used as a trade mark as a Manischewitz product. In fact, the Tam Tam crackers

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had a larger sale than any other Manischewitz product. Indeed, Mr. Hahanovitch went so far as to say that the sale of Tam Tams had surpassed the sale of the other Manischewitz products during the past 5 years by so much that whereas he had often been referred to as the "Manischewitz man" he was now referred to as the "Tam Tam man".

In addition to marking its crackers with its Tam Tam word mark the plaintiff, and its parent company before it, had for many years used two Jewish emblems on its packages, one the Star of David and the other the six-branched candelabrum. These emblems were used to indicate that the products in the packages were Kosher. The Star of David by itself indicated a Kosher product for daily use, whereas the six-pointed candelabrum or the Star of David combined with the six-pointed candelabrum indicated a product that was strictly Kosher for passover. The Tam Tam crackers carried only the Star of David emblem for the reason that while they were Kosher for daily use they were not strictly Kosher for passover, because of their leavening ingredients.

The plaintiff's products, whether produced in Canada by it or distributed in Canada for its parent company, carried indications of the bakeries of manufacture. For example, the package containing the matzos referred to The B. Manischewitz Company as "famous the world over for its strictly Kosher bakeries". The package containing the matzo farfel (Exhibit 20) referred to the Manischewitz bakeries as "the largest and most Kosher Matzo Bakeries in the world". And the Tam Tam cracker package with Tam Tam printed on the Star of David described the Tam Tam crackers, "Star of them all", as coming "from the world famous bakeries of the B. Manischewitz Co".

The course of conduct of the defendants of which the plaintiff complains may now be stated. There were three specific complaints, namely, the use of the word mark Some Tam, the use of the Star of David and the six-branched candelabrum as symbols and the description of the defendants as "Toronto's Most Famous Quality Bakery". On the other hand, counsel for the defendants stressed the differences between the defendants' farfel and the plaintiff's products. The Some Tam farfel did not look

like the plaintiff's matzo farfel or the plaintiff's Tam Tam crackers. Indeed, it was not a matzo farfel but rather a baked noodle. But a customer looking at it might think of it as a cracked up cracker. Moreover, the shape of the Some Tam farfel package was not like that of any of the packages in which the plaintiff sold its products. And the colors of the packages and the general get-up were different. But, as was pointed out in the case of trade marks, the presence of difference does not deny similarity. Indeed, there cannot be similarity between two objects unless there is some difference between them. Otherwise, there would be identity, not similarity.

The differences relied upon by counsel do not, therefore, answer the plaintiff's complaint. It is the total effect of the defendants' course of conduct that must be considered and looked at in the light of whether there would be a reasonable apprehension that it would be likely to create confusion. The defendants knew of the plaintiff's word mark Tam Tam 2 or 3 years before they adopted the word mark Some Tam. They also knew that the plaintiff produced a farfel. When they first put out their own farfel, which is a baked noodle, rolled out, dried and then crumbled, they sold it in plain cellophane bags. They did not put it out under the name Some Tam until after August 31, 1949, which was 5 years after the first use of Tam Tam by the plaintiff's parent. By this time, Tam Tam had become known as a Manischewitz product. No reason was given by the defendants for their use of such a meaningless word as Tam as part of their word mark, although counsel for the defendants made much of the fact that the farfel was described on the package as "The farfel with that Haimishen Tam!" as if "tam" meant something.

Moreover, the defendants' use of the Star of David and the six-branched candelabrum on its package was intended to convey the idea that they were selling a Kosher product. They knew that these emblems were used by the plaintiff. It was suggested that these were well known Jewish emblems but Mr. Hahanovitch said that he did not know of any product except that of the plaintiff that carried both emblems. Mr. Manischewitz also said that he did not know of any other company or any company in any trade that had ever marked on their products the Star of David and

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the six-branched candelabrum together. Then there was the use by the defendants of the words "Toronto's Most Famous Quality Bakery".

It is not necessary in an action for passing off to prove actual confusion but the fact that confusion has actually occurred is strong evidence of the probability of its occurrence: *Vide* 32 Hals., Second Edition, page 618. Here, as I have already pointed out, there is evidence of actual confusion. The evidence of Mr. Lifshitz is as relevant to the issue of passing off as it was to that of infringement. I consider it important. When he was asked what impression he got when he first saw the defendants' package of Some Tam farfel he said that he thought that it was another new Manischewitz product. He looked at the package. It appeared to him like Tam Tam instead of Some Tam as the marks on it were similar to the Manischewitz product. These were the Star of David and the candelabrum which he had seen mostly on the Manischewitz products. He just noticed that Some Tam farfel appeared like a Tam Tam product.

I must say that I am not surprised at the confusion described by Mr. Lifshitz. In my judgment, it would be quite natural for persons accustomed to the Manischewitz products and knowing the Tam Tam crackers as a Manischewitz product to think of the Some Tam farfel as some kind of a Tam Tam or Manischewitz product. Under the circumstances, I find that the defendants so directed public attention to their Some Tam farfel that at the time they commenced to do so it might be reasonably apprehended that their course of conduct was likely to create confusion between their farfel and the plaintiff's products and that the plaintiff has established its cause of action.

There will, therefore, be judgment in favour of the plaintiff for the injunction sought by it and the order for delivery up of all containers, labels and the like containing the word Some Tam. Since counsel for the plaintiff in the course of his argument elected an accounting of profits rather than damages there will be, unless the parties agree otherwise, a reference to the Registrar for an accounting of profits and judgment for the amount found by him. The plaintiff will also be entitled to costs.

Judgment accordingly.
