

1987 May 13

[A. LOIZOU, DEMETRIADES, PIKIS, JJ]

ADIDAS SPORTSHUHFABRIKEN ADI DASSLER KG

Appellants - Plaintiffs.

v.

THE JONITEXO LIMITED.

Respondents - Defendants.

(Civil Appeal No. 6799).

5 *Civil Wrongs — Passing Off — The Civil Wrongs Law, Cap 148, section 35 — Ambit of — A codification of the corresponding tort in English Law — The necessary prerequisites for the plaintiff to succeed — Association between the mark and the goods it brands of such a nature as to create a right to the use of the mark to the exclusion of others, imitation or copying of plaintiff's mark, likelihood of confusion on the part of the ordinary purchaser by reason of such imitation, and damage resulting therefrom — Analysis of such prerequisites*

10 *Evidence — Cross-examination — Failure to put pertinent aspects of defence in the cross-examination of the plaintiff and his witnesses — Absence of explanation for such omission — Effect*

Appeal — Conflict of opinion between the two members of the trial Full District Court relating to the appreciation of evidence and its impact on the outcome of the case — Approach of Court of Appeal

15 The appellants are the manufacturers of Adidas sportswear. Appellants sportswear were highly reputed for their quality and were successfully marketed in many countries. A wide range of appellants' products was continuously marketed in Cyprus since 1962. Appellants' mark, with which they have consistently (with rare exceptions) branded their sportswear since
20 first introduced in Cyprus, was compounded of 3 stripes (portrayed in a particular way), a clover and the word Adidas. The 3-stripes feature prominently and constitute the hallmark of their products. From a distance it is the only noticeable part of the mark.

25 The respondents adopted the 3 stripe device as a mark of the sportswear manufactured and marketed by them after their incorporation in 1978.

As a result the appellants instituted a passing off action against the respondents. The action divided the members of the trial Court. Kouris

P D C found for the appellants, whereas Nicolaides D J found for the respondents In view of such conflict of opinion the action was dismissed (see section 27(2) of The Courts of Justice Law 14/60) Hence the present appeal

The two main reasons in support of the judgment of Nicolaides D J were that (a) The products of the two traders entered the Cyprus market at about the same time in the year 1962 a fact that negated suggestions of imitation and the establishment of a right on the part of the appellants to exclusive use of the device, (b) The distinguishability of the products of the two manufacturers mainly on account of the fact that the 3 stripes were only part of the appellants' trade mark In accordance with the judgment of Nicolaides, D J the confusion by the adoption of the device of the 3 stripes could only arise from a distance, but not across the counter An additional factor that made confusion unlikely was the fact that appellants' products were sold from special shops The possibility of confusion was made more remote still, in accordance with the same judgment, by the addition after the institution of the action of the word «Jonitexo» on the products of the respondents

It must be noted that finding (a) was based on the evidence of Mr HadjiMichael, the Managing Director and principal shareholder of the respondents, to the effect that before the respondents' incorporation he had been manufacturing since 1962 sportswear with the 3 stripe device This version, however, was not canvassed in the cross-examination of the principal or any other witness of the appellants

Held, *allowing the appeal* (1) The need for scrutiny of Judicial action on appeal becomes all the greater in a case where the trial Court is evenly divided in its appreciation of the evidence and its impact upon the outcome of the case

(2) Failure to put forward a pertinent aspect of the defence case to witnesses for the plaintiff is not necessarily fatal to its validity, but in the absence of a proper explanation of the omission, the Court may disregard it, because of the denial of a proper opportunity to the plaintiff to controvert it A lot will depend on the nature of the allegation omitted to be put in cross-examination and the reasons for the omission In this case no explanation was given for the omission hereinabove referred to Koums, P D C was justified in attaching little or no weight to the relevant version of the respondents

(3) In any event the inescapable inference on a proper appreciation of the evidence of Mr HadjiMichael is that the 3-stripe device was not the adopted mark of his products of sportswear

(4) The tort of passing off is codified in Cyprus by s 35 of the Civil Wrongs Law, Cap 148 The codification is not exhaustive, but may be supplemented by the principles relating to the tort as known in English Law Our case law suggests that s 35 not only reproduces the corresponding English tort, but has the same range of application as this tort finds in England

(5) For the plaintiff to succeed in passing of action he must prove:

5 (a) A right to the use of the mark to the exclusion of the defendant established by reference to the association of the mark with the products of the plaintiff. The accrual of such right depends on the nexus between the mark and the product it brands. The association must be strong enough as for the mark to be of itself suggestive of the origin of the goods. The means of forging the association are not limited in a specific way. Whether the necessary link between the mark and the product exists is a question of fact. Evidence of user, the length of it and the reactions of the purchasing public are highly relevant to the determination of the issue.

(b) Imitation or copying of the mark of the plaintiff by the defendants in the process of manufacture or sales of the products.

15 (c) Likelihood of confusion on the part of the ordinary purchaser arising from the imitation of the mark. The law is not concerned with the scrupulous purchaser, but with the ordinary purchaser, who is apt to be swayed by images. The question - which is one of fact - is not the one asked by Nicolaidis, D.J., namely whether an ordinary purchaser can, on account of differences in the marks, distinguish between the rival products, but whether the association between the products of the plaintiffs and the part of the mark imitated is so strong as to create a likelihood of confusing the ordinary purchaser about the origin of the products of the defendants.

20 (d) Damage resulting from such likelihood of confusion. Whenever because of the imitation the ordinary purchaser is likely to be confused about the origin of the goods, damage is presumed to occur in the absence of evidence to the contrary.

25 (6) In this case the evidence established a definite association between the 3-stripes and appellants' products. The Court is disinclined to allow a manufacturer to monopolize a mark consisting of stripes, but a right to its use may be established by a long and consistent use on a large scale. A balance must be kept between the need to sustain free competition and that of protecting the public from imitations. In this case and in the light of the evidence that the imitation was likely to confuse the public the line must be drawn in favour of the appellants. In the absence of evidence to the contrary damage is presumed. In the result the appeal is allowed and an injunction will be issued in their favour.

Appeal allowed with costs here and in the Court below in favour of the appellants.

Cases referred to:

40 *Pyrgas v. Stavridou* (1969) 1 C.L.R. 332;

Andrea and Others v. Dourmouh, 1962 C.L.R. 7;

- Bank of Cyprus (Holdings) v. The Republic* (1985) 3 C L R 1883.
- Evren Warning B V. v Townsend and Sons* [1979] 2 All E R 927.
- HadjiKynacos Co v United Biscuits* (1979) 1 C L R 689.
- Universal Advertising and Publishing Agency and Others v Vouros*, XIX
C L R 87. 5
- Jonitexo Ltd v Adidas* (1984) 1 C L R 263.
- Spalding v A W Gamage Ltd* [1914-15] All E R Rep 147.
- O T Limited v Cumming and Co* [1915] 32 R P C 69
- Payton and Co Ltd v Snelling, Lambart and Co Ltd* [1901] A C 308;
- Cadbury Schweppes v Pub Squash Co* [1981] 1 All E R 213 10

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Kourris, P.D.C. and S. Nicolaides, D.J.) dated the 31st May, 1984 (Action No 5183/80) whereby their action for an order restraining the defendants from marketing their sportswear with 3-stripes on the outer side in order to stop them from passing off their wear as those of the appellants was dismissed. 15

M. Montanios with G. Platritis, for the appellants.

St. Erotocritou (Mrs.), for the respondents.

Cur. adv. vult. 20

A. LOIZOU J.: The judgment of the Court will be delivered by PİKIS, J.

PIKIS J.: The passing off action of the appellants (plaintiffs) the manufacturers of Adidas sportswear, against the respondents (defendants), local manufacturers of sportswear, divided the Full District Court of Nicosia composed of Kourris, P.D.C., (as he then was), and S. Nicolaides, D.J. The President of the Court found for the appellants and approved an injunction restraining the respondents from marketing their sportswear with 3-stripes on the outer side in order to stop them passing off their wear as those of appellants. Earlier the learned President found that appellants proved a right to the exclusive use of the 3-stripe device in the way portrayed on their products and concluded that in marketing their goods with a similar device, the respondents breached the right of appellants safeguarded by s. 35 of the Civil Wrongs Law, Cap. 148. An association had been established between the mark and 25
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the sportswear of appellants sufficiently strong to entitle them to protection from imitation or copying of the mark. Furthermore, Kourris, P.D.C. found that the copying or imitation was likely to confuse the ordinary purchaser about the origin of the goods and thereby mistake the products of respondents as Adidas sportswear. In face of the likelihood of confusion he inferred the sustenance of damage on the part of the appellants and found their case proven, whereupon he made an injunction in terms appropriate to stop the respondents passing off their goods as those of appellants.

For his part Nicolaides, D.J., while acknowledging that the 3-stripes in the way portrayed on their sportswear was a distinguishing feature of the products of appellants, nonetheless he found for the respondents for two main reasons:

(a) The simultaneous and coincidental use of the 3-stripe device by both parties. In accordance with his judgment, the products of the two traders entered the Cyprus market at about the same time in the year 1962, a fact that negated suggestions of imitation or copying and the establishment of a right on the part of the appellants to exclusive use of the device; and

(b) The distinguishability of the products of the two manufacturers, mainly on account of the fact that the 3-stripes were only part of the mark of the appellants.

The mark of the appellants was compounded of a clover and the word Adidas in addition to the 3-stripes, a fact that set them apart and made them easily distinguishable from the sportswear of the respondents that carried only the 3-stripe device. As can be discerned from the judgment of Nicolaides, D.J., the 3-stripes were not in themselves a separate or a distinguishable feature of the products of the appellants; therefore, the adoption of a similar device by the respondents could not confuse the purchasing public about the origin of their goods or mistake them for those of the appellants. The confusion could only arise, as the learned Judge pointed out, from a distance such as that ordinarily separating the spectators' stand from the football pitch but not across the counter. An additional factor that made confusion unlikely, in the opinion of the learned Judge, was the fact that the products of the appellants were sold from special shops bearing outside the name of Adidas. The possibility of confusion was made more remote

still, in accordance to Nicolaides, D.J., by the addition after the institution of the action of the word «Jonitexo» on the sportswear of the respondents. Kourris, P.D.C., remained unimpressed by the addition, not least because some of the sportswear of the appellants too had names added to the 3-stripe device, such as, «John Barrington» and «Squash» and ruled that a confusion was likely and made an injunction as the only effective way to protect the interests of the appellants.

In view of the conflict of judicial opinion, the Court applied the provisions of s.27 of the Courts of Justice Law (14/60) and gave judgment for the respondents. Section 27(2) enacts that in the event of the trial Court being evenly divided, judgment shall be given against the party on whom the burden of proof lies. And as the burden of proof in a passing off action lies on the plaintiffs, the action was dismissed as an inevitable incident of the application of the aforementioned provisions of the law. Needless to say the need for scrutiny of judicial action on appeal becomes all the greater in a case where the Court is evenly divided in its appreciation of the evidence and its impact upon the outcome of the case*. And we were invited to view the findings and inferences drawn by the Court, that is, by Nicolaides, D.J., with the extra caution warranted by the division of judicial opinion.

Appellants challenged the finding that Mr. HadjiMichael, the Managing Director and principal shareholder of the respondents, manufactured and marketed long before the incorporation of the respondent company in 1978, sportswear with the 3-stripe device. Relying on his evidence, Nicolaides, D.J., found that the witness had manufactured and marketed sportswear with the 3-stripe device as far back as 1962, the year in which appellants' products were first marketed in Cyprus. The finding was contested as running contrary to the weight of the evidence and as one hardly warranted by the testimony of Mr. HadjiMichael himself. Firstly, our attention was drawn to the fact that the above version of the respondents was not canvassed in the cross-examination of Mr. Soleas, the principal witness or any other witness of the appellants. In fact, no suggestion had been made to anyone of them that the predecessors of respondents marketed sportswear with the 3-stripe device at any time prior to the incorporation of the company. Of course, failure to put forward a pertinent aspect

* See *Nicolas Pyrgas v. Theodora Charalambous Stavridou* (1969) 1 C.L.R. 332, 336; *Antonis Andrea and Others v. Sadi Doumoushy*, 1962 C.L.R. 7.

of the defence case to witnesses for the plaintiff is not necessarily fatal to its validity*. A lot will depend on the nature of the allegation and the reasons for not raising it in the course of cross-examination of the witnesses of the adversary. In the absence of a proper explanation of the omission, the Court may justifiably disregard factual allegations not put to witnesses of the adversary because of the denial of a proper opportunity to the latter to controvert them in evidence. Liberty to controvert the case of the other side is at the core of the adversarial system of justice premised on the elicitation of the truth through the process of confronting the adversary with every material aspect of . party's case. In the absence of such confrontation, the Court is left with only one side of the story and may, on that account, disregard it as one-sided and incompatible with the right of his opponent to be afforded a proper opportunity to put forward his case too on the subject under controversy. In this case no explanation whatever was given as to the failure of the respondents to propound this aspect of the case in the cross-examination of witnesses of the appellants, in face of which the Court was justified as Kourris, P.D.C., did, to attach little or no weight to it.

Not that the evidence of Mr. HadjiMichael materially changed the complexion of the case for the respondents before the trial Court in that as Kourris, P.D.C., noted in his judgment, his testimony put at its highest, established no more than that Mr. HadjiMichael began since 1962 to manufacture occasionally sportswear with the 3-stripes on a very limited basis and subject to a specific request of purchasers. Appellants doubted the relevance of evidence pertaining to the manufacture of sportswear by Mr. HadjiMichael prior to the incorporation of the company, an entity separate and distinguished from its shareholders - *Bank of Cyprus (Holdings) v. Republic*** . A rider to this argument stems from appreciation of the fact that the relevance of such evidence, aside from its worth, lies in the fact that it tends to negative the claim of the appellants to exclusive use of the 3-stripe device in the mark and not in the link between the company and its shareholders. Be that as it may, I find it unnecessary to probe the question further in view of the inconclusiveness of the case of the respondents on the subject and the inevitability of the relevant findings made by Kourris, P.D.C.

* See Phipson, 11th Ed., para. 544, p. 649.

** (1985) 3 C.L.R. 1883.

A review of the evidence of the respondents on the production of sportswear with the 3-stripe device prior to the incorporation of the company, establishes no more than the following:-

(a) A small quantity of sportswear were manufactured by Mr. HadjiMichael aided by his wife from about the year 1962. Production was on a limited scale and the 3-stripes were only added at the request of individual customers. It was not a mark of the products of Mr. HadjiMichael. 5

(b) Production dropped further still between the years 1964-1969. At that period of time, Mr. HadjiMichael was a full-time salaried employee at a Nicosia sports shop, only engaged in the manufacture of sportswear in his spare time in order to supplement his income. The business started by Mr. HadjiMichael in 1969 was ruined in 1974 in the wake of the Turkish invasion. His shop at Hermes Street was occupied by the Turkish forces. 10 15

The inescapable inference on a proper appreciation of the evidence is that the 3-stripe device was not the adopted mark of the products of the sportswear of Mr. HadjiMichael or any other local manufacturer of sportswear for that matter. The 3-stripe device was adopted as a mark of the sportswear manufactured and marketed by the respondents after the incorporation of the company. Other local manufacturers too seemingly adopted the same mark for their products after the institution of the present proceedings. Mr. HadjiMichael himself admitted in his affidavit in opposition to an application for an interim order that prior to the incorporation of the company only occasionally were sportswear manufactured by himself branded with the 3-stripes. This occurred, as he said, 'επίοτε', that is, from time to time at uncertain intervals. On those occasions too he was, on his own evidence, primarily acting on the instructions and at the request of specific customers. The 3-stripes were not the adopted mark for his products. 20 25 30

This is an appropriate stage to examine and reflect upon findings common in the judgment of both members of the Court referable to the quality and reputation of the sportswear of appellants. Their sportswear were highly reputed for their quality and were successfully marketed in very many countries. A wide range of their products was continuously marketed in Cyprus since 1962. Over the years they acquired high reputation and captured 35 40

a big part of the Cyprus market. Such is the popularity of their sportswear that a great percentage of secondary school children show preference and wear them in a variety of circumstances. Their sportswear are extremely popular among athletes too, as well as the general public, rated as qualitative sportswear.

Now we shall deal with the significance of the 3-stripes as part of the mark of the sportswear of the appellants. With rare exceptions their products are uniformly branded with the 3-stripes as the ensign of their wear. A clover and the word Adidas complete the mark with which they brand and have branded their wear since first introduced in Cyprus and seemingly other countries too. The 3-stripes feature prominently and constitute the hallmark of their products. From a distance it is the only noticeable part of the mark. A visual inspection of the products of the rival traders consisting of Exhibits 4, 5 and 6, and 7, 8, 9 respectively, confirms the testimony of a number of witnesses that the 3-stripes is the prominent feature of the mark of appellants. The comparison also confirmed the similarity, if not identity, of the design of the 3-stripes featuring on the sportswear of the two manufacturers. Advertisement catalogues of the appellants further indicate that the 3-stripes feature on nearly all the products of the appellants.

Nicolaidis, D.J., as earlier indicated, ruled against the risk of confusion or more appropriately still, found that possibility to be remote or inconsistent because of amenity on the part of the purchasing public to distinguish between the wear of the two manufacturers on account of the addition of the clover and the word Adidas on the sportswear of appellants. Thus an essential ingredient of the tort of passing off was found to be missing disintitling the appellants from succeeding in the action. Only from a distance could the products of appellants and respondents be confused, an immaterial factor as the ordinary purchaser is not expected to make decision to buy from merely seeing products at such distance. Any confusion that might be engendered from a distance would be put right by the differences in the marks of the rival sportswear on closer notice across the counter.

Appellants disputed on the one hand the validity of the above finding and doubted its relevance on the other. In their submission, the Judge misdirected himself as to the considerations relevant to his determination, a misdirection that led him to attach undue importance to the amenity of the purchasing public to

distinguish between the rival products upon closer scrutiny. In order to appreciate the conflicting submissions on this most important aspect of the case, we must address ourselves to the elements of the tort of passing off in juxtaposition to the evidence bearing on the subject. The tort of passing off is designed to protect the property of the owner, if any, in the mark or get up under which his goods are sold or displayed for sale. For the owner, his agents or assignees, to succeed in a passing off action, they must establish such association between the mark and the products as to entitle them to use it to the exclusion of other manufacturers or traders. The association must, as we perceive the law on the subject, be strong enough as for the mark to be of itself suggestive of the origin of the goods. It must be linked to the goods of the owners, though it need not necessarily indicate their provenance. The mark or get up need not adhere to any particular pattern and may be wholly descriptive. The genesis of the right to the use of a mark, regarded in law as a quasi property right, is dependent on the nexus between the particular mark and the goods. Nor are the means of forging an association between the two limited in any specific way. It is settled that an association may be established by a wide variety of means, including an advertisement campaign*.

Whether the necessary link exists between the mark and the goods it characterizes is a question of fact. Evidence of user, the length of it and the reactions of the purchasing public is highly relevant to the determination of the issue. Ultimately the accrual of a right entitling the owner to protection in the use of the mark is, we repeat, dependent on the nexus between the mark and the products it brands.

The tort of passing off as defined by English law, is codified in Cyprus by s 35 of the Civil Wrongs Law. In point of fact it is modelled on the corresponding English tort and purports to reproduce its provisions as noticed in *Hadjikyriacos Co v United Biscuits*** It has been held that the codification of the tort in s 35 is not exhaustive, it may be supplemented by reference to the principles of the tort as known to English Law***.

Section 35 of the Civil Wrongs Law provides:

•Any person who by imitating the name or description, sign, label or otherwise causes or attempts to cause any goods to be mistaken for the goods of another person, so as to be likely to

* See, *Evren Warning BV v Townsend & Sons* [1979] 2 All ER 927

** (1979) 1 C.L.R. 689

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

lead an ordinary purchaser to believe that he is purchasing the goods of such other person, shall commit a civil wrong against such other person:

5 Provided that no person shall commit a civil wrong by reason only that he uses his own name in connection with the sale of any goods».

Our caselaw suggests that s. 35 not only it reproduces the corresponding English tort, but has the same range of application as this tort finds in England*. At the core of the tort is the likelihood of the ordinary purchaser confusing the products of the imitator with those of the plaintiff. The copying or imitation need not be fraught with a motive to bring about confusion**: nor is proof of fraudulent intention an indispensable element of the tort though the presence of such intention may be of assistance to the plaintiff in establishing the possibility of deception***. For the plaintiff to succeed in a passing off action he must prove:

- (a) A right to the use of the mark to the exclusion of the defendant established by reference the association of the mark with the products of the plaintiff.
- 20 (b) Imitation or copying of the mark of the plaintiff by the defendants in the process of manufacture or sale of the products.
- (c) Likelihood of confusion on the part of the ordinary purchaser arising from the imitation of the mark; and lastly,
- 25 (d) Damage resulting therefrom.

Notwithstanding the similarity of the 3-stripes displayed on the sportswear manufactured by the respondents to the 3-stripes used as part of the mark of the appellants, Nicolaidis, D.J. ruled out the possibility of confusion taking the view that the other two parts of the mark of the appellants helped to identify their products and made them distinguishable from those of the respondents. Only from a distance could the sportswear of the two parties be confused, long enough to obscure the presence of the clover and

* See, *inter alia*, *HadjiKynacos Co v United Biscuits (1979) 1 C.L.R. 689*, *Jonitexo Ltd v. Adidas (1984) 1 C.L.R. 263* The decision given in the appeal of the respondents in this case against the interim order made at the instance of the appellants after the institution of the present proceedings

** See, *Spalding v A. W. Gamage Ltd [1914-15] All E.R. Rep. 147*.

*** See, *O. T. Limited v. Cumming & Co [1915] 32 R.P.C. 69*

the word Adidas The ordinary purchaser could not be misled across the customer's counter as the last two aspects of the mark of the appellants would easily lead him to identify appellants' products

It is settled that imitation of part of a mark may, depending on its effects, sustain an action of passing off* Whether the ordinary purchaser is likely to be confused by the copying or imitation of the mark of another, is primarily a question of fact dependent on the prominence of the part of the mark imitated and its implications 5

Nicolaides, D J , asked, with respect, the wrong question in determining the likelihood of confusion The question is not whether ordinary purchasers can, on account of differences in the marks distinguish between the rival wear - the question asked by the Judge - but whether the association between the products of the plaintiffs and the part of the mark imitated is so strong as to create a likelihood of confusing the ordinary purchaser about the origin of the products of the defendants If the image of the products of the plaintiff is sufficiently associated with the part of the mark imitated, imitation thereof may affect the ordinary purchaser in a variety of ways as to the origin of the goods Ultimately, the question is whether the association of the mark with the products is strong enough as for the display of the mark to ring a bell in the mind of the ordinary purchaser about the origin of the products We are not concerned with the scrupulous purchaser, but with the ordinary purchaser who is apt to be swayed by images 10 15 20 25

In our judgment the evidence as to the likelihood of confusion on the part of the ordinary purchaser from the copying or imitation of the 3-stripe device used on the wear of the appellants was overwhelming The 3-stripes in the way portrayed on the sportswear of the appellants were the hallmark of their products pointing to their origin, that is, that they were manufactured by Adidas The other two features of the mark of the appellants, that is, the clover and the word 'Adidas', were less prominent and their absence from the products of the respondents did not serve to distinguish them from those of the appellants In fact, from a distance they were unnoticeable 30 35

There was a definite association between the 3-stripes in the

* See, *Payton & Co Ltd v Snelling Lambard & Co Ltd* [1901] A C 308 311

way devised and the products of the appellants. Naturally the Court is disinclined^d to allow a manufacturer to monopolize a mark consisting of stripes, a device lacking uniqueness in itself; but a right to its use may be established arising from long and consistent user on a large scale. The caselaw suggests that a balance must be kept between the need to sustain free competition on the one hand, and that of protecting the public from imitations on the other*. In this case the line must be drawn on the side of the appellants in the light of evidence that the imitation was likely to confuse the public in their choice of sportswear. Some evidence comes from the respondents themselves as to the implications of cessation of the imitation. There is evidence coming from their part that during the period that the interim order was operative and on that account forbidden from exporting their products with the 3-stripe device, their sales dropped dramatically. Although the evidence is not directly relevant to the implications of imitation of the mark of the appellants by the respondents in the Cyprus market it is suggestive of the reactions of the purchasing public in a wider sense to the use of the mark.

About the fact of imitation there can be no doubt. An identical 3-stripe device to that of appellants was portrayed on the sportswear of the respondents. Nor can there be any doubt about the fact that respondents competed for the preference of the same purchasing public, those interested in the acquisition of sportswear.

In the totality of the evidence on record it can be fairly inferred that by the copying or imitation of the 3-stripe device marking the qualitative sportswear of the appellants, respondents sought to pass off their goods as those of the appellants and that must be stopped, as *Kourris, P.D.C.*, decided.

No finding of the sustenance of specific damage is necessary in order to uphold a passing off action. Damage is presumed to occur in the absence of evidence to the contrary, and none was given in this case, whenever because of the imitation, the ordinary purchaser is likely to be confused about the origin of the goods**.

The addition of the word «Jonitexo» did not, as *Kourris, P.D.C.*, noted, remove the likelihood of confusion as the appellants too

* *Cadbury Schweppes v Pub Squash Co [1981] 1 All E.R. 213 (P.C.)*

** See, *inter alia*, *Kerly's Law of Trade Marks and Trade Names, 10 Ed.*, para. 16-04, p. 364

occasionally add names to the 3-stripe device. In our judgment the order approved by Kourris, P.D.C., was duly warranted by the need to protect the infringed rights of the appellants.

In the result the appeal is allowed with costs here and in Court below (for one advocate). The judgment of the trial Court founded on the decision of Nicolaides, D.J., is set aside and substituted by the following order, couched along the lines approved by Kourris, P.D.C.:- **5**

The respondents (defendants) Jonitexo Ltd., are hereby restrained personally, through their servants, agents or assignees, from manufacturing, producing, selling or offering for a sale, distributing or in any other way dealing with articles of clothing and more specifically sportswear, in particular, shorts, track-suits, T-shirts, in the Cyprus market bearing on their external side the 3-stripe device appearing on the products of the appellants (Adidas Sportshuhfabriken Adi Dassler KG., of Germany) or any variation thereof. **10**
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*Appeal allowed.
Order for costs
as above.*