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REFERENCES

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Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 26 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 26 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

Halsbury's Statutory Instruments

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Arsenal Football Club plc v Reed

(Case C-206/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES RODRÍGUEZ IGLESIAS (PRESIDENT), PUISOCHET, WATHELET, TIMMERMANS (RAPPORTEUR) (PRESIDENTS OF CHAMBERS), GULMANN, EDWARD, JANN, SKOURIS, MACKEN, COLNERIC AND VON BAHR
ADVOCATE GENERAL RUÍZ-JARABO COLOMER

14 MAY, 13 JUNE, 12 NOVEMBER 2002

European Community – Trade marks – Infringement – Defence – Use of mark as badge of support, loyalty or affiliation – Council Directive (EEC) 89/104, art 5(1)(a).

The claimant football club had registered, inter alia, the words ‘Arsenal’ and ‘Arsenal Gunners’ as trade marks for a class of goods which consisted of articles of outer clothing, articles of sports clothing and footwear. It designed and supplied its own products or had them made and supplied by a network of approved resellers. From several stalls located outside the claimant’s stadium, the defendant had sold football souvenirs and memorabilia, almost all of which was marked with signs referring to the claimant. The defendant displayed a notice which stated that the words or logos on the goods offered for sale did not ‘imply or indicate any affiliation or relationship with the manufacturers or distributors of any other product ...’ Claiming, inter alia, that the defendant had infringed its trade marks, the claimant brought proceedings. The High Court rejected the claimant’s argument that the use by the defendant of the signs registered as trade marks was perceived by those to whom they were addressed as a badge of origin, so that the use was a ‘trade mark use’. Instead, it found that the signs affixed to the defendant’s goods were, in fact, perceived by the public as ‘badges of support, loyalty, or affiliation’. It concluded that the claim might succeed only if the protection conferred on the trade mark proprietor by the provisions of Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks)¹ was interpreted widely so that it prohibited use by a third party other than trade mark use. Accordingly, the court decided to stay the

¹ The relevant provisions of Directive 89/104, so far as material, are set out at judgment paras 5–8, below.

proceedings and refer the following question to the Court of Justice of the European Communities: 'Where a trade mark is validly registered and ... a third party uses in the course of trade a sign identical to that trade mark in relation to goods which are identical with those for [which] the trade mark is registered ... does the third party have a defence to infringement on the ground that the use complained of does not indicate trade origin ... If so, is the fact that the use in question would be perceived as a badge of support, loyalty or affiliation to the trade mark proprietor a sufficient connection?' a
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Held – The essential function of a trade mark was to guarantee the origin of the marked goods or services to the consumer or end user by enabling the goods or services to be distinguished from others which had another origin, without any possibility of confusion. To ensure that guarantee, the proprietor had to be protected from competitors who sought to take unfair advantage of the status and reputation of the mark by selling products illegally bearing it. The exclusive right under art 5(1)(a) of the directive was conferred in order to ensure that the trade mark could fulfil its functions. The exercise of that right had therefore to be reserved for cases where a third party's use of the sign affected or was liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods. Whilst certain uses for descriptive purposes were excluded from the scope of art 5(1) since they did not affect any of the interests which that provision aimed to protect and did not fall within the concept of use within that provision, the situation in the main proceedings was fundamentally different, since the use of the sign was in the context of sales to consumers and was obviously not intended for purely descriptive purposes. The use of signs such as 'Arsenal' in the instant case created the impression that there was a material link in the course of trade between the goods concerned and the trade mark proprietor. That conclusion was not affected by the presence of the notice stating that the goods were not official goods, since there was a possibility that some consumers might, if they were to come across the goods after they had been sold by the defendant and taken away from the stall, interpret the use of the claimant's signs as designating the claimant as the undertaking of origin of the goods. Moreover, there was no guarantee that all the goods designated by the trade mark had been manufactured or supplied under the control of a single undertaking which was responsible for their quality, as was required by authority. In those circumstances, it followed that the use of the sign which was identical to the trade mark at issue was liable to jeopardise the guarantee of origin which constituted the essential function of the mark. It was consequently a use which the proprietor might prevent under art 5(1) of the directive. It was immaterial that in the context of that use, the sign was perceived as a badge of support for or loyalty or affiliation to the proprietor of the mark (see judgment paras 47–62, below). c
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Hoffmann-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH Case 102/77 [1978] ECR 1139 and *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634 applied. i

Hölterhoff v Freiesleben Case C-2/00 [2002] All ER (EC) 665 distinguished.

Notes

For the use of trade marks to indicate the characteristics of goods and services, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 90.

Cases cited

- a** *Ansul BV v Ajax Brandbeveiliging BV* Case C-40/01 (2002) Transcript (opinion), 2 July 2002, ECJ.
Bayerische Motorenwerke AG (BMW) v Deenik Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905, ECJ.
Bristol-Myers Squibb v Paranova A/S Joined cases C-427/93, C-429/93 and C-436/93 [1996] ECR I-3457, ECJ.
- b** *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc (formerly Pathe Communications Corp)* Case C-39/97 [1998] All ER (EC) 934, [1998] ECR I-5507, ECJ.
Davidoff & Cie SA v Gofskid Ltd Case C-292/00 (2002) Transcript (opinion), 21 March 2002, ECJ.
Gottardo v Istituto nazionale della previdenza sociale (INPS) Case C-55/00 [2002] ECR I-413, ECJ.
- c** *Hoffman-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* Case 102/77 [1978] ECR 1139, ECJ.
Hölterhoff v Freisleben Case C-2/00 [2002] All ER (EC) 665, [2002] ECR I-4187, ECJ.
Libertel Group BV v Benelux Trademarks Office Case C-104/01 (2002) Transcript (opinion), 12 November 2002, ECJ.
- d** *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97 [1999] All ER (EC) 587, [1999] ECR I-3819, ECJ.
Loendersloot (t/a F Loendersloot Internationale Expeditie) v George Ballantine & Son Ltd Case C-349/95 [1997] ECR I-6227, ECJ.
Marca Mode CV v Adidas AG Case C-425/98 [2000] All ER (EC) 694, [2000] ECR I-4861, ECJ.
- e** *Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959, ECJ.
Parfums Christian Dior SA v Evora BV Case C-337/95 [1997] ECR I-6013, ECJ.
Philips Electronics NV v Remington Consumer Products Ltd Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475, ECJ.
- f** *Philips Electronics NV v Remington Consumer Products Ltd* [1999] RPC 809, CA.
Robelco NV v Robeco Groep NV Case C-23/01 (2002) Transcript (opinion), 21 March 2002, [2002] All ER (D) 311 (Nov), ECJ.
SA CNL-SUCAL NV v HAG GF AG (HAG II) Case C-10/89 [1990] ECR I-3711, ECJ.
SA Société LTJ Diffusion v SA SADAS Case C-291/00 (2002) Transcript (opinion), 17 January 2002, ECJ.
- g** *SABEL BV v Puma AG, Rudolf Dassler Sport* Case C-251/95 [1997] ECR I-6191, ECJ.
Shield Mark BV v Joost Kist (t/a Memex) Case C-283/01 OJ 2001 C275 p 7, ECJ.
Sieckmann v Deutsches Patent-Und Markenamt Case C-273/00 (2001) Transcript (opinion) 6 November 2001, ECJ.
- h** *Zino Davidoff SA v A&G Imports Ltd, Levi Strauss & Co v Tesco Stores Ltd, Levi Strauss & Co v Costco Wholesale UK Ltd* Joined cases C-414–C-416/99 [2002] All ER (EC) 55, [2002] Ch 109, [2002] 2 WLR 321, [2001] ECR I-8691, ECJ.

Reference

- j** By order of 4 May 2001, received at the Court of Justice of the European Communities on 18 May 2001, the High Court of Justice of England and Wales, Chancery Division ([2001] IP & T 810) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions (set out at judgment para 27, below) on the interpretation of art 5(1)(a) of the First Council Directive (EEC) 89/104 (to approximate the laws of the

member states relating to trade marks) (the First Directive). Those questions were raised in proceedings between Arsenal Football Club plc (Arsenal FC) and Matthew Reed concerning the selling and offering for sale by Mr Reed of scarves marked in large lettering with the word 'Arsenal', a sign which is registered as a trade mark by Arsenal FC for those and other goods. Written observations were submitted on behalf of: Arsenal FC by S Thorley QC and T Mitcheson, Barrister, instructed by Lawrence Jones, Solicitors; Mr Reed by A Roughton, Barrister, instructed by Stunt & Son, Solicitors; the Commission of the European Communities by NB Rasmussen, acting as agent; the European Free Trade Association Surveillance Authority by P Dyrberg, acting as agent. Oral observations were made on behalf of Arsenal FC, represented by S Thorley and T Mitcheson; Mr Reed, represented by A Roughton and S Malynicz, Barrister; and the Commission, represented by NB Rasmussen and M Shotter, acting as agent. The language of the case was English. The facts are set out in the opinion of the Advocate General.

13 June 2002. **The Advocate General (D Ruíz-Jarabo Colomer)** delivered the following opinion¹.

1. Is the proprietor of a registered trade mark entitled to prevent any use, in the course of trade, of identical signs for identical goods or services, other than the uses covered by art 6 of the First Directive relating to trade marks (the First Directive)?² Or, on the contrary, does the exclusivity conferred by art 5 only extend to use which discloses its origin, that is to say, the connection between the proprietor and the goods or services which the trade mark represents? And, if the answer to that second question is in the affirmative, is use as a badge of support, loyalty or affiliation to the owner of the sign indicative of such a connection?

2. Those are the doubts which the High Court of Justice of England and Wales—hereinafter referred to as the High Court—wishes the Court of Justice of the European Communities to dispel in these proceedings for a preliminary ruling.

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3. Arsenal Football Club plc (Arsenal), also nicknamed 'the Gunners', is a well-known English football club, founded in 1886.

4. Since 1989, Arsenal has registered two word trade marks, 'Arsenal' and 'Arsenal Gunners', and two graphic marks, the Crest Device and the Cannon Device, all for the purpose of distinguishing articles of clothing and sports footwear, goods falling within class 25 of the international trade mark nomenclature.

5. Mr Matthew Reed is a trader who since 1970 has been selling souvenirs and articles of clothing connected to the claimant club in the vicinity of Highbury football ground, the team's stadium. Those items bear the signs which the club registered as trade marks.

6. In particular, he offers for sale scarves prominently marked with the word 'Arsenal'. They are products which Mr Reed advertises as unofficial in the stalls from which he carries on business, with a large notice with the following text:

1 Original language: Spanish.

2 First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1).