

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION  
THE COMPANY CARLO ERBA SPA,  
VIA CARLO IMBONATI,

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COMPANY  
CARLO ERBA  
SPA, VIA CARLO  
IMBONATI  
v.  
REPUBLIC  
(OFFICIAL  
RECEIVER AND  
REGISTRAR IN  
HIS CAPACITY  
AS REGISTRAR  
OF TRADE  
MARKS)

*Applicant,*

*and*

THE REPUBLIC OF CYPRUS, THROUGH THE  
OFFICIAL RECEIVER AND REGISTRAR, IN HIS  
CAPACITY AS REGISTRAR OF TRADE MARKS,

*Respondent.*

(Case No. 138/76).

5 *Trade Marks—Opposition to registration—Section 20 of the Trade  
Marks Law, Cap. 268—Hearing and determination of oppo-  
sition by Registrar after acceptance of application for regi-  
stration—Registrar not acting as a Judge in his own cause  
and not making himself “an exceptional Court” contrary to  
Article 30.1 of the Constitution—E. Merck v. The Republic  
and Another (1972) 3 C.L.R. 548 and I.W.S. Nominee Co.  
Ltd. v. The Republic (1967) 3 C.L.R. 582 followed.*

10 *Trade Marks—Registration—Opposition to—Section 20 of the  
Trade Marks Law, Cap. 268—Application to register word  
“MIANTOR” in class 5 of Schedule IV of the Trade Marks  
Rules, 1951-1971—Opposition by owners of registered trade  
mark “MIDAMOR”—Both trade marks relating to goods  
15 which are the same or of the same description—Reasonable  
likelihood of deception or confusion—Sections 13 and 14 of  
the Law—Onus of proof—Comparison of two trade marks by  
Registrar a legitimate method of approach—Degree of re-  
semblance necessary—Duty to protect public from consequen-  
20 ces of deception and confusion still exists in case of pharma-  
ceutical products even where there are restrictions upon their  
distribution—And possibility of mistakes through bad hand-  
writing in prescriptions a factor to be taken into consideration  
—Respondent Registrar acted properly in rejecting applica-  
tion.*

25 *Constitutional Law—Courts—Opposition proceedings under section*

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*20 of the Trade Marks Law, Cap. 268 before Registrar of Trade Marks—Registrar not a “Judicial Committee” or “exceptional Court” contrary to Article 30.1 of the Constitution.*

*Natural Justice—Opposition proceedings before Registrar of Trade Marks under section 20 of the Trade Marks Law, Cap. 268—Registrar not acting as a Judge in his own cause.*

The applicant applied to the respondent Official Receiver and Registrar of Trade Marks for the registration of the word “MIANTOR” as a trade mark in class 5 of Schedule IV of the Trade Marks Rules, 1951-1971, in respect of pharmaceutical, veterinary and sanitary substances, infants’ and invalids’ foods, plasters, material for bandaging, material for stopping teeth, dental wax, disinfectants, preparation for killing weeds and destroying vermin. The application was accepted for registration in Part “A” of the Register of Trade Marks and was duly advertised in the official Gazette of the Republic. On the 19th April, 1975, Notice of Opposition under section 20(2) of the Trade Marks Law, Cap. 268, was filed by Merck & Co. Incorporated, who are the owners in Cyprus of registered trade mark No. 13026 “MIDAMOR” dated 30.6.70 in respect of pharmaceutical, veterinary and sanitary substances. The grounds of the opposition were the following:

The trade mark “MIANTOR” resembles to the trade mark “MIDAMOR” and if it will be allowed to be registered it will cause confusion among doctors and chemists.

The applicants by their counterstatement dated 3rd May, 1975, which was filed under section 20(4) of Cap. 268, alleged by way of preliminary objections:

- (a) That the Registrar of Trade Marks cannot deal with this case because he had already accepted the trade mark “MIANTOR” for registration; and
- (b) that the trial before the Registrar of Trade Marks is contrary to Article 30 of the Constitution of Cyprus.

On the merits applicants alleged that there does not exist confusion between the two trade marks, which are different both phonetically and in writing and because the two trade marks are not offered freely to the public, but after a doctor’s prescription to a chemist. Thus, the confusion may occur only among disinterested public and not among experts like doctors

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5 who are in a position and are obliged to distinguish the one drug from the other and to make the necessary prescription; the public, and in particular the patient, do not take part in the selection of the drug, nor does the chemist, unless he fails in his duty to make certain that he gives out the right drug.

10 In examining the opposition under section 20(5)\* of Cap. 268 the respondent considered first whether any of the goods in respect of which the applicants were seeking registration, were the same or of the same description as any of the goods of the opponents said Registration No. 13026 (see sections 13 and 14 of Cap. 268).

15 After answering this question in the affirmative the Registrar then considered the question whether "presuming user for the opponents of their mark in a normal and fair manner in relation to the respective goods will there be a reasonable likelihood of description or confusion arising amongst a substantial number of persons if the applicants should also use their mark in a normal and fair manner in relation to any of the goods included in their specification". In considering this question the Registrar compared the two trade marks by looking at the words "MIDAMOR" and "MIANTOR"; and after finding that in opposition proceedings, based on sections 13 and 14 of Cap. 268, the onus of proof was upon the applicants to establish that their trade mark is registrable, he came to the conclusion that the applicants failed to discharge this onus and directed that the opposition should succeed because "there can be a real tangible danger of confusion amongst a substantial number of persons, within the meaning of section 14(1), if applicants' mark is allowed to proceed for registration". Hence the present recourse.

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30 Counsel for the applicant contended:

- 35 (a) That once the respondent Registrar accepted the application for the registration of the trade mark, he could not himself hear and determine the opposition to it and so act as a judge in his own cause; and that by doing so he was making himself "an exceptional Court" the establishment of which is prohibited under Article 30.1 of the Constitution.

\* Quoted at p. 439 *post*.

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- (b) That the trade mark sought to be registered is not likely to deceive or cause confusion.
- (c) That the Registrar should have confined his examination to the contents of the affidavit filed on behalf of the opponent to the effect that the two trade marks "might cause confusion by a dispenser through bad handwriting by a doctor".

*Held*, (1) that the adjudication by the Registrar on matters relating to opposition to registration of a trade mark under section 20 of Cap. 268, does not amount to an exercise of judicial authority; that the Registrar whilst acting in that capacity was not "a judicial Committee" or "exceptional Court" in the sense of Article 30.1 of the Constitution; that he was not performing judicial but administrative duties and he was not acting as a judge in his own cause; and that, accordingly, applicant's contention must fail (see *Merck v. The Republic* (1972) 3 C.L.R. 548 and *I.W.S. Nominee Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582).

(2) That the respondent Registrar properly directed himself on the law as to the onus of proof in cases of opposition proceedings; that he rightly treated the opposition as based on sections 13 and 14 of Cap. 268; and that after deciding the matter under section 14(1) there was no problem for him to disallow the registration of the applicants' trade mark also under section 13 as the scope for possible confusion under section 14 is wider than the scope for confusion under section 13 (see *Harker Stagg Ltd's ("Angelox" "Aludrox" [1954] 71 R.P.C. 136)*).

(3) That when comparing the two trade marks by looking at the words "MIDAMOR" and "MIANTOR", which formed part of the evidence, the Registrar was considering the evidence before him in the sense of section 20(5) of Cap. 268; that such a comparison was a legitimate method of approach in the circumstances; and that he rightly pointed out that the two words consisted of the same number of letters with the same prefix MI, with the same suffix OR and having the letter 'A' amongst their body, thus making the number of letters which the said two words have in common to five out of seven.

(4) That in case of pharmaceutical products even where there are restrictions upon their distribution such as prescrip-

tion, the duty to protect the public or ultimate purchaser from the consequences of deception and confusion still exists and the possibility of a mistake through bad handwriting is a factor to be taken into consideration to that end; that once the application for the registration was in respect of all the goods in class 5 of Schedule IV, the Registrar acted properly in the circumstances; and that, accordingly, the recourse must be dismissed.

*Application dismissed.*

10 Cases referred to:

*Merck v. The Republic and Another* (1972) 3 C.L.R. 548;

*I.W.S. Nominee Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582;

*Smith Hayden and Co. Ltd's Application* [1946] 63 R.P.C. 87 at p. 191;

*Harker Stagg Ltd's ("Angelox" "Aludrox")* [1954] 71 R.P.C. 136;

*Seixo v. Provezende* [1865] L.R. 1 Ch. 192;

*Harker Stagg Ltd's Application* [1953] 70 R.P.C. 205;

*Geigy A.C. v. Chelsea Drug & Chemical Co. Ltd.* [1966] R.P.C. 64;

*Staines v. La Rosa* [1953] 1 W.L.R. 474 at p. 482.

#### Recourse.

Recourse against the refusal of the Registrar of Trade Marks to accept for registration in class 5 of Schedule IV of the Trade Marks Rules, 1951 the word "MIANTOR".

*A. Emilianides*, for the applicant.

*R. Gavrielides*, Counsel of the Republic, for the respondent.

*Cur. adv. vult.*

The following judgment was delivered by:-

A. LOIZOU, J.: The applicant applied to the respondent Official Receiver and Registrar of Trade Marks for the registration of the word "MIANTOR" as a trade mark in class 5 of Schedule IV of the Trade Marks Rules, 1951-1971, in respect of pharmaceutical, veterinary and sani-

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tary substances, infants' and invalids' foods; plasters, material for bandaging; material for stopping teeth, dental wax; disinfectants; preparation for killing weeds and destroying vermin.

The application was accepted for registration in part "A" of the Register of Trade Marks. It was duly advertised in Supplement No. 5 to the official Gazette of the Republic, No. 1159 dated 20.12.74 at p. 128. On the 19th April, 1975, Notice of Opposition was filed by Merck & Co. Incorporated who are the owners in Cyprus of registered trade mark No. 13026 "MIDAMOR" dated 30.6.70 in respect of pharmaceutical, veterinary and sanitary substances. The grounds of the opposition were the following:

The trade mark "MIANTOR" resembles to the trade mark "MIDAMOR" and if it will be allowed to be registered it will cause confusion among doctors and chemists.

The applicants by their counterstatement dated 3rd May, 1975, alleged the following:

(A) By way of preliminary objections:

That the Registrar of Trade Marks cannot deal with this case because he had already accepted the trade mark "MIANTOR" for registration; and

that the trial before the Registrar of Trade Marks is contrary to Article 30 of the Constitution of Cyprus.

(B) On the merits applicants alleged the following:

That there does not exist confusion between the two trade marks, which are different both phonetically and in writing and because the two trade marks are not offered freely to the public, but after a doctor's prescription to a chemist. Thus, the confusion may occur only among disinterested public and not among experts like doctors who are in a position and are obliged to distinguish the one drug from the other and to make the necessary prescription; the public, and in particular the patient, do not take part in the selection of the drug, nor does the chemist, un-

less he fails in his duty to make certain that he gives out the right drug.

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5 The opponents filed an affidavit by their Assistant Secretary Charles E. Childs, Jr., alleging therein that the two trade marks "when used on the same or similar products, may cause confusion, by a dispenser through bad handwriting by a doctor and, therefore, could lead to very serious consequences".

10 Applicants filed three affidavits in support of their counterstatement: One, by Spyros Enotiades, a merchant of drugs in Cyprus, the second by Doctor Ioannis Polydorides and the third by Andreas Karavias, a chemist.

15 The above three affiants alleged that the two trade marks are different and cannot cause confusion or deception, as they involve pharmaceutical substances of different use, only dispensed through chemists and after doctors' prescription. Further, they allege that the trade mark "MIANTOR" is used as a spasmolytic drug whereas the trade mark "MIDAMOR" is used as a diuretic drug; that  
20 both the writing and the pronunciation of the two trade marks are different; and that in case of doubt, chemists should consult the doctors who issued the prescription, and, therefore, there can be no confusion.

25 A hearing took place before the Assistant Registrar of Trade Marks, acting as Registrar of Trade Marks, on the 3rd February, 1976, under the provisions of rule 48 of the Trade Marks Rules, 1951-1971 and section 20 of the Trade Marks Law, Cap. 268, where both parties were represented by counsel.

30 The Registrar delivered his reserved judgment on the 9th March, 1976 and for the reasons given therein he found that the applicants had not succeeded in discharging the onus of proof which lied on them under sections 13 and 14(1) of the Trade Marks Law, Cap. 268 and that  
35 the opposition should succeed and directed that the application for the registration of the trade mark applied for should not proceed, and made no order as to costs.

This decision is the subject of the present recourse.

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The first ground of law relied upon by the applicant is that once the Registrar of Companies accepted the application for the registration of the trade mark, he could not himself hear and determine the opposition to it, and so act as a judge in his own cause; also, that by doing so, he was making himself "an exceptional court" the establishment of which is prohibited by Article 30.1 of the Constitution.

By section 20 of the Trade Marks Law, when an application for registration of a trade mark has been accepted, the Registrar must, after such acceptance, cause the application to be advertised in the manner prescribed by the Trade Marks Rules and any person may within the prescribed time from the date of the advertisement of such an application give notice to the Registrar of opposition to the registration. The procedure thereafter, is governed both by sub-sections (3), (4) and (5) of s. 20 and the Trade Marks Rules (1951-1971) and in particular rules 30-56. Upon completion of the hearing and on a consideration of the evidence the Registrar decides whether and subject to what conditions or limitations, if any, the registration is to be permitted.

The same legal point was raised by learned counsel in the case of *E. Merck v. The Republic and another* (1972) 3 C.L.R. 548, but in relation to the refusal of the Registrar of acceptance of that application, under section 19 of the Trade Marks Law and rule 32 of the Trade Marks Rules which governs the cases of hearings on the Registrar's objections. In that case I held that registration of trade marks is a matter falling within the domain of public law and consequently the functions of the Registrar of Trade Marks under rule 32 are administrative and not judicial ones and the exercise of the powers and duties of the Registrar under section 19 of the Trade Marks Law, amounts to an act or decision falling within the ambit of Article 146 of the Constitution, giving this Court competence to deal with it in its administrative jurisdiction. I referred in support of that view to the case of *I.W.S. Nominee Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582 which I followed. I also held that the adjudication on any matter under the said section did not amount to an exercise of judicial authority nor could it be said that the



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Registrar of Trade Marks acting in that capacity was “a judicial Committee” or “exceptional Court” in the sense of Article 30.1 of the Constitution, and I decided that rule 32 was not unconstitutional as it provided only procedural fairness in the exercise of an administrative function and the rule of natural justice that no one should be a judge in his own cause, was not in any way violated. Further, I said that the Registrar is not performing judicial but administrative duties and when in the exercise of his administrative discretion such a person or organ or authority forms a *prima facie* opinion and invites the interested parties to be heard, it cannot be said to be acting as a judge in his own cause.

In my view, the same principles govern also a case under section 20 whereby the Registrar of Companies does not register but accepts the application for registration and by causing the application as accepted to be advertised in the official Gazette, he affords an opportunity to any person to give notice of opposition to its registration. In other words, he performs an administrative duty which involves due inquiry and he follows a procedure provided for both by the law and the relevant rules. The applicant, therefore, cannot succeed on this ground.

Having dealt with these preliminary objections raised by the applicant in this application—raised but not argued before the Registrar—I turn now to the grounds in respect of the substance of the case, which are to the effect -

- (a) that the trade mark sought to be registered is not likely to deceive or cause confusion, and
- (b) that the Registrar should confine his examination to the contents of the affidavit of Mr. Childs filed on behalf of the opponent, that the two trade marks “might cause confusion by a dispenser through bad handwriting by a doctor”.

The Registrar properly directed himself on the law as to the onus of proof in cases of opposition proceedings under sections 13 and 14 of the Trade Marks Law which, onus of proof, is placed upon the applicants who have to establish both that their trade mark is registrable and that the opposition is not justified. He rightly treated the opposition as based on sections 13 and 14 of the Law, in view

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of its wording which reads, "The trade mark 'MIANTOR' resembles with the trade mark 'MIDAMOR' and if its registration is permitted, it will cause confusion among the doctors and chemists".

On examining the objection under section 14(1) of the Law, two main questions were considered. The one was, whether any of the goods in respect of which the applicants were seeking registration, were the same or of the same description as any of the goods of the opponents Registration No. 13026. This question was answered in the affirmative and without much difficulty, as on the facts there was no dispute that the opponents were registered in class 5 of Schedule IV of the Trade Marks Rules in respect of pharmaceutical, veterinary and sanitary substances and the applicants wished to be registered for all the goods in class IV of the said Schedule. Consequently, it could clearly be seen that the goods comprised in the applicants' specification were the same or of the same description as those of the opponents' goods.

The second question which, according to the Registrar, called for an answer, because of the affirmative one given to the first question, was whether "presuming user for the opponents of their mark in a normal and fair manner in relation to the respective goods, will there be a reasonable likelihood of deception or confusion arising amongst a substantial number of persons if the applicants should also use their mark in a normal and fair manner in relation to any of the goods included in their specification?"

The question for decision posed once it was decided that the goods concerned were the same or of the same description, was the one formulated by the Court in *Smith Hayden and Co. Ltd's application* [1946] 63 R.P.C. 87 at p. 101 cited in Kerly's Law of Trade Marks and Trade Names, 10th Ed. p. 172 -

"Assuming use (by one or more of the registered proprietors of the marks cited) in a normal and fair manner for any of the goods covered by the registration of those marks, is the Court satisfied that there will be no reasonable likelihood of deception or confusion among a substantial number of persons if (the applicants for registration) use their mark normally

and fairly in respect of any goods covered by their proposed registration?"

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5 He further stated that evidence was filed on behalf of the parties on the question of whether it was likely that deception or confusion might arise, but acted on the principle that this question is for the Registrar alone and he cannot abdicate a decision of that matter to witnesses (Kerly's *ibid*, p. 475, paras 17-34). But the evidence ad-  
10 duced by the parties in this case by way of affidavits already mentioned did not cover all the goods for which the trade marks involved were concerned. The applicant's evidence was restricted to the use of one drug, a spasmolytic drug under the trade mark "MIANTOR" and to the use of a diuretical drug under trade mark "MIDAMOR"  
15 which are only sold by dispensers and after doctors' prescriptions. Opponents' evidence spoke of confusion by a dispenser through bad handwriting by a doctor, but did not specify whether that was in respect of all goods for which they were registered or not. The Registrar then pro-  
20 ceeded to compare the two trade marks, first, by looking at the words and went on to say the following:

25 "It can be seen at a glance that both words have the same number of letters, *i.e.* 7 each; they both begin with the same prefix, MI, and they end with the same suffix OR. They both have the letters which the said two words have in common to 5.

30 In comparing the two trade marks involved in the present case I had in mind that it has been stated above and also the rules of comparison as they appear in Kerly's Law of Trade Marks, and Trade Names, 10th Edition, at paragraphs 17-07 *et seq.* I cite from the same paragraph 17-07: 'You must take the two words. You must judge them, both by their  
35 look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks'  
40 (*Pianotist Co. Ltd's Appn* [1906] 23 R.P.C. 774, at p. 777).

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In that connection I refer also to what was said in the case of *Aristoc Limited v. Rysta Limited* [1945] A.C. 68; 62 R.P.C. 65 particularly to what was said in the Court of Appeal in that case by Luxmoore, L.J., at [1945] A.C. 86. The learned Lord Justice said this: (Extract cited from Buler T.M. [1966] R.P.C. 141, from p. 146, where it is cited.)

'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 important 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'.

Having made a careful comparison of the two trade marks in the light of all facts and circumstances pertaining to the trade marks involved and in the light of the relevant legal situation, I have come to the conclusion that there can be a real tangible danger of confusion amongst a substantial number of persons, within the meaning of section 14(1), if applicants' mark is allowed to proceed to registration".

After the Registrar decided the matter under section 14(1) there was no problem for him to disallow the registration of the applicants' trade marks also under section 13, as the scope for possible confusion under section 14 is wider than the scope for confusion under section 13. For this proposition he relied on the judgment of Evershed

M.R. in the case of *Harker Stagg Ltd's* ("Angelox" "Aludrox") [1954] 71 R.P.C. 136, and reached the *sub judice* decision.

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5 From the approach of the Registrar as above outlined, it is apparent that he acted in accordance with the provisions of section 20(5) of the Law, whereby, "...The Registrar... shall, after hearing the parties if so required, consider the evidence and decide whether and subject to what conditions or limitations, if any, registration is to be permitted".

10 In my view, when comparing the two trade marks by looking at the words "MIDAMOR" and "MIANTOR" which, formed part of the evidence, he was "considering the evidence before him" and such a comparison is a legitimate method of approach in the circumstances. He  
15 rightly pointed out that the two words consisted of the same number of letters with the same prefix MI with the same suffix OR and having the letter 'A' amongst their body, thus making the number of letters which the said  
20 two words have in common to five out of seven.

No doubt, as stated by Lord Cranworth in *Seixo v. Provezende* [1865] L.R. 1 Ch. 192, "What degree of resemblance is necessary... is from the nature of things incapable of definition a priori. And the standard of course  
25 is not always the same". In the case of pharmaceutical products even where there are restrictions upon their distribution such as prescriptions, the duty to protect the public or ultimate purchaser from the consequences of deception and confusion still exists and the possibility of a  
30 mistake through bad handwriting is a factor to be taken into consideration to that end. Support for this proposition can be found in the cases of *Harker Stagg Ltd's Application* [1953] 70 R.P.C. 205 and *Geigy A.C. v. Chelsea Drug & Chemical Co. Ltd.* [1966] R.P.C. 64.

35 Once, therefore, the application for the registration was in respect of all the goods in class 5 of Schedule IV, the Registrar acted properly in the circumstances. After all, as pointed out in Kerly's Law of Trade Marks (*supra*) p. 51 (and the authority for that proposition given is the  
40 case of *Staines v. La Rosa* [1953] 1 W.L.R. p. 474 at p.

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482), “even if objections are not clearly taken before the Registrar or the Court, the tribunal for the interests of the purity of the register should, in a plain case, reject the application”.

For all the above reasons the present recourse fails but in the circumstances I make no order as to costs.

*Application dismissed.*

*No order as to costs.*