Overview of Passing Off

What is passing off?

The principle underlying the tort of passing off is that “A man is not to sell his own goods under the pretence that they are the goods of another man”. There is no statutory cause of action for passing off. The tort has developed on an ad hoc basis, by way of decisions that often seem motivated by a judicial desire not to let an unmeritorious wrongdoer escape liability.

Elements of the tort

Classic passing off

The “classic form” of passing off involves a three-part test. This “classical trinity” test was described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Products Ltd v Borden Inc [1990] UKHL 12*):

- A goodwill or reputation attached to the goods or services.
- A misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.
- Damage to the claimant, by reason of the erroneous belief engendered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the claimant.

Who can sue for passing off?

Actions in passing off may be brought by anyone who can establish the existence of the three elements of goodwill, misrepresentation and damage. However, only traders who have generated goodwill can bring a passing off action. If a company or individual has not traded, the cause of action is unlikely to be open to them. Actions in passing off are, however, open to all types of traders, including companies, partnerships and sole traders.