

A Lidl Decision with Big Implications – Court of Appeal Edition

Article By:

Serena Totino

The Court of Appeal of England and Wales upheld the previous judgment (see [here](#)) that Tesco Clubcard logos infringed Lidl's trade marks and constituted passing off. Although it found that Tesco did not infringe Lidl's copyright, it is time for Tesco to rebrand its Clubcard logo.

Summary of the Appeal

The appeal focused on the following grounds:

- **Trade mark infringement and passing off:** Tesco's argues that the first instance's judge erred to conclude that the average consumer seeing the Tesco Clubcard signs would believe that the advertised prices were being "price matched" against Lidl. The Court of Appeal held that, owing to the distinctive nature of Lidl's marks and Lidl's reputation for low prices, customers could be misled into thinking that Tesco's prices were the same or lower than Lidl's. In addition, the Court of Appeal agreed that Tesco could have easily used an alternative sign to promote its Clubcard prices and that there was no clear reason justifying its use of the signs.
- **Copyright infringement:** the Court of Appeal held that, although Lidl's sign lacked a high degree of creativity, it was not purely mechanical or technical and there were some elements of creativity. Nevertheless, the court was convinced by Tesco's arguments that it had not copied a substantial element of Lidl's marks. Tesco had previously used similar blue shading and yellow circles, and the spacing between the shapes in Tesco's signs were different to Lidl's. As a result, Tesco's copyright appeal was allowed.
- **Invalidity claim:** Lidl appealed against the finding that its wordless trade mark was registered in bad faith. Lidl contested that the High Court shifted the evidential burden onto it to show good faith in its registrations, but the Court of Appeal upheld the first instance's decision that the duty rested on Lidl to show good faith and dismissed the appeal. This is a space to watch, as the Supreme Court's decision in the *Skykick* case is due in the upcoming months.

Takeaways

Reading the judgment, it appears clear that if the Court of Appeal would have been called to decide

the case in the first instance, the result might have been different, but it was rightly noted that when findings of facts are rationally supportable, there is no space for overturning a decision.

This case is already a landmark case with practical applications for brand owners. In particular, this decision is a reminder that well-constructed evidence is key to win a trade mark infringement case based on consumer confusion and invalidity claims based on bad faith and ever-greening practices are under the spotlight and proved to be a useful defence. Therefore, consider filing strategies thoroughly should be a priority.

From a commercial perspective, brands should consider that such disputes may result in multimillion-pound rebranding and damages that could be avoided by conducting effective clearance searches or negotiating amicable settlements at the early stage.

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