

Neutral Citation No. [2013] NICC 20

Ref: 2013NICC20

*Judgment: approved by the Court for handing down*

Delivered: 22/11/13

*(subject to editorial corrections)\**

**CRAIGAVON CROWN COURT (sitting in BELFAST)**

**R**

**v**

**RAFAL TOMASZ RYMACKI  
and  
KRZYSTOF DAWID JANKOWSKI**

His Honour Judge McFarland

1. The defendants have each pleaded guilty to two offences of selling goods bearing an unauthorised trade mark and trading in counterfeit products both contrary to section 92 of the Trade Marks Act 1994. The offences carry a maximum sentence of 10 years imprisonment.
2. On the 24<sup>th</sup> May 2012 the police searched premises at Union Street and Church Street in Portadown. They found 1,212 pairs of underwear bearing the Calvin Klein logo. This underwear would appear to have been manufactured in China, was imported into Northern Ireland and was destined to be sold to the public on the internet using the eBay website. A subsequent examination of the underwear indicated that it was counterfeit. Other paperwork recovered indicated that both defendants were involved in the business of importation of the goods from China and then selling them using their homes as a base. By their pleas they have acknowledged their guilt.
3. The defendants are brothers and are of Polish descent. They came to live in Northern Ireland. Both had full time jobs, but in an effort to boost their income they set up a trading business under the style "RJ Distribution". Both state that this involved legitimate trading by buying items, mainly clothing, in bulk and then selling them on to the public using the internet. All this was done from their own homes. The police were unable to find any other counterfeit goods or other evidence of trading in counterfeit goods, which would appear to support this trading history.

4. As for the trading in the Calvin Klein items, Jankowski stated that he initially believed the items to be authentic having received a certificate from the suppliers. He was unable to produce the certificate. Even if such a certificate existed, which I doubt, it was clearly a fraudulent document and that would be obvious as such to any person. Jankowski stated that the items cost about £2 each and were sold for between £4 and £7 each. Rymacki suggested other amounts with the purchase price between US\$5 and US\$8, and the sale price for packs of five at £40 (i.e. £8 each).
5. The sale was through the eBay website using PayPal as the payment method. Further police investigations revealed that three accounts were used on the eBay website - rjtrader, rmdirectltd and estemos1. In total 1007 pairs of underwear were sold during the period 22<sup>nd</sup> November 2011 and 24<sup>th</sup> December 2012. The average sale price was £5.53 per pair. Applying this figure as a potential sale price for the items seized by the police (1,212 pairs of underwear) an estimate of the potential net profit to be gained by the defendants from the sale of the items seized is £4,278.
6. Calvin Klein has indicated that its male underwear would retail at between £18 and £22 each. Calvin Klein is a well-recognised retailer which has invested heavily in research and development, marketing, advertising and branding. Using its figures as a base-line, its loss in respect of the items already sold would be between £21,816 and £26,664 and its potential loss in respect of the items seized would be between £18,126 and £22,154. This pre-supposes that customers attracted to purchase the items from the defendants on the eBay website would have been happy to spend £18 - £22 for the legitimate item. It is, however, acknowledged that even if the internet purchasers would not be attracted to buy at that price, the existence of these fake items on the market and on display does diminish the appeal of a product which is marketed for its exclusiveness and sophistication. Quantification of any such loss sustained by Calvin Klein is therefore impossible. Nonetheless those individuals and companies who through their design ability, inventiveness, hard work, and investment of time and capital to establish a brand that people aspire to be associated with must be protected from those who would attempt to undermine their profits by knowingly passing off fake goods.
7. Offences of this nature are essentially a fraud, perpetrated either against the purchaser and/or against the trademark holder. A purchaser could be assuming that they are purchasing a real product, manufactured by the trademark holder. The level of any purchaser's

belief in such an assumption will depend on the circumstances of the purchase and the amount paid. Whatever the circumstances of the purchase, the trademark owner is a victim in that its business and profitability is affected by such sales.

8. In addition to the direct impact of the crime, there are associated issues arising out of the impact of loss of business on the part of genuine wholesale and retail outlets and consequential loss of revenue to the Exchequer through the taxation of such outlets. In certain specific cases involving the sale of goods such as medicinal products, electrical goods or children's toys, there may be quality defects that could give rise to serious health and safety issues arising out of sale and distribution of fake trademarked products.
9. There is a clear public interest in the enforcement of laws designed to protect intellectual property such as trademarks.
10. There are no guideline decisions issued by the Court of Appeal in respect of this type of offending. The Trade Marks Act 1994 applies throughout the United Kingdom, and it is desirable that there be a degree of consistency when offenders are sentenced in different parts of the country for offences under the Act. To this end, decisions of the England and Wales Court of Appeal are of some relevance, as are guidelines issued by the English Sentencing Council.
11. Advice has been issued to Magistrates' Court by the English Sentencing Council (May 2008 at page 106) using the familiar approach of the Council by setting out a table for appropriate sentences for first time offenders after conviction -

<b>Examples of nature of activity</b>	<b>Starting point</b>	<b>Range</b>
<b>Small amount of items</b>	Band C fine	Band B fine to low-level community order
<b>Larger number of counterfeit items but no involvement in wider operation</b>	Medium level community order, plus fine	Low level community order to 12 weeks custody, plus fine
<b>High number of counterfeit items or involvement in wider operation e.g. manufacture or distribution</b>	12 weeks custody	6 weeks custody to Crown Court
<b>Central role in large-</b>	Crown Court	Crown Court

(References to fine bands relate to an English practice of fine calculation. Band B is an amount equivalent to 100% of an offender's relevant weekly income, and Band C is 150%.) Aggravating factors include a high degree of professionalism, a high degree of profit and purchasers being at risk of harm from the goods. A mitigating factor would be mistake or ignorance about the provenance of the goods. No guidance is given for the Crown Court in England.

12. Recent decisions of the England and Wales Court of Appeal include Yanko [1996] 1 Cr App R (S) 217, Ansari [2000] 1 Cr App R (S) 94, Woolridge [2005] EWCA Crim 1086, Lee [2010] EWCA Crim 268, Brayford [2010] EWCA Crim 2329, Manders [2012] EWCA Crim 908 and Khan and others [2013] EWCA Crim 802
13. In particular I refer to Yanko (a case involving conspiracy to manufacture medicinal products). The court identified several serious aspects. First, there was the undermining of the business of reputable companies by producing imitations; secondly there was a risk to the health of consumers; thirdly there was the leading role played by Yanko in what was a highly professional enterprise. In Ansari (a case involving sale of fake designer clothing) emphasis was made on consideration of the likely and actual profit from the trading enterprise. Finally, in Khan at [44] Moore-Bick LJ identified five features that should be considered by the court –
  - Offences of this type are difficult, time consuming and expensive to detect
  - They undermine reputable companies who are entitled to be protected
  - The court should consider how professional the offending was
  - There should be an estimation of the likely or actual profit
  - The need for an element of deterrence must be borne in mind.
14. Any person involved in the manufacture and distribution of counterfeit items should expect to receive a custodial sentence. At this level of offending there is a strong element of deterrence in the sentence. It follows that unless there are exceptional circumstances this sentence should not be suspended (see DPP's Ref 13, 14 and 15 of 2013 [2013] NICA 63 at [14]). As to the length of such a sentence much will depend on the circumstances of the case. Offences of this nature are essentially confidence frauds, so the seriousness of the offence will depend largely on the amount of loss to the trademark owner or profit generated by the offenders whichever figure is the more accurate in determining the correct level of culpability. Sums up to £20,000 should

attract sentences, after a contest, with a starting point of between 1 and 3 years, sums up to £100,000 should have a starting point of between 3 and 4 years, sums up to £500,000 should have a starting point of 4 and 5 years, and for sums over £500,000 the starting point should be between 5 and 6 years.

15. At the other end of the range, those involved in the sale to the public of a small number of counterfeit items should receive a fine. For those involved in the sale of a larger number of items, a careful analysis of the scale of the operation is required, with sentences ranging from a fine or community order to a short custodial sentence. A relevant record for similar offences or offences involving fraud or dishonesty or a failure to heed warnings about previous conduct (see for example the case of Lee) would be of particular significance.
16. As always, co-operation with the law enforcement agencies and the owner of the trademark would be a very important factor. Admission of one's guilt at interview followed by a plea of guilty at arraignment should attract an appropriate reduction in sentence in accordance with Article 33 of the Criminal Justice (NI) Order 1996. This would normally be in the region of 33%. A suspended sentence may be appropriate for persons with a lesser role, who enter their guilty plea at an early opportunity, co-operate with the authorities, show remorse, and have a clear criminal record.
17. Compensation orders may be appropriate in order that the trademark owners and/or innocent purchasers be compensated if they suffer real loss as a result of an offender's criminal activity.
18. Applying these principles to the facts in this case, I do not consider that there are any aggravating factors. The prosecution submitted that it was a sophisticated operation by virtue of the use of the internet. I do not believe that the use of the internet for the sale shows a degree of sophistication. The eBay website and payment through the PayPal account is widely used by many individuals, both to sell and to purchase items of all sorts. In fact, the use of the internet no doubt was instrumental in their detection as the offering of the Calvin Klein items would have attracted the attention of the company. The only other possible aggravating factor would be the scale of the operation, which I will deal with shortly.
19. There are no mitigating factors relating to the offence itself. As for personal mitigation much of what has been said by counsel and is set out in the respective pre-sentence reports has similar application to both defendants. They are extremely hard-working individuals attempting to better their lives by coming with their families to

Northern Ireland. In an effort to improve the well-being of their families they started up a legitimate trading company, buying and selling goods. Although they were tempted to branch into the sale of fake goods, the profits were relatively modest in nature. There were no trappings of wealth and no evidence of extravagant life-styles. There has not been an application under the Proceeds of Crime legislation. They have no previous convictions for crimes of this type or other crimes involving dishonesty or violence. They have both pleaded guilty and have acknowledged their guilt. As Polish citizens, with a limited grasp of English, any time in prison would be difficult.

20. I do not believe that any purchaser buying the underwear on the eBay website would have been expecting to receive genuine Calvin Klein items because of the price. They would have been engaging in a pretence, in an attempt to impress others by wearing underwear associating themselves with a highly sophisticated brand of clothing. Perhaps it would also improve their self-esteem. In any event, I believe that this is not a case where one could accurately estimate the loss to the Calvin Klein brand. The figures of £40,000 - £50,000 loss are highly speculative as they assume that the purchaser would have paid the full price for the underwear.
21. Given the facts surrounding this case, including the nature of the goods, the method of sale, and the price offered, a much better measure of seriousness would be the number of counterfeit items involved and the actual profit made, or likely to be made. 1,212 counterfeit items were seized and 1,007 had already been sold. This would mean total actual and potential sales in the region of £12,000 with a total actual and potential profit of about £8,000.
22. I consider the appropriate sentence, after a contest, would be 15 months in custody. I will reduce this to 10 months to take into account the plea of guilty. In all the circumstances I consider that this is a case which merits a suspended sentence. Neither defendant has a relevant criminal record, they have pleaded guilty and have shown remorse. They have made full and frank disclosures about the source of the counterfeit goods. I consider that their apprehension and prosecution will be a major disinhibiting factor when it comes to further offending. In all the circumstances I consider that I should suspend the prison sentence, and propose to do so for a period of 2 years. This is concurrent sentence in relation to both counts. Both defendants should be aware that should they commit a further criminal offence during this period of suspension, then the court dealing with them then, will consider putting into operation this sentence.

23. A Destruction Order is made in respect of the counterfeit goods seized by the police.