

IN THE COURT OF APPEAL FOR SIERRA LEONE

CORAM: THE HON. MR. JUSTICE S.T. NAVO - PRESIDING JUSTICE  
THE HON. MR. JUSTICE D.E.M. WILLIAMS - JUSTICE OF APPEAL  
THE HON. MR. JUSTICE G. GELAGA KING - JUSTICE OF APPEAL

BETWEEN:-

GALLINA BLANCA S.A. - APPELLANT  
AND  
T. CHOITHRAMS & SONS (S.L.) LTD - RESPONDENTS

B.C.J. Thompson Esq., for the Appellant

Edward J. Akar, Esq., for the Respondents

JUDGMENT DELIVERED THE 14<sup>th</sup> DAY OF July 1988.

WILLIAMS J.A.:- This is an appeal against the Judgment of Thompson-Davies Judge (as he then was) delivered on the 4th day of July, 1983 in the High Court of Sierra Leone. The grounds of the appeal are:-

1. That the Learned Trial Judge misdirected himself in law by holding that the Courts will always protect persons or businesses against damage to their goodwill only where there was real and tangible danger of confusion of the Trade Mark or indicia complained of
2. That the Learned Trial Judge erred in law in failing to direct himself that in a case of Passing Off, it is sufficient as the facts show, to show that a substantial number of persons likely to become purchasers of the goods are liable to be deceived by the Defendant's use of the name of the goods complained of
3. That the Learned Trial Judge wrongfully conceived the law by holding that to believe that a reputation has attached to the Plaintiffs by use of the name the infringement of which is complained of, the Plaintiffs must be known in this country.
4. That the decision is against the weight of the evidence.
5. That the Learned Trial Judge misdirected himself on the law by failing to advert his mind to an important principle of Law in this type of case, that if the goods of a manufacturer have become known in the market by a particular name, the adaption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of the device
6. That the Learned Trial Judge misdirected himself by failing



to evaluate properly or at all a vital piece of evidence to wit - that P.W.4 at page 25 lines 1-20 of the Records that when she asked Defendant/Respondent for a packet of Jumbo cubes that they instead sold to her a packet of Chambo cubes and represented that Jumbo cubes and Chambo cubes were one and the same product.

The Reliefs sought from this court are:

- (a) That the Judgment obtained on the 4th day of July, 1983 be set aside.
- (b) That Judgment be entered for the Appellant
- (c) That the costs of the Action herein and below be borne by the Respondent.

Arguing ground 1 of the appeal, Counsel for the Appellant referred to page 37 lines 5-9 of the records of the case and submitted that what is contained therein is an oversimplification of the law. Lines 5-9 of the records read as follows:

" The courts will always protect persons or businesses  
" against the likelihood of damage to its goodwill, but  
" will only do so where there was real and tangible danger  
" of confusion arising by the use of the mark or indicia  
" complained of, even in the absence of evidence of actual  
" confusion "

Counsel then referred to the case of Reddaway vs Banham (1896) App.Cases 199. He referred also to the Headnote of the case of R.Choithram & Sons vs P.Choithram & Sons (1964/66) ALRS 253 at p.257 re principle of law. Counsel then submitted that nobody has any right to represent his goods as the goods of somebody else. He referred to the evidence of Kadiatu Koroma who testified as P.W.4 at the trial. Counsel for the appellant submitted further that a quick glance at the wrappers of the respective products leaves one with the irresistible motive that the respondent intended to pass off their goods as those of the appellant. He then referred to the case of Seixo vs Proyegea (1866) 1 Ch.App.192. Continuing, Counsel for the appellant submitted that the learned Trial Judge misconceived the law and the principle on which relief is granted.

Rounding up his argument in Ground 1, Counsel for the appellant submitted that the courts will prevent a trader from adopting a trade mark resembling that of a rival; that ordinary purchasers purchasing with normal caution are likely to be misled. In his argument in ground 2, Counsel for the appellant referred to the case of Norman Kark Ltd vs Odhams Press Ltd (1962) 1 A.E.R. 636. He referred to the records and submitted that the Learned Trial Judge has not applied his mind to the law applicable to this type of cases.

Dealing with ground 3 of the appeal, Counsel for the appellant stated that it has never been the state of the law as stated at page 37 that the plaintiff must be known in this country. It is the product Jumbo cubes that should be known in this country Counsel stressed. He then referred to the case of LEATHERCLOTH COY vs AMERICAN LEATHER CLOTH COY 11 English Rep.(H.L.) 1435; also to the case of Draper vs Frist (1939) 3 A.E.R. 513. Counsel for the appellant rounding up his argument, told the court with regard to grounds 4, 5, and 6, that he was adopting his arguments and submissions on the other grounds. Replying, Counsel for the respondents submitted that with regard to what is contained in lines 5-9 at page 37 of the records, the Learned Trial Judge stated the proper law. He contended that the Reddaway case is not applicable to this appeal. He then emphasized that the respondents are not the manufacturers of Chambo cubes and also not the sole importers and distributors of that product. They are traders selling all types of goods he re-emphasized. Counsel for the respondents submitted also that the subject-matter in the Choithram vs Choithram case cited by Counsel for the appellant was, Name of the firm and not products sold. He asked the court to treat the witness Kadiatu Koroma as a careless and indifferent person. He highlighted that Kadiatu Koroma deposed in the court below that she had been buying Jumbo cubes for more than two years. Counsel for the respondents then referred to the Norman Kark case previously



referred to by Counsel for the appellant and in particular to the second paragraph at page 384 and the last paragraph at page 392. He referred also to Halsbury's Laws of England 3rd Edition Volume 38 paragraph 1011 re class of persons likely to be confused. He then referred to the evidence of one Saad in the court below who, he submitted, had told the court below that the products were different. He stated also that the respondent sold both products but did not pass off one for the other. He submitted also that the wrappers of the respective products are different. Re the case of Seixo vs Provezende cited by Counsel for the appellant, Counsel for the respondents submitted that that case is not applicable to this appeal. He challenged that the Norman Kark case rather supports the respondent's case. He submitted also that there were two manufacturers in the Leathercloth case cited by Counsel for the ~~res~~ appellant; also that the Draper vs Trist case was for assessment of damages only. Rounding up, Counsel for the respondents submitted that there is no mark of Jumbo cubes put on Chambo. He submitted also that resemblance is a question of fact for the Judge to decide. He referred to the case of Michael Aboud & Sons vs Pee Cee (Pantap Stores) (1970/71) ALRSL 125 and submitted that there was no passing off by the respondents as complained of by the appellant. The respondents merely gave the buying public a choice which is not passing off Counsel emphasized. On that note he asked this court to dismiss the appeal with costs.

In his final reply, Counsel for the appellant invited this court to look at the Michael Aboud case and submitted that in that case, both parties were traders. He submitted further that the case of T. Choithram vs Cyprus Wines (1950/56) ALRSL 358 does not apply to this case. He then asked this court to find for the appellant and grant the reliefs sought.

The foundation and nature of an action for passing off are based on the following definition and principles of law:



It is an actionable wrong for a defendant to represent , for trading purposes, that his goods are those or that his business is that of the plaintiff and it makes no difference whether the representation is effected by direct statement or by using some of the badges by which the goods of the plaintiff are known to be his or any badge 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. 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. In Kerly's Law of Trade Marks and Trade Names 8th Edn it is stated that the principle of law may be plainly stated that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures, does or does not come up to the proposition enunciated; each particular case must always be a question of evidence and the more simple the phraseology the more like it is to a mere description of the article sold the greater becomes the difficulty of proof; but, if the proof establishes the fact, the legal consequences appear to follow. This was, in fact, what Lord Halsbury said in the case of Reddaway vs Banham (1896) A.C. at p. 204. In the case of Burberrys vs Cording (1909) 26 R.P.C. 693 at p.701, Parker J in his Judgment said:

" The principles of law applicable to a case of this sort  
" are well known. On the one hand, apart from the law as  
" to trade marks, no one can claim monopoly rights in the  
" use of any word or name, or indeed in any other way, to  
" represent his goods as being the goods of another to  
" that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt  
" granted to protect property, but the property, to protect  
" which it is granted, is not property in the word or name,



" but property in the trade or goodwill which will be  
" injured by its use. If the use of a word or name be  
" restrained, it can only be on the ground that such  
" use involves a misrepresentation, and that such misre-  
" presentation has injured, or is calculated to injure,  
" another in his trade or business. If no case of decep-  
" tion by means of such misrepresentation can be proved,  
" it is sufficient to prove the probability of such de-  
" ception, and the court will readily infer such probabi-  
" lity if it be shown that the word or name has been  
" adopted with any intention to deceive. In the absence  
" of such intention, the degree of readiness with which  
" the court will infer the probability of deception must  
" depend on the circumstance of each particular case, in-  
" cluding the nature of the word or name, the use of which  
" is sought to be restrained. It is important for this  
" purpose to consider whether the word or name is prima  
" facie in the nature of a fancy word or name, or whether  
" it is prima facie descriptive of the article in respect  
" of which it is used. It is also important for the same  
" purpose to consider its history, the extent to which it  
" is or has been used by others. If the word or name is  
" prima facie descriptive or be in general use, the  
" difficulty of establishing the probability of deception  
" is greatly increased. Again, if the person who seeks  
" the injunction has not used the word or name simply for  
" the purpose of distinguishing his own goods from the  
" goods of others, but primarily for the purpose of de-  
" noting or describing the particular kind of article to  
" which he has applied it, and only secondarily, if at all,  
" for the purposes of distinguishing his own goods, it  
" will be more difficult for him to establish the pro-  
" bability of deception. But whatever be the nature or  
" history of the word or name, in whatever way it has been  
" used, either by the person seeking the injunction or by  
" others, it is necessary where there has been no actual  
" deception, to establish at least a reasonable probability  
" of deception"

See also the case of Deloville (G.B.) Ltd vs Harry Stanley  
(1946) 63 R.P.C. 103 at p. 104. In a case of this nature, the  
court must be satisfied that defendant's conduct is calculated  
to pass off or at least, to produce such confusion in the minds  
of probable customers or purchasers or other persons with whom  
the plaintiff has business relations as would be likely to



lead to the other goods being bought and sold for his. If it is shown to have been intended by the defendant to deceive in this way, the court will not generally push the injury further. Lord Macclesfield in the case of Michell vs Reynolds 1 Sm L.C. (10th Edn.) at p.391 said:

" He only can suffer by his knavery and surely the courts  
" of justice are not concerned lest a man should pay too  
" dear for being a knave"

Cozens-Hardy M.R. also said in the case of Claudius Ash, Sons & Co vs Invicta Manufacturing Co.Ltd (1912) 29 R.P.C.:

" If you find a defendant who is a knave, you may  
" presume he is not a fool"

In the case of Lever vs Bedingfield (1896) 16 R.P.C. 3 (C.A.) it is stated that the intention is only evidence of the actual deception or probability of deception which may be inferred from it. If the court does not believe that there is any probability of deception the action must fail. Again Lord Esher (M.R.) in the same case of Reddaway vs Banham referred to earlier, made this statement:

" The law does not take notice of a fraudulent intention  
" in a man's mind if he does nothing to carry out the fraud"

Earl Loreburn in the case of Claudius Ash Sons & co referred to already, made this classical statement:

" When ~~one~~ establish the intent to deceive it is only ~~an~~  
" a shortstep to proving that the intent has been success-  
" ful, but still it is a short step even though it be a  
" short step"

The principle elaborated by Lord Kingsdown in the Leather cloth Co vs American Leather cloth Co (1865) H.L.C523, 538 is stated as follows:

" The fundamental rule is that one man has no right to put  
" off his goods for sale as the goods of a rival trader and  
" he cannot therefore (in the language of Lord Langdale in  
" the case of Perry vs Truefit (1842) 6 Beav.66) be allowed  
" to use names, marks, letters or other indicia by which  
" he may induce purchasers to believe that the goods which  
" he is selling are the manufacture of another person."

The onus of proving deception is upon the plaintiff. It is not for the defence to prove that there are persons who purchase the goods of a defendant who are not misled if it is established that there are a large number of persons who are. In this case, the appellant as plaintiff has not established having regard to the evidence adduced, that there are a large number of persons who were misled by the Chambo cubes. Only one witness as a purchaser, was called at the trial; a witness who not only can be described as a careless and indifferent person but also whose evidence can be described as very suspect. Here was a purchaser who said that she had been buying Jumbo cubes for over two years thus knowing Jumbo cubes well.; the same purchaser in her evidence in the court below deposed that she went to the shop and asked for Jumbo cubes then Chambo cubes were sold to her. Could she not there and then have said that she did not want that kind of cubes? Would she, if honestly speaking, have taken the Chambo cubes home having known Jumbo cubes for so long? There is no evidence that her Aunt had known Jumbo cubes prior to the alleged incident but there is evidence that as soon as she took the Chambo cubes home her Aunt detected the difference and rejected it. Again the witness was a mere purchaser who eventually got what she wanted; what then was her business going to tell the proprietors of what had happened at Choithrams. How came her to know who were the proprietors of Jumbo cubes - a mere purchaser at that. How came her to know where to go to find the proprietors of Jumbo cubes? These are some of the questions unanswered, which make her evidence very suspect. But to compound the suspicion, take the evidence of P.W.3 at the trial in the court below; Nabil Naimir Saad a name which bespeaks a Lebanese and that lone purchaser did say that it was a Lebanese who took down her name and address. Mr. Saad said in his evidence that he went to the



Guard Street Fourah Bay Road market where he met a lady selling Chambo cubes and Maggi cubes; he did not ask the lady whether she had Jumbo cubes to sell. This witness rather went on to depose that in his presence a customer came and asked for Jumbo cubes and the seller produced Chambo cubes, which the customer refused to take, that is to say, the purchaser was not deceived - she was able immediately to see that it was not Jumbo cubes. He went on to say however, that the seller told the purchaser that Chambo cubes was the new type of Jumbo cubes. That was another prospective purchaser who, on the evidence of the plaintiff/appellant, was not deceived in anyway. Let it not be forgotten that the onus of proving deception is on the plaintiff. Can such evidence support deception? I think not. But why did Mr. Saad not take down the name and address of that seller or that buyer as a prospective witness? I think it pertinent to re-state here that if the court does not believe that there is any probability of deception the action must fail. Instances of actual deception need not be proved if the court is otherwise satisfied of the probability of deception and on the other hand they are not necessarily conclusive where ~~and~~ they have occurred in cases, for example, where their number is comparatively insignificant - this was so stated in the case of Civil Service Supply Association vs Dean (1879) 13 Ch.D.512. It has been held that persons to be considered in estimating whether the resemblance between the marks in question is likely to deceive are all those who are likely to become purchasers of the goods upon which the marks are used provided that such persons use ordinary care and intelligence. It must be pointed out here that intelligence does not mean or conote book learning.

During the course of the arguments for and against the appeal, certain decided cases were cited. Counsel for the appellant cited the case of Reddaway vs Banham and Counsel



for the respondent submitted that that case is not applicable to this appeal. I have read ~~th~~ through that case and I cannot agree that it is not applicable to this appeal. I think that case is very instructive for the purposes of this appeal. It is in that case that Lord Halsbury L.C. enunciated the principle of law when he said:

" For myself I believe the principle of law may be very  
" plainly stated and that is, that nobody has any right  
" to represent his goods as the goods of somebody else"

Having enunciated that principle of law the Learned Jurist issued this injunction:

" How far the use of particular words, signs or pictures  
" does or does not come up to the proposition which I  
" have enunciated in each particular case must always be a  
" question of evidence and the more simple the phraseo-  
" logy the more like it is to ~~be~~ a mere description of the  
" article sold, the greater becomes the difficulty of  
" proof; but if the proof establishes the fact the legal  
" consequence appears to follow"

Counsel for the appellant referred also to the case of Seixo vs Provezende. In that case, Lord Cranworth L.C. made these statements:

" What degree of resemblance is necessary from the nature  
" of things is a matter incapable of definition a priori.  
" All that the courts of justice can do is to say that  
" no trader can adopt a trade mark so resembling that of  
" a rival as that ordinary purchasers purchasing with  
" ordinary caution are likely to be misled  
" x x x x x x x x x x x x x  
" It would be a mistake however, to suppose that the  
" resemblance must be such as would deceive persons  
" who should see the two marks placed side by side.  
" The rule so restricted would be of no practical use"

This is a case which, no doubt, is relevant to this appeal. The case of Norman Kark Publications Ltd vs Odhams Press Ltd (1962) W.L.R.Vol.1 380 was referred to by both Counsel. In that case, the plaintiff was striving to protect the use of the name "Today". In this appeal, the appellants are not protecting the use of the name "Jumbo"



In his reply to the arguments of Counsel for the defendant Counsel for the appellant invited this court to look at the case of Michael Aboud & Sons vs Pee Cee & Sons (Pantap Store) (1970/71) AIRSL 125. I have done so and the following passages in the Judgment of Browne-Marke J (as he then was) are very instructive viz:

" Although in considering the similarity of trade marks it  
" will be necessary to compare the two marks to ascertain  
" whether the resemblance is such as to be calculated to  
" deceive, the principle to be applied is not how much the  
" marks resemble each other when examined together but whe-  
" ther the general impression is the same or substantially  
" so, because marks are remembered by general impression or  
" by some significant detail rather than by photographic  
" recollection"

" For a passing-off action to succeed there must be evi-  
" dence to show that customers were misled or deceived into  
" confusing the defendant's product with that of the plain-  
" till, and evidence that the packaging of both products  
" is the same size or colour may be relevant in helping to  
" prove that this has happened"

In his judgment in the court below, the Learned Trial Judge found as a fact, that with respect to infringement, the design and colour of the wrapping of the defendant's (now respondent) product do not in anyway infringe the plaintiff's (now appellant) trade mark as shown in exhibits C and E. The Learned Trial Judge also found that the likelihood of confusion between Jumbo cubes and Chambo cubes is not sufficiently great bearing in mind that the name Maggi cubes as stated by D.W.2 has become the publici juris of all cubes broths in this country. The Learned Trial Judge in his judgment stated also that:

" The courts will always protect persons or businesses  
" against the likelihood of damage to its goodwill, but  
" will only do so where there was real and tangible danger  
" of confusion arising by the use of the mark or indicia  
" complained of, even in the absence of evidence of actual  
" confusion."



In the case of Draper vs Trist (1939) 3 A.R.R.513 the subject-matter was assessment of damages. It is not immediately relevant to this appeal.

The case of passing off is one based on facts adduced in evidence before the court. The role of the trial judge is to evaluate the evidence examine the marks and on the facts decide whether or not there was any intention to deceive or any probability of any intention to deceive. If there was, on the facts, then the plaintiff ought to succeed. If there was no intention to deceive or there was no probability of any intention to deceive then the plaintiff should fail. The appellant is asserting that there was an intention to deceive on the part of the defendants. <sup>respondents</sup> On the other hand, the <sup>respondents</sup> defendants contend that there was no intention to deceive; that they brought in Chambo cubes to afford greater choice to purchasers and that they innocently sold both Jumbo and Chambo cubes and other broths leaving the purchasers to take their pick.

According to the evidence adduced by the appellant it has been shown that Chambo cubes are different from Jumbo cubes. According to the evidence, Jumbo cubes are stronger whilst Chambo cubes are milder. Some purchasers, there must be, who would require a milder cube - that is Chambo cubes; Others there are, who would prefer the stronger cube - that is Jumbo cubes. We have seen the respective wrapper of the two cubes and for my part I would say that the wrappers are not the same. They are not the same to the extent that on the evidence a purchaser was shown Chambo cubes and she immediately rejected it saying that she wanted Jumbo cubes. There is, however, the evidence that was given by that other purchaser; so the court was left with two divergent pieces of evidence both proffered by the plaintiff in the court below. Upon such evidence the Learned Trial Judge came to a conclusion in these words:




" What indeed the evidence tends to disclose is that  
" there might be embarrassment and inconvenience to the  
" the plaintiff and these are not sufficient to prove  
" this claim, but not confusion in the minds of the  
" public as between the defendants and the  
" plaintiffs"

His Lordship then went on to dismiss the plaintiff's claim.

On all the authorities and the facts as disclosed in  
the evidence before the court below and what was argued in  
this court, I do not think that there is justification or  
cause shown to disturb the finding of fact by the Learned  
Trial Judge.

In the circumstances, this appeal must fail and it is  
accordingly dismissed with Costs such Costs to be taxed.

Order accordingly.

 J.R.  
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I agree .....

I agree .....