1983 September 26

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

THE JONITEXO LTD.,
Appellants-Defendants,

v.

ADIDAS SPORTSCHUHFABRIKEN ADI DASSLER KG,
Respondents-Plaintiffs.

(*Civil Appeal No.* 6371).

Injunction—Interlocutory injunction—Discretion of trial Court—Review of exercise of by Court of Appeal—Principles applicable—Passing off action—Serious question to be tried at the trial—Plaintiffs having an even chance of success in their claim—Court of Appeal not satisfied that discretion of trial Judge to grant an interlocutory injunction wrongly exercised—Section 32(1) *of the Courts of Justice Law,* 1960 (*Law* 14/60)*—Court of appeal and trial Judge should refrain from pronouncing on the merits of the case and from resolving the factual disputes.*

Passing off—Ingredients of—Interlocutory injunction—Extent of—Court of Appeal and trial Judge should refrain from pronouncing on the merits of the case and from resolving the factual disputes.

By a generally endorsed writ the respondents-plaintiffs claimed an injunction restraining the appellants-defendants from passing off their products as the respective products of the plaintiffs; and they, also, by relying on section 32(1) of the Courts of Justice Law, 1960 (Law 14/60) applied for an interlocutory injunction. The trial Court after finding "that there was a serious question to be tried at the trial and that the plaintiffs have an even chance of succeeding in their claim" granted an interlocutory injunction by means of which the appellants and their servants or agents were restrained, until the final determination of the action, or until further order, from "manufacturing, producing, selling, offering or exposing for sale, distributing or in any way dealing with sports or leisure wear consisting of track suits, including the separate jackets and

trousers thereof, T-shirts and althetic shorts, any of which bear the three stripes device which appears on the plaintiffs' respective products". Hence this appeal.

Held, (1) that the making of an interlocutory injunction is the outcome of the exercise of discretionary powers which should not be interferred with on appeal unless the Supreme Court is satisfied that the trial Court's discretion was wrongly exercised: that this Court has not been satisfied that, in the present case, the discretion of the trial Court was wrongly exercised and that, therefore, there exist grounds justifying intervention on appeal in order to set aside the complained of interlocutory injunction: accordingly the appeal must fail.

Held, further, (Per A. Loizou, J., Malachtos, J. concurring):

(1) That the determination of the extent of the interlocutory injunction which touches the questions of reputation, imitation of get-up or part thereof and the proof of likelihood of deception which are the ingredients of the wrong of passing off, is so connected with the factual and legal issues of the case and its merits that this Court should refrain from saying anything and to exhibit the utmost caution out of fear that any pronouncement made, when dealing with an interlocutory injunction on appeal, might be misconstrued or treated as prejudging any of the issues that have to be determined at the trial.

(2) That the trial Judge properly held that it was undesirable to endeavour to resolve on such evidence as has been adduced the factual disputes on which the result of the action will ultimately turn.

Appeal dismissed.

Cases referred to:

M. & M. Transport Co. Ltd. v. *Etairia Astikon Leoforion Lemesou Ltd.* (1981) 1 C.L.R. 605 at pp. 608-609;

Odysseos v. *A. Pieris Estates Ltd.* (1982) 1 C.L.R. 557 at pp. 568-570;

Karydas Taxi Co. Ltd. v. *Komodikis* (1975) 1 C.L.R. 321 at pp. 327-328;

Cadbury Schweppes Pty Ltd. v. *Pub Squash Co. Pty Ltd.* [1981] 1 All E.R. 213;

Universal Advertising and Publishing Agency and Another v. *Vouros*, XIX C.L.R. 87;

Edge v. *Niccolls* [1911] A.C. 693;

Spalding Bros. v. *Gamage* [1915] 32 R.P.C. 273.

Appeal.

Appeal by defendants against the ruling of the District Court of Nicosia (G. Nicolaou, D.J.) dated the 7th January, 1982 (Action No. 5183/80) whereby an interlocutory injunction was granted against them in an action for passing off.

St. Erotokritou (*Mrs.*), for the appellants.

G. Platritis with *M. Montanios*, for the respondents.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES P.: The appellants have challenged, by means of this appeal, an interlocutory injunction which was granted by the District Court of Nicosia in an action for passing off (No.5183/80) which was instituted against them, as defendants, by the respondents, as plaintiffs.

The injunction was based on section 32(1) of the Courts of Justice Law, 1960 (Law 14/60), and by means of it the appellants and their servants or agents were restrained, until the final determination of the action, or until further order, from "manufacturing, producing, selling, offering or exposing for sale, distributing or in any way dealing with sports or leisure wear consisting of track suits, including the separate jackets and trousers thereof, T-shirts and athletic shorts, any of which bear the three stripes device which appears on the plaintiffs' respective products".

The following salient facts are stated in the appealed from decision of the trial Court:

"The plaintiffs are a German firm engaged in the manufacture, sale and distribution on a large scale of, inter alia, athletic and leisure wear including track suits, T-shirts and athletic shorts. They carry on their trade in many parts of the world and they have been in the Cyprus market since 1962. The defendants are a Cyprus firm registered as a limited company in 1978 to carry on the existing business of its present managing director, Mr. Loukas HjiMichael, in the manufacture, sale and distribution of products similar to those of the plaintiffs, in which he had engaged since 1961.

> By a generally endorsed writ filed on 13th November, 1980, the plaintiffs claim an injunction restraining the defendants from passing off their products as the respective products of the plaintiffs by using what the plaintiffs call the three stripes device which, according to the plaintiffs, has become a distinguishing commercial mark of the plaintiffs' products; and they also claim damages for such passing off."

The trial Court after having heard arguments by counsel appearing for the parties, as well as after having considered the evidence which was placed before it, not only by means of affidavits, but, also, when three of the affiants were cross-examined, reached the following conclusion:

> "For the purpose of the present application it seems to me that on the material before me there is a serious question to be tried at the trial, and that the plaintiffs have an even chance of succeeding in their claim. But having said this, I would not wish to make any further comment on the factual aspect of the matter, save to say that I have not reviewed or commented on the evidence adduced in detail and have not made any other particular finding, advisedly."

It has been argued by counsel for the appellants that the expression, in the aforequoted passage, "the plaintiffs have an even chance of succeeding in their claim" does not amount to a finding that there is a probability that the plaintiffs are entitled to relief, as envisaged by the proviso to section 32(1) of Law 14/60.

I cannot agree with this argument because, in my view, the said expression should be construed in the context of the decision of the trial Court as a whole and, when this is done, it can safely be inferred that the trial Court was satisfied that the relevant prerequisite, for making an interlocutory injunction under section 32(1), did exist.

The trial Court has, also, examined whether without an interlocutory injunction it would be difficult or impossible to do complete justice at a later stage, and, also, the question of the balance of convenience, and having found that it would be more convenient and just to grant than to refuse the interlocutory injunction, it granted it as complained of.

I would like to observe that at the stage of granting or refusing an interlocutory injunction, such as the one which was made in the present case, the parties should limit themselves to the issue of whether or not, in the light of the provisions of section 32(1) of Law 14/60 and of the relevant principles of law, such an injunction should be granted; and this cleary interlocutory stage of the proceedings should not be treated as an opportunity for the parties to fight out the merits of the case either by adducing evidence or by advancing arguments in this respect. I venture to add, further, that save in those cases where there exist such special circumstances as to justify resorting to the remedy of an appeal against an interlocutory injunction, the course which is most conducive to the proper administration of justice is to ensure that the pleadings are filed without delay and that the case is heard on its merits as early as possible, without delaying its determination because of an appeal, as in the present instance.

The manner of the proper application of section 32(1) of Law 14/60, in granting or refusing an interlocutory injunction, has been examined in, inter alia, *M. & M. Transport Co. Ltd. v. Eteria Astikon Leoforion Lemessou Ltd.* (1981) 1 C.L.R. 605, 608-609, and *Odysseos v. A. Pieris Estates Ltd.* (1982) 1 C.L.R. 557, 568-570.

I consider it useful to observe, in this respect, that as pointed out by Lord Denning M.R. in *Hubbart v. Vosper* [1972] 1 All E.R. 1023, 1029, "the remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

Furthermore, it is well settled that the making of an interlocutory injunction, such as that on the present occasion, is the outcome of the exercise of discretionary powers which should not be interfered with on appeal unless the Supreme Court is satisfied that the trial Court's discretion was wrongly exercised (see, inter alia, in this connection, *Karydas Taxi Co. Ltd. v. Komodikis* (1975) 1 C.L.R. 321, 327-328 and *M. & M. Transport Co. Ltd.* case, supra, 611).

Having considered carefully all the arguments advance during the hearing of this appeal I have reached the conclusion that I have not been satisfied that, in the present case, the discretion

of the trial Court was wrongly exercised and that, therefore, there exist grounds justifying intervention on appeal in order to set aside the complained of interlocutory injunction.

On the contrary, I am satisfied that the elements envisaged by section 32(1) of Law 14/60 as prerequisites for the making of such an injunction were correctly found by the trial Court to exist; and, also, that the trial Court approached the matter in the light of the properly applicable thereto principles of law as regards the civil wrong of passing off, as they have been expounded in, inter alia, *Cadbury Scheweppes Pty Ltd v. Pub Squash Co. Pty Ltd.* [1981] 1 All E.R. 213.

The appropriate stage at which the rights of the parties to the action concerned are to be determined is when judgment will be given on the merits of the action, and not the stage of the interlocutory injunction which is the subject-matter of this appeal; consequently, in order to avoid prejudging, in any way, any of the issues relevant to the merits of this case I will refrain from referring to any one of them; and, of course, the granting of the interlocutory injunction by the trial Court, and the fact that such injunction is now upheld by this Court, should not be treated as prejudging whether or not the respondents, as plaintiffs, are entitled to succeed in their action against the appellants as defendants.

As regards, however, the manner in which the injunction in question has been framed I should state that, even though I do not intend, in the least, to influence the outcome of the aforesaid action, I have reached the conclusion that the injunction is wider in scope than necessary, in that it prohibits the appellants and their servants or agents from manufacturing or selling goods which bear the three stripes mark - (which is alleged by the respondents to have become the distinctive commercial mark of their products) - and which, at the same time, bear clearly inscribed on them, together with the said three stripes mark, the word "Jonitexo", which is the trade name of the appellants; consequently, I am of the opinion that the injunction can still serve fully the purpose for which it was granted, in accordance with section 32(1) of Law 14/60, even if there are excluded from its ambit goods such as the aforementioned. But, as my two

learned brother Judges do not agree with me in this respect, the injunction should be allowed to stand as granted.

In the light of all the foregoing this appeal has to be dismissed with costs.

A. LOIZOU J.: I agree that this appeal should be dismissed with costs. The principles governing the exercise of a Court's discretion in granting or refusing an interlocutory injunction and those upon which a Court of Appeal will interfere with such exercise of judicial discretion, have been expounded in numerous judgments of this Court by reference also to English cases on the subject and as the President of this Court has dealt elaborately with this aspect of the case, I need not say anything on the subject.

The point on which I cannot, however, find myself in agreement with the judgment of the President, are the observations made by him with regard to the extent of the interlocutory injunction given by the trial Judge and his comments that it might be considered to cover a wider range than it ought to and the use by the appellants of the word "Jonitexo", the name of their Company, alongside with the stripes.

In view of the determination of this point which touches the questions of reputation, imitation of get-up or part thereof and the proof of likelihood of deception which are the ingredients of the wrong of passing off, is so connected with the factual and legal issues of the case and its merits that I feel compelled to refrain from saying anything and to exhibit the utmost caution out of fear that any pronouncement made, when dealing with an interlocutory injunction on appeal, might be misconstrued or treated as prejudging any of the issues that have to be determined at the trial.

This approach is born out by a cursory glance at the law pertaining to the actionable wrong of passing off and its essential elements. In Cyprus this law is defined by section 35 of the Civil Wrongs Law, Cap. 148, a codification which has been found not to be exhaustive however, hence the recourse to the Common Law for a complete picture of it (*Universal Advertising and Publishing Agency and Another v. Vouros*, XIX C.L.R., p.87).

As regards certain of the above issues, the position is summed up in Kerly's Law of Trade Marks & Trade Names, 10th Edition. In para. 16-02 it is stated that "it makes no difference whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connection with goods of the same kind, not being the goods of the plaintiff, in such a manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff". And then "The question whether the use of particular words or badges is calculated to pass off the defendant's goods as those of the plaintiff is often one of difficulty, but it is in substance a question of fact".

Then in para. 16-68 it is said:

> "The relative importance to be attributed to names and word marks on the one hand, and to get-up on the other, is a matter upon which different people have different views; with the result that the outcome of disputes about get-up is exceptionally hard to predict."

Also in para. 16-69 reference is made to the case of *Edge v. Niccolls* [1911] A.C. 693, in which:

> "The plaintiffs sold bags of laundry blue, each bag holding a stick or 'dolly' of a particular form. The evidence showed that customers bought entirely by the appearance of the goods, relying in particular on the 'dolly'. The defendants adopted a similar dolly, and the presence on their goods of their name was in these circumstances held an insufficient distinction".

Moreover, imitation of part of a get-up may be shown to be so identified with the plaintiff's goods that its use for similar goods is calculated to passing them off as his (see Kerly's (supra), para. 16-71).

In conclusion I would like to point out that the onus of proving deception is upon the plaintiffs and the question of likelihood of deception is for the Court (not the witnesses) to decide "looking at the documents and evidence before it" (see *Spalding Bros. v. Gamage* [1915] 32 R.P.C. 273, referred to in Kerly's (supra) page 425).

Indeed the learned trial Judge exhibited, after referring to the legal principles relevant to the issues raised before him caution by stating the following:-

> "I believe it would be undesirable in the present case to endeavour to resolve on such evidence as has been adduced the factual disputes on which the result of the action will ultimately turn. Passing off cases very often pose difficult factual questions in respect of which considerable evidence may be adduced to enable the Court to decide: see the comment of the Privy Council in *Cadbury Schweppes Ltd. and Others v. Pub Squash Co. Pty Ltd.* [1981] 1 All E.R. 213".

I fully share his attitude and I have afortiori on appeal acted likewise.

MALACHTOS, J.: I also agree that the appeal should be dismissed with costs without any modification of the order made by the trial Judge. I adopt the reasons given by my brother Judge Loizou on this issue.

Appeal dismissed with costs.