

THE HIGH COURT

BETWEEN

JACOB FRUITFIELD FOOD GROUP LIMITED AND JACOB FRUITFIELD FOODS LIMITED

PLAINTIFFS

AND

UNITED BISCUITS (U.K.) LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 12th of October, 2007.

1. Introduction

1.1. The reputation of the Jacobs brands of figrolls and cream crackers hardly needs to be stated. The plaintiffs in these proceedings ("Jacobs") have acquired, through the second named plaintiff, the group of companies known as Irish biscuits (which included the company W & R Jacob Limited) from the French conglomerate Groupe Danone. That acquisition occurred in 2004 and as a result Jacobs acquired the right to various trademarks including the Jacobs brand for this jurisdiction. The rights acquired included those relating to Jacobs' figrolls and cream crackers. Around the same time the defendants ("United Biscuits") acquired the United Kingdom biscuit business of Groupe Danone and as a result acquired equivalent rights to the Jacobs brand for the United Kingdom.

1.2 United Biscuits also have a long established business (including in this jurisdiction) trading under the "McVites" brand name. It would hardly have needed any evidence to establish that both the Jacobs and McVites brands are extremely well known in the State and have significant market shares. It would also be clear to even the most casual observer that such brands are supported by very significant marketing expenditure by their owners.

1.3 It is against that background that the intention of United Biscuits to launch a competing McVites brand of both figrolls and cream crackers in this jurisdiction needs to be considered. It is important to emphasise that Jacobs do not claim to have any monopoly in the use of the terms "figrolls" or "cream crackers". There is nothing, *per se*, therefore, objectionable about McVites seeking to launch their products in this jurisdiction using those names.

1.4 It is, however, contended that the packaging in which the respective products are in the course of being launched by McVites is such as is likely to lead to significant confusion amongst purchasers with a resulting damage, it is said, to Jacobs established goodwill in the products. Against that background Jacobs have commenced these proceedings claiming injunctive relief and damages for passing off. As a matter of some considerable urgency an application for an interlocutory injunction was heard on Monday and Tuesday the 1st and 2nd of October last. At the close of the argument I indicated to the parties that I would give my decision on the following day (that is Wednesday the 3rd October) but would deliver a detailed reasoned judgment some little time later. This is that judgment.

1.5 On Wednesday the 3rd October I indicated that I was prepared to grant the interlocutory relief sought on behalf of Jacobs in relation to the figrolls product but not the cream cracker product. The reasons for coming to that view are set out in this judgment.

1.6 It seems to me to be appropriate to commence with a consideration of the legal principles by reference to which an injunction should be granted at an interlocutory stage in a case such as this. I therefore turn, first, to the law on passing off.

2. The Law – Passing Off

2.1 As this is an application for an interlocutory injunction, it is common case that the matters which I need to address are those which have been identified in *Campus Oil v. Minister for Industry (No. 2)* [1993] I.R. 88 and applied by this court on many occasions since. In that context, it is clear that the first matter that needs to be considered is as to whether Jacobs have established a fair case to be tried and, indeed, if Jacobs have so done, whether United Biscuits has established a *prima facie* defence. With that in mind it is appropriate to turn first to the cause of action which Jacobs assert.

2.2. It is common case between counsel that the so called triple test for establishing a cause of action in passing off, as identified by the House of Lords in *Reckitt & Coleman Products Limited v. Borden Ink*, [1990] 1 All ER 873 is applicable in this jurisdiction as well. See for example the judgment of Laffoy J. in *Miss World Limited v. Miss Ireland*, [2004] 2 IR 394. It is agreed that the three elements of the test are:-

- (a) The existence of a reputation or goodwill in the claimants product including, where appropriate, in a brand name or get-up;
- (b) The risk of confusion between what is alleged to be the offending product and the claimants product; and
- (c) Whether damage to the claimants' goodwill by virtue of any such confusion has been established.

2.3 In *Reckitt & Coleman*, Lord Oliver defined reputation or goodwill in the following terms:-

"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 is particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically on the plaintiffs' goods or services."

2.4 That Jacobs have a long established reputation in the biscuit business and, in particular, in relation to both figrolls and cream crackers could not be doubted and was not contested. However it clear from the passage which I have just cited that it is not just the reputation of the product that the court is concerned with. In order for an action in passing off, based on the "get up" of the product, to succeed, it must be established that the claimants concerned have a reputation in the presentation of its product in a particular way by reference to factors such as those identified by Lord Oliver being brand name, trade description or features of labelling or packaging. It seems clear to me that the features in which any such established goodwill may rest have the potential to vary enormously from case to case. This is simply because the features which the public will identify with the product concerned will likewise vary enormously. In some cases the trade name or the brand name may be the dominant feature. In others it may be a combination of the two. In yet further cases a distinctive form of packaging may be the matter most likely to attract the public's attention.

2.5 There is not, in my view, any one magic formula by reference to which the court can or should assess the aspects of a products presentation to the public, in which its goodwill or reputation may rest. True it is to state that in many of the cases cited in argument the court was, on the facts of the individual case under consideration, particularly impressed by one or, perhaps, two features. But that is not to say that such a feature has, necessarily, any greater status, on the facts of a different case, from any other aspect of the overall "package".

2.6 In *Mitchelstown Co-operative Agricultural Society Limited v. Golden Vale Products Limited* (Unreported, High Court, Costello J., 12th December, 1985) the distinctive tubs in which butter substitute had been sold for a period of ten months prior to the arrival of the competing product was sufficient to enable Costello J. to be satisfied that a sufficient reputation in that singular aspect of the get up in question had been established so as to give rise to a fair question to be tried. The fact that a combination of different matters may give rise to the distinctive "get up" was noted by Budd J. in *Polycell Products Limited v. O'Carroll and Others T/A Dillon O'Carroll* [1959] I.R. Jur 34 at 38. It seems to me to be clear from that judgment that even though a party might not be able to claim a monopoly in each of the individual elements by which the product concerned might be presented, it may, nonetheless, be able to sustain a reputation in the combination of elements sufficient to meet the first test.

2.7 It also seems to me that the second test identified in *Reckitt v. Coleman* is very closely connected with the first. The risk of confusion stems from the fact that the relevant buying public may identify the claimants product from its get up. On that basis a reputation or goodwill will have been established in the get up concerned. Where the particular features of the get up in respect of which the reputation concerned has been established are to be found in a similar form in the competing product then confusion may well be likely. It is, of course, those features in which the reputation or goodwill vests which are likely to cause the buying public to identify the product concerned with the claimant. It is, therefore, also more likely, should those features be, in general terms, replicated in the competing product, that confusion will result. It is the very fact that the relevant features lead the public to view the product as that of the claimants that gives rise to the risk of confusion should those features also be present in the competing product.

2.8 It seems to me, therefore, that it is appropriate to identify the features which are likely to lead to such identification on the part of the buying public and consider whether such features also appear, in a similar fashion, in the competing product so as to identify the risk of confusion. It again follows that the precise features which need to be considered will vary from case to case precisely because features which the public are likely to identify with the product will themselves vary.

2.9 For example counsel for United Biscuits placed particular reliance on the decision in *Fisons v. Godwin* (1976) RPC 653. From some of the passages in the judgments in that case it might be inferred that, where a brand or trade name appears on competing packaging which is significantly different from the claimants brand name, it would be very difficult to infer any risk of confusion. However a consideration of the pictures of the two competing products, set out in the judgment in that case, makes it clear that while both competing products had certain similarities (both were, in effect, large plastic bags designed for plant growing and with a floral motif), the overriding distinguishing factor was that in both cases the trade name of the competing producers and the brand name of the competing products were shown in exceptionally large print in such a way as would have made it clear to any likely purchaser that the products were different. I mention that authority at this stage for the purposes of reiterating that the features of the presentation of a particular product to the public in which reputation may lie and by reference to which, therefore, any risk of confusion must be judged, have the potential to vary enormously from case to case. To that extent authority as to the features which impressed the court as being those to which the reputation attached (and by reference to which the risk of confusion was judged) may not be of great assistance as such determinations are derived from the court's impression of the features that were important in relation to the particular product under consideration.

2.10 I am, also, satisfied that the court must look at the product of the claimant in the way in which its typical purchaser might be likely to look at it, for the purposes of ascertaining whether its get-up has attached to it a reputation or goodwill and also for the purposes of identifying those features which might give rise to that reputation or goodwill. It is also clear that the court can and should take into account the typical way in which the product concerned is likely to be presented to the public and the typical way in which the public is likely to make its decision concerning the purchase of the product concerned.

2.11 As is clear from the authorities, a claimant is entitled to protect the goodwill established in the minds of its customers. It is the potential interference with that goodwill that gives rise to the possible cause of action. It has been noted that a claimant is entitled to protection even in respect of a segment of its customers who may not exercise a very high degree of care in selecting the product concerned. That point should, in my view, however, not be exaggerated. There will be certain customers who may be, for all practical purposes, almost indifferent to which product of a particular type they may buy. At that level it is hard to see how a claimant has any entitlement to the continued allegiance of such customers. It is only where the customer concerned cares sufficiently about the precise product which he or she intends to purchase that a goodwill in that product can, realistically, be said to exist. It is hard to see how there is any goodwill attaching to a product by reference to an utterly careless purchaser. Nonetheless it remains clear that a claimant retains an entitlement not to have improper interference with any goodwill which it may have built up in customers who retain a wish to purchase the claimants' product but who may not exercise a very high standard of care in making their choices. In the words of the authorities the claimant retains a goodwill in those customers as well. It is, therefore, clear that the standard by reference to which the existence of goodwill needs to be judged (and, it follows, by reference to which the risk of confusion also needs to be determined) is that applied by any significant number of potential customers for the products concerned. It is also clear that those matters need to be judged by reference to the circumstances in which such customers will, typically, purchase the product concerned.

2.12 Counsel for United Biscuits places particular reliance on the judgment of the Supreme Court in *Adidas v. O'Neill* [1983] ILRM 112 and in particular on the comments of O'Higgins C.J. at pp. 115-116 in which it is noted that a claim for passing off, based exclusively on get up, is rare. O'Higgins C.J. quoted with approval a passage from the 10th ed. of Kerly's *Law of Trademarks* which does, it has to be said, note the possibility that imitation of get up alone may amount to passing off. However the passage goes on to assert that such cases are rare since trade names and word trade marks are normally present as a means of warning the public as to the distinction between the claimants goods and the competing goods. In those circumstances, it is said, that the resemblances between the goods must be extremely close for a claim in passing off by get up alone to be maintained.

2.13 It has also often been said that the question of the similarity between the get up of two products should be judged, to a significant extent, as a matter of first impression. See for example *An Bord Trachtála v. Waterford Foods plc* (Unreported, High Court, Keane J., 25th November, 1992) and *United Biscuits UK Limited v. ASDA Stores Limited* (1997) RPC 513.

2.14 I am, therefore, satisfied that I should approach the question of the reputation of Jacobs in the get up of the two products under consideration and the risk of confusion with United Biscuits competing product on the following basis.

Firstly I should have regard to the circumstances in which the products are likely to be purchased, the sort of customers who are likely to purchase them, and the amount of attention which, at least the less careful of those purchasers, are likely to apply to their considerations. The competing get ups should be judged as a matter of first impression but also by reference to the type of features which, in all the circumstances of the case, are likely to attract the attention of a purchaser in those circumstances. While it is true to state that distinguishing brand or trade names need to be carefully considered, that aspect of the case also needs to be seen in context by reference to the extent which those features are likely, in all the circumstances, to have an effect on actual purchasers. I do not consider that either *Fisons* or *Adidas* establish any special rule to be applied in cases where brand or trade names are present. Those cases merely state the obvious. That in many, perhaps most, cases where there is a clear presence of a brand or trade name it is likely that purchasers will identify the differences in the product by reference to it. There may, however, be cases where, in all the circumstances of the case, and notwithstanding such a distinguishing feature, a risk of confusion nonetheless continues.

I now propose applying those principles to the facts of this case.

3. Application to the facts of this case

3.1 The starting point has, of course, to be a consideration of whether Jacobs has established a reputation in its product in its current get up so as to attach a goodwill to the product in that packaging. It is clear that both Jacobs products have been in identical packaging to that in which they are currently marketed for a number of years and have been in largely similar packaging for some considerable period of time. In those circumstances it seems to me that Jacobs has established a *prima facie* case to the effect that it has a goodwill in the current get up of both products. On that basis it is appropriate to turn to the risk of confusion by considering the initial impression of the similarities between the competing products and whether there are any factors which might legitimately lead to a different conclusion being reached than that indicated by those first impressions. As indicated earlier, it has often been said that in cases such as this first impressions are best. The extent to which that may be true, may, in a fact, vary from case to case. However it seems to me that such a consideration is particularly apposite in a case, such as this, where the product will almost invariably be purchased from a stacked supermarket shelf in circumstances where, as we all know from common experience, a purchaser is likely to spend very little time indeed making a choice. It is not because there is any rule of law to this effect that first impressions may well be best in a case such as this. It is because the typical, not unduly careful, customer will only have a brief impression to go on when selecting a product. The reputation of a product by reference to its get-up and the risk of confusion must, therefore, be judged on that basis.

3.2 I have to confess that nothing identified in either the affidavit evidence, or the argument of counsel, caused me to divert from the initial impression which I got of the competing products in this case. It seemed to me that the overall impression of the figrolls products are such that they would appear, on a supermarket shelf, to be extremely similar. While it is true to state that the McVites brand name appears at the top of the alleged offending package and while it is also true to state that there appears a blue band towards the top left hand corner which is not present on the Jacobs package (the Jacobs brand name also appears on the top left hand corner), it does appear to me that in all other respects the packaging is remarkably similar. I have annexed to this judgment the relevant exhibits showing the competing products. It is, of course, important to take out of the equation any features which may reasonably be described as "generic" of packaging of the type of products concerned. Similarity in the features of the get up of a product from different suppliers may be determined, at least in part, by the product which the get up is designed to package.

3.3 Almost all biscuit packages have a certain broad similarity as to size and shape varying, perhaps, by the particular size of the biscuit concerned. It is also true to state, as was argued by counsel for United Biscuits, that Jacobs can assert no monopoly in a red coloured package. Indeed as noted in the course of the argument, packets for certain types of biscuits frequently follow a particular colour scheme, which, it might be suggested, is indicative of the type of the product involved. Dark rich colours maybe suggestive of chocolate biscuits. Bright pastel shades, of biscuits involving fruit or the like. So far as it goes, I accept the argument put forward on behalf of counsel for United Biscuits that Jacobs cannot claim a monopoly to a red packet of broadly the size that both competing packets feature in this case. Nor can Jacobs assert any entitlement to the name "figrolls" itself. However the similarities in packaging go much further than that.

3.4 One should not over emphasise the individual elements, particularly in a case where it is almost certain that the purchaser will not take the opportunity to engage in a detailed consideration of the two packets. Indeed if this was a case where it was almost certain that customers would take a careful look at the relevant product before making a purchasing decision, then it would be manifestly clear that no risk of confusion could arise because such a customer would undoubtedly see that one packet bore the name "McVites" while the other packet bore the name "Jacobs". However a casual look at both packets, together with a look at how they appear when presented on supermarket shelves as per the exhibit evidence filed (which is again annexed to this judgment) seems to me to confirm the first impression that the two packets are extremely similar such that there is, at least for the purposes of establishing an arguable case, a real risk of confusion.

3.5 The overall appearance of both packets is extremely similar. While it may not be possible to assert a monopoly in any one of the individual features, the combination of the colour, the font in which the word "figrolls" is written, the fact that it is written in a way which gives the impression of casting a shadow on the packet from writing which is slightly above it, the presence of depictions of figrolls and the like make the two sets of packaging appear extremely similar. It should also be noted that packets are frequently displayed stacked on supermarket shelves in such a manner as lead to only the side of the packet being visible to the potential customer. The sides of the competing packets are again extremely similar and, unless the customer were to notice the competing "McVites" and "Jacobs" logos, then a real risk of confusion, sufficient to meet an arguable case threshold, was, in my view, established. The logos are small. The dominant features of the packets both on their top and on their sides are the colours, the name figrolls in a particular font, and pictures of figrolls. It also seems to me that a particular factor that must be fully taken into account in this case stems from the fact that both products bear the same name. As indicated earlier there is nothing, of course, wrong in this. Jacobs have no monopoly in the name "figrolls". However where the name represents a highly dominant feature of the packaging then the risk of confusion is all the greater when the differentiating brand name appears, by comparison, in such a small size. On general impression and on that analysis I was more than satisfied that Jacobs had made out a fair case to be tried under this heading.

3.6 Different considerations seemed to me to apply in relation to the cream cracker packaging. While there are certain broad similarities including, in general terms, a yellow or light orange colour with a large white on brown name, there remain significant differences. The name Jacobs appears in large print on three of the sides of the cream cracker manufactured by that firm. If it is true to state (as Jacobs must establish in order to succeed), that there is a reputation in the existing get up, then it is clear that that reputation applies to a form of packaging in which the name Jacobs appears as a major feature. The competing McVites product does, indeed, show the name McVites in relatively small print, such that it might not be readily noticed. However the white on brown print on the compelling product refers to "cream crackers" on the McVites packaging and is, in reality, quite distinguishable from the Jacobs version. In those circumstances I was not satisfied that Jacobs had made out a fair case to be tried in respect of the cream cracker product.

3.7 In those circumstances, while being satisfied that a fair case to be tried had been made out in respect of the figrolls product I was not satisfied that a fair case to be tried had been made out in respect of the cream cracker product. It followed that it was unnecessary to go on to consider any of the other factor that need to be taken into account in the grant of an interlocutory injunction so far as the cream cracker product was concerned. It was, however, necessary for me to consider those matters in relation to the figrolls product. In that context it is appropriate to turn to the case law in relation to the grant or refusal of interlocutory injunctions in passing off cases where a fair case to be tried has been established.

4. The Adequacy of Damages and the Balance of Convenience in Passing off Cases

4.1 Jacobs rely on passages from the judgment of Costello J. in *Mitchelstown*, Laffoy J. in *DSG Retail v. PC World* (Unreported, High Court, Laffoy J., 13th January, 1998) and to certain comments by me, citing these judgments, in *Metro International SA v. Independent News & Media plc* [2006] 1 ILRM 414 at para. 4.5. On that basis it is said that there is an axiom to the effect that a plaintiff will suffer uncompensatable damages if an injunction is refused even though the plaintiff has established a fair case to be tried and that the balance of convenience will, therefore, almost always require that an interlocutory injunction be granted in those circumstances.

4.2 I do not think that those cases establish that there is a rule of law to such an effect. What the cases indicate is that a proper application of the principles applicable to a consideration of the balance of convenience and the adequacy of damages will normally, in a passing off case, lead to the conclusion that the plaintiff will suffer uncompensatable damages and that the balance of convenience will favour the grant of an injunction. The factors which lead to such a conclusion may vary from case to case. However those factors frequently include some or all of the following.

4.3 Firstly a claimant's goodwill is a property right which should not lightly be taken to be capable of being diminished or interfered with in return for damages. If the claimant is refused an interlocutory injunction but succeeds at trial, then it follows that the claimant's goodwill will have been interfered with in the intervening period in a manner which will be difficult to assess and, in many cases, not capable of adequate compensation in damages.

4.4 As pointed out by Laffoy J., in *DSG Retail*, the fact that customers may buy the competing product, believing it to be that of the claimant, necessarily gives rise to a risk of uncompensatable damages to the goodwill of the claimant. This will be so even if that situation lasts for only a relatively short period of time. The claimant is entitled to his goodwill as it is. He is entitled not to have its value diminished even with the payment of compensation.

4.5 These, and other factors are likely to lead to a conclusion, in at least most cases, that a plaintiff will suffer significant and uncompensatable damage if he is refused an interlocutory injunction but succeeds at trial.

4.6 The question which I was required to address is as to whether there were unusual features of this case which ought to lead to a different conclusion being reached. There are, no doubt, a number of features of this case which need to be properly taken into account.

4.7 Firstly it is clear that United Biscuits intend to change to somewhat different packaging on their competing McVites products in the near future. It would appear on the evidence currently before the court that only a very small amount of McVites product had been offered for sale by the time of the hearing. Another larger amount had already been manufactured in the packaging which is alleged to offend. It is said on behalf of United Biscuits that it is impractical to repackage that product. However it is said that as soon as all of the existing product has been distributed (which is estimated to take approximately four weeks) all future relevant products will be in the new packaging. No case was made at the hearing before me that the new packaging would give rise to a legitimate claim for passing off on the part of Jacobs. In those circumstances, it is said that the absence of an injunction would simply permit potentially offending competing product to be available for a period not likely to significantly exceed four weeks. Thus, it is argued, the scale of interference with any potential goodwill which Jacobs may have, is necessarily significantly less than would typically be the case where, in the absence of an injunction, the allegedly offending product would be marketed up and until the trial.

4.8 Secondly it is pointed out that there has, in the past, been a close business relationship between Jacobs and United Biscuits so that, from time to time, product for one has been manufactured by the other. Thus, it is argued, the usual legitimate concerns which a plaintiff might have about customers receiving, and believing to be theirs, a product over which they had no control, are of less relevance on the facts of this case.

4.9 On other side of the equation United Biscuits places reliance on the fact that they are in a start up situation. On the evidence it would appear that United Biscuits have put in place an initial promotional campaign which involves obtaining "slots" in various supermarkets for the products concerned. On the evidence currently before the court it would appear that, if the existing slots which have been booked are not utilised, then it is unlikely that the promotion could start again until after Christmas. It is suggested that, if an injunction is granted which would prevent the products being launched in their current packaging, then it follows that any new launch could only be contemplated at a time when sufficient product in the new get up was available. That, it is said, would not be practicable until a point in time which was too near Christmas for appropriate promotional slots to be available.

4.10 Firstly it should be said that I accept that each of the points to which I have referred are well made so far as they go. They are all factors which need to be properly taken into account. It seemed likely to me that, in the event that an injunction was granted in respect of the figrolls product, the launch of that product would have to be delayed for a period of approximately three months. There is not, however, in reality, any real reason why any such delay could not be compensated in damages which would not be unduly difficult of calculation. In the event that United Biscuits succeeds at trial (and I am minded to put in place measures to ensure that as early a trial as possible can be achieved) then United Biscuits would be able to launch its product in due course. It will, in any event, be able to launch its product in the proposed new packaging after a delay of no more than three months. There is no real reason to believe that the success or otherwise of its competing product will be any different if it is launched later rather than now, so that the only loss would stem from the fact that the income stream from the product would be delayed. That is a matter which is well capable of calculation in damages.

4.11 In that context counsel for United Biscuits refers to comments which I made in *Metro International* concerning the difficulty of estimating damages in circumstances where a business is interfered with at or near its inception. It should, however, be remembered that, in *Metro International*, I was dealing with a case in which both competing brands were seeking to enter an entirely new market. In those circumstances the fact that one party might get, by means of an injunction which did not ultimately turn out to have been justified, a head start, might make it impossible to estimate what would have happened had there been a level playing field. I am dealing here with a very different situation. There is an established market in which Jacobs is a significant or even dominant player. If McVites are able to break into that market to any significant extent then they will be equally be able to do so after a short period of time during which an injunction would be in place. There is no reason to believe that their success or otherwise would be any different

in the future.

4.12 For those reasons I was satisfied that damages would be likely to be an adequate remedy for United Biscuits in the event that an injunction was granted but ultimately be refused at trial.

4.13 The other side of the coin is to consider whether the special factors identified by counsel on behalf of United Biscuits mean that, on the unusual facts of this case, damages would also be an adequate remedy for Jacobs in the event that they do not now get an injunction but succeed at trial. While accepting that the unusual facts make a judgment in that regard somewhat less obvious in this case than it might be in the "axiomatic" circumstances identified by both Costello J. and Laffoy J. to which I have referred, I remained of the view, on balance, that damages would not be an adequate remedy for Jacobs notwithstanding those unusual circumstances. Jacobs have a property interest in the goodwill in their brand today. While the extent of the potential interference with that property interest might be less, by virtue of the unusual features of this case, it nonetheless remains, potentially, a not insignificant interference with that property right which is not, in my view, capable of proper compensation in damages.

4.14 In those circumstances I was satisfied that the balance of convenience favoured the grant of the injunction in respect of the figrolls product. I will now hear counsel further on the measures which need to be put in place for the purposes of expediting the full hearing of these proceedings.

5. Some other matters

5.1 A considerable amount of the affidavit evidence tendered on both sides was concerned with factual allegations concerning some issues which do not seem to me to be central to the questions which I had to address in deciding whether to grant or refuse the interlocutory orders sought. United Biscuits raised the question of the extent to which Jacobs had accurately set out, in their original affidavit, the extent to which the McVites product had in fact been launched. United Biscuits asserted that Jacobs affidavits did not properly set out the fact that some of the product had already been launched by the time the affidavits were sworn. In addition it was contended that the fact of product already having been, at least to a limited extent, in the market place without any actual evidence of confusion was a factor which ought weigh heavily in the courts consideration as to whether a fair issue to be tried had been established.

5.2 However it seems to me that the evidence currently before the court suggests that only a relatively small amount of product had been in the marketplace and for quite a short period of time. In those circumstances I was not persuaded that the absence of any evidence of actual confusion is a particularly significant factor that should weigh in the balance in this case. That is not too say that it might not be a very important factor in other cases where the length of time during which the competing product had been available and the extent that it was available ought, if there be any true risk of confusion, to lead to actual instances of confusion which could be established in evidence.

5.3 United Biscuits also makes complaint about the circumstances in which representatives of Jacobs appear, on the evidence, to have informed persons in the industry that an injunction had been obtained. What, in fact, had occurred was that an undertaking had been given for a short period of time prior to the initiation of proceedings as a result of correspondence between solicitors. It may well be that certain statements made by representatives of Jacobs were technically inaccurate but I am not satisfied, on the evidence currently available, that anything improper occurred. It does not seem to me, therefore, that the issues to which I have referred could affect any discretion which the court might have in the grant or refusal of an injunction.

6. Conclusion

In those circumstances I was not satisfied that any factors had been identified which would make it proper for me to depart from applying the ordinary tests by reference to which an interlocutory injunction should be granted or refused in a case such as this. For the reasons which I have set out I was satisfied that those tests lead to the grant of an injunction in respect of figrolls but not in respect of cream crackers.



[\[2007\] IEHC 368 Jacob Fruitfield Food Group Ltd -v- United Biscuits \(U.K.\) Ltd.doc](#)