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Case No: CH-2021-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 12/08/2022

Before :

MR JUSTICE ADAM JOHNSON

Between :

MONSTER ENERGY COMPANY

- and -

RED BULL GmbH

Appellant

Respondent

Andrew Norris QC (instructed by Bird & Bird LLP) for the Appellant
Jonathan Moss (instructed by Taylor Wessing LLP) for the Respondent

Hearing date: 21 March 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Friday 12 August 2022.

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Mr Justice Adam Johnson :

Introduction

1. Monster Energy Company (“*Monster*”) is a manufacturer of energy drinks. It has applied for the registration of a trade mark in the following form: RED DAWG.
2. Another very well-known manufacturer of energy drinks is Red Bull GmbH (“*Red Bull*”). It is the owner of the following, earlier word mark: RED BULL.
3. Red Bull opposed the registration of Monster’s proposed mark, relying both on s.5(2)(b) and s. 5(3) of the Trade Marks Act 1994 (“*TMA*”).
4. By decision dated 26 August 2021 (“*the Decision*”), the Hearing Officer Mr James Hopkins rejected Red Bull’s objection based in s.5(2)(b). In dealing with s.5(2)(b), he concluded that there was no likelihood of direct or indirect confusion between the marks, even in relation to goods that are identical (see at [67]-[69]). However, he upheld Red Bull’s objection based on s.5(3).
5. Monster now seeks to appeal that decision aspect of the Decision – i.e., the upholding of Red Bull’s objection based on s.5(3) TMA. It has a statutory right to do so under, s.75. That is the only Ground of Appeal relied on.

The Decision Below

S. 5(3) TMA

6. At the commencement of the proceedings, s.5(3) stated as follows:

“A trade mark which –

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

7. It is common ground between the parties that in order to sustain a challenge under s.5(3), the opponent needs to establish:
 - i) that the earlier mark has a reputation in the UK;
 - ii) that use of the contested mark would “*call to mind*” the earlier mark, such that the consumer of the goods would make a “*link*” with the earlier mark; and
 - iii) as a result, one of three forms of injury would arise, namely (1) detriment to the distinctive character of the earlier mark, (2) detriment to the reputation of the earlier mark, or (3) taking unfair advantage of the earlier mark.

Reputation

8. As to point (i), Monster did not contest the proposition that Red Bull had a reputation in respect of energy drinks. Mr Hopkins had no hesitation in concluding (see at [77]) that Red Bull's word mark had a "*very strong reputation*" in the UK in relation to energy drinks.

"Link" with the earlier mark

9. As to point (ii), in dealing with the question of "*link*", Mr Hopkins said the following at [80]:

"The competing marks both consist of two words which begin with the identical word 'RED' and will be understood as referring to red animals. Taking this in combination with the identity of the goods, the very high distinctive character of the third earlier mark as well as the very strong reputation it enjoys, I consider that a significant part of the relevant public will make a link between them. Although I have found that there would be no direct or indirect confusion between the competing marks, it is, in my view, highly likely that the third earlier mark will be brought to mind upon encountering the contested mark."

Injury: "taking unfair advantage"

10. Under a separate heading, "*Damage*", Mr Hopkins then dealt with point (iii), the requirement that there be some form of injury or damage.
11. At [82], he referred to the decision of Arnold J (as he then was) in Jack Wills Limited v. House of Fraser (Stores) Limited [2014] EWHC 110 (Ch). I will come back to this below.
12. At [83]-[85], Mr Hopkins sought to frame the issue as it had developed between the parties. At [83], he described the essence of Red Bull's objection. This was focused on injury falling within category (3) in [7(iii)] above, namely *unfair advantage*.
13. Red Bull's case, as summarised by Mr Hopkins, was that registration of the proposed mark would give Monster "*an unfair economic advantage*". This was put as follows: "*... that is because [Monster] will benefit from [Red Bull's] marketing efforts, resulting in the need for less of its own*". In putting forward that case, Red Bull relied on the fact that Monster had not adduced any evidence as to why they chose the contested mark, and submitted that an adverse inference should therefore be drawn, namely that Monster's subjective intention was to profit from the similarity with the RED BULL mark.
14. At [84], Mr Hopkins summarised Monster's response. It denied that use of the contested mark would provide it with any unfair advantage. It argued that it was up to Red Bull to adduce evidence showing that unfair advantage would in fact arise, and it had produced no such evidence. It said it would be unfair for any adverse inference to be drawn against it in relation to the choice of the contested mark, because its intentions

had not been called into question until shortly before the hearing, and so it had not had a proper opportunity to address that issue in its own evidence.

15. At [85] Mr Hopkins said he was not prepared to infer commercial dishonesty in the choice of the proposed mark by Monster. He said:

“I note that the applicant’s intentions regarding its choice of the contested mark did not form part of the opponent’s pleaded case. Although I accept that it was still open to the applicant to deal with the issue of its own volition during the evidence rounds, I am not prepared to infer that the applicant sought to deceive the public, or cause confusion, as to the trade origin of the goods sold under the contested mark”.

16. At [86], Mr Hopkins dealt with Monster’s argument that Red Bull had failed to submit any evidence of unfair advantage. He made two points in relation to this (footnotes omitted):

“... it has been established that the proprietor of an earlier mark does not need to demonstrate actual or present damage under section 5(3). Furthermore, it is not necessary for evidence to be adduced of actual damage; it is permissible to deduce from the evidence that there is a serious risk of such damage”.

17. Then at [87], Mr Hopkins set out his conclusion on the question of unfair advantage, as follows:

“I have already found that consumers would not be prone to the effects of direct or indirect confusion. Therefore, I do not believe that consumers would purchase the applicant’s goods in the mistaken belief that they are provided by, or connected with, the opponent. Nevertheless, upon encountering the contested mark, it is my view that consumers of the contested mark will certainly be reminded of the third earlier mark; it will, therefore, appear instantly familiar, thereby making it easier for the applicant to establish its mark and to sell its energy drinks without incurring the marketing costs that would usually be required. The contested mark would be able to attract more consumers to purchase goods offered under it than would be the case if the earlier mark was not brought to mind. This would essentially allow the contested mark to free-ride on the reputation of the earlier mark and gain an unfair commercial advantage.”

18. Since Monster had made out no case that it had due cause for using the contested mark, the opposition based on s.5(3) succeeded.

The Appeal

19. Monster’s appeal is directed at the reasoning in paragraph [87] of the Decision.

20. The nub of the challenge is as follows. Mr Hopkins' overall conclusion was that there was a risk of the contested mark *free riding* on Red Bull's earlier mark. But that was not a conclusion that was open to him. There was no evidence directly supporting it or from which a risk of free riding could properly be inferred. What Mr Hopkins seems to have done instead is to say: well, I am satisfied that consumers would make a "link" between the two marks – I have already said so; and because the contested mark will therefore appear "*instantly familiar*", it follows that it will be easier for Monster to establish its marks and sell its energy drinks without incurring the marketing costs that would otherwise have been necessary and that is unfair.
21. Monster says that this analysis is flawed, because it conflates the "link" requirement with the "*unfair advantage*" requirement, and that is illegitimate because they are different things: "[t]he analysis of whether free riding is likely is a separate legal step in the determination requiring analysis of the evidence in relation to that step" (Grounds of Appeal, at para. 4).
22. Here, it is argued Mr Hopkins did not carry out that separate step, and had he applied his mind to it properly, he would have concluded there was no evidence supporting the conclusion he drew, essentially for the following reasons:
 - i) It is not enough simply that the owner of the later mark or marks benefits from an advantage. There must be something about it which makes the advantage *unfair*: see, e.g., Whirlpool Corp v. Kenwood Ltd [2009] EWCA Civ. 753; [2010] R.P.C. 2. Here, Mr Hopkins having expressly rejected the contention that Monster had any positive intention to deceive or cause confusion, it is difficult to see what unfairness there could have been, and Mr Hopkins did not explain why he thought there was any. Monster's counsel, Mr Norris QC, said that in the absence of evidence of an express and direct intention to cause harm, what he called a more "*diffuse*" intention might still be enough to render an advantage unfair – meaning, having an eye on, or being conscious of, the advantage likely to flow from an association with the earlier mark, even without meaning positively to take advantage of it. But here, he argued, there was no finding of intention even in that sense, and no basis for such a finding, and so there was no unfairness.
 - ii) Relatedly, there was no evidence either of advantage or unfairness. Such matters had to be proven and could not simply be assumed, just as, in those cases where the injury relied on is detriment to the distinctive character or reputation of the earlier mark, detriment must be proven: see, e.g., Case C383/12P Environmental Manufacturing LLP v OHIM ECLI:EU:C:2013:741; [2012] ETMR 54, and the summary of the relevant principles in Kerly's Law of Trade Marks and Trade Names (16th Edition), at para. 11-119. In this case, para. [87] of Mr Hopkins' Decision does not engage in any evidential analysis, and nowhere else in the Decision does Mr Hopkins attempt to analyse the evidential basis for saying there was an advantage which was unfair. Indeed, other aspects of the Decision were inconsistent with that idea, most particularly the finding on the objection under s.5(2)(b) that there was no risk of confusion between the different marks.
23. Red Bull in their submissions resisted both these arguments and said they were misconceived. Their main points were essentially as follows:

- i) On the question of unfairness, it is perfectly possible for an advantage to be characterised as unfair, irrespective of whether the owner of the later mark had the subjective intention (whether focused or “diffuse”) of taking advantage of the earlier one. In an appropriate case, unfairness can be shown to arise from the use of a sign which has the objective effect of creating an unfair advantage, even if it is not proven that subjectively (in whatever sense) that is what the owner of the later mark wanted to achieve: see the Jack Wills decision (mentioned above) at [80].
- ii) On the question of evidence and proof, it was not correct to say that Mr Hopkins had conflated the question of whether there was a “link” with the question of whether there was injury (the separate steps at [7(ii)] and [7(iii)] above). Mr Hopkins dealt with the “link” issue at [80], and then with the injury/damage question separately at [87], by addressing his mind to the question of unfair advantage. He did not assume there was an unfair advantage merely because the “link” was made out; instead, at [87], he drew certain conclusions as to the wider effects of consumers making the “link”, and it is those conclusions that support the overall assessment of unfair advantage. They were entirely fair and rational conclusions to draw, which were consistent with common sense and reflected Mr Hopkins’ wide experience as a Hearing Officer dealing with similar matters. There is no justification for the Court to interfere with them unless satisfied they were plainly wrong. That could not be shown here.

Discussion and Conclusions

24. In my opinion, Mr Hopkins’ conclusions on the unfair advantage question are not open to challenge and the appeal must be dismissed.
25. To begin with, it is obviously correct Mr Hopkins reached the conclusion that an unfair advantage was made out despite the lack of any subjective intention of Monster’s part to take advantage of the earlier RED BULL mark, whether that be a specific intention or, I think, the sort of “diffuse” intention described by Mr Norris QC.
26. Instead, and although I agree that the reasoning in para. [87] of his Decision is rather compressed, it seems to me that a fair reading of Mr Hopkins’ analysis, looked at in light of the Decision as a whole, is as follows:
 - i) Irrespective of any subjective intention specifically in relation to the earlier RED BULL mark, Monster obviously chose the proposed sign RED DAWG with a view to it having brand significance, and with a view to it having an impact on their consumers.
 - ii) I accept that Mr Hopkins does not spell out expressly in [87] that Monster’s choice of the RED DAWG mark was intended to have these effects, but (1) it seems to me they are entirely uncontroversial propositions; (2) it is clear from Mr Hopkins’ earlier references to Jack Wills, which set the context of the analysis in this part of his Decision, that he had in mind, and was dealing with, precisely the species of unfair advantage recognised in that case, which involves consideration of how consumer behaviour is impacted; (3) the logic of [87] obviously rests on Monster having that general intention in relation to its proposed new mark – that was the point of registering it; and (4) earlier, at [42],

Mr Hopkins had carried out an assessment of the likely purchasing process for the average consumer, and so had well in mind the impact of the mark on consumer purchasing behaviour.

- iii) In short, in my opinion it is entirely obvious that the analysis in para. [87] of the Decision rests on the premise that the RED DAWG mark was intended to influence the economic behaviour of consumers of Monster energy drink products.
- iv) The next point is an express finding that, because of the similarity between the marks, consumers encountering the later RED DAWG mark will “*certainly be reminded*” of the earlier RED BULL mark, even if they are not confused between them. That, moreover, will make it easier for Monster to establish and sell its RED DAWG energy drinks without incurring the marketing costs that would otherwise have been required. That is what gives rise to unfairness in the required sense: RED DAWG will in fact, whether that is what Monster subjectively intended or not, be given a free-ride, and will therefore gain an unfair commercial advantage. There is no “*due cause*”, and so s.5(3) is engaged.

The Issue of Principle

- 27. Looking first at the question of legal principle, I see nothing at all objectionable in Mr Hopkins’ conclusion that the set of factors he relied on gives rise to an *unfair advantage* in the required sense, even though Monster had no subjective intention (whether precise or *diffuse*, in Mr Norris’ sense) of seeking to take advantage of the RED BULL mark.
- 28. That follows from the Jack Wills decision itself. In that case the defendant, House of Fraser, had developed a clothing brand known as Linea, which used a logo in the form of a pigeon with a top hat and bow tie. This was similar, but not identical, to a logo used by the clothing retailer Jack Wills, which took the form of a pheasant with a top hat and cane. At [42], Arnold J expressly rejected the contention that there had been any attempt to copy any of Jack Wills’ branding. The relevant designer, Mr McLean, had not given evidence, and Arnold J considered it would be unfair to conclude that he had deliberately copied Jack Wills’ branding when he had not had the opportunity of defending himself. Arnold J did say, however, that he thought Mr McLean was perhaps subconsciously influenced by some of Jack Wills’ branding, of which he would have been aware, and that he was possibly led in that direction by the nature of the briefing he received.
- 29. Despite the lack of any subjective intention, the claim under s.5(3) was made out, because the concept underlying s.5(3) was wider and was not dependent on proof of the defendant’s subjective intention. At [80], having reviewed the underlying EU legislation and the main authorities up to that point, Arnold J made two points about the concept of *unfair advantage*. The first was that “*this aspect of the legislation is directed at a particular form of unfair competition.*” The second, more specifically, was about the relevance of the defendant’s conduct. Arnold J’s conclusion was that unfairness in the requisite sense was *not* limited to those cases where the defendant’s subjective intention was to exploit the reputation and goodwill of the earlier mark:

“It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant’s conduct is most

likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill”.

30. I see no room in this analysis for a requirement that there must still be some form of *diffuse* intention, of the type Mr Norris QC described – *i.e.*, in the form of the user of the later mark having an eye on the earlier mark. On my reading of it, I see nothing in Jack Wills to say that that is a necessary element of the test of unfairness. I agree that, in Jack Wills at [42], Arnold J expressed some views about what the designer, Mr McLean, is likely to have had in mind, but I do not consider that those comments – effectively made in passing and as an aside – had any bearing at all on the way in which Arnold J’s overall conclusion was expressed at [109]-[110], which was as follows:

“109. Did use of the Pigeon Logo take unfair advantage of the reputation of the Trade Marks? Although it is not open to Jack Wills to contend that House of Fraser adopted and used the Pigeon Mark with the intention of free-riding on the reputation of the Trade Marks, it does not follow that House of Fraser’s intentions in adopting and using the Pigeon Logo are irrelevant. I have already found that House of Fraser intended the Pigeon Logo to have brand significance, and that that is how consumers will have perceived it. Furthermore, it is clear that House of Fraser’s intention in using the Pigeon Logo was to make the garments more attractive to consumers. I consider that it was a classic case of a retailer seeking to enhance the attraction of its own brand goods by adopting an aspect of the get-up of prestigious branded goods, in this case an embroidered logo of the kind used by Fred Perry, Lacoste, Polo Ralph Lauren and others. Thus House of Fraser was seeking to influence the economic behaviour of consumers of Linea menswear. I see no reason to think it will not have succeeded in that endeavour.

110. Furthermore, I consider that it is a legitimate inference from the nature of the particular market, the nature of the logos and the circumstances of the case, that, due to its resemblance to the Trade Marks, the effect of House of Fraser’s use of the Pigeon Logo will have been to cause a subtle but insidious transfer of image from the Trade Marks to the Pigeon Logo (and hence from Jack Wills’ goods to House of Fraser’s goods) in the minds of some consumers, whether that was House of Fraser’s intention or not. This will have assisted House of Fraser to increase the attraction of its goods in circumstances where House of Fraser did not undertake any advertising or promotion of those goods. Furthermore, House of Fraser had no justification for such conduct. Thus I conclude that House of

Fraser did take unfair advantage of the reputation of the Trade Mark”.

31. As I read [109] of Jack Wills, the intentions referred to there were not expressed by reference to the Jack Wills marks at all. The logic of Arnold J’s reasoning was to say (1) House of Fraser obviously intended the pigeon logo to have brand significance, (2) House of Fraser obviously intended the pigeon logo to make the Linea garments more attractive to consumers, and (3) House of Fraser was therefore seeking to influence the economic behaviour of consumers for Linea menswear, and no doubt had succeeded in doing so. None of these points is an intention vis-à-vis the Jack Wills logo or brand. In fact, in the introductory part of [109], Arnold J expressly recorded that he was not concerned with whether House of Fraser had any intention of free riding on the reputation of the Jack Wills marks as such.
32. Arnold J then went on at [110] to set out a “*legitimate inference*” available to him on the primary facts, which included general matters such as the nature of the market and the nature of the logos. This was that use of the House of Fraser pigeon logo “*will have been to cause a subtle but insidious transfer of image*” from the Jack Wills logo to the pigeon logo in the minds of consumers, “*whether this was House of Fraser’s intention or not*”, and that would assist House of Fraser in increasing the attraction of its goods in circumstances where it did not undertake any advertising or promotion of those goods.
33. This analysis of unfairness is not at all dependent on any subjective intention vis-à-vis the earlier mark. The only form of intention referred to was a general one, vis-à-vis intending to influence the economic behaviour of consumers. The logic was: you (House of Fraser) adopted a logo with that general intention in mind (i.e., it was intended to have the effect of helping you sell the goods in question to your customers). As it happens, you chose a logo – admittedly without intending to – which was similar but not identical to another logo used by another brand selling products in the same area. That is unfair, *not* in the sense that you acted with the subjective intention (*diffuse* or otherwise) of taking advantage of the earlier logo, but in the sense that I can see objectively that you *are in fact* taking advantage, because the similarity will enable you to sell more items without spending money on advertising or marketing. There is no good reason for that, and so it amounts to unfair competition in the form of “*free riding*”.
34. Returning then to the present case, and focusing for now on the relevant issue of principle, on this view of the law I can see nothing at all objectionable with the approach taken by Mr Hopkins. He was doing no more and no less than recognising an established form of unfairness. His Decision is not open to challenge on the basis of any misdirection or misunderstanding of the relevant principles of law in play.
35. On the contrary, it seems to me his analysis of the law was clear and correct. His detailed analysis of the unfair advantage question starts at [82] of the Decision, under the heading “*Unfair competition*” – which is precisely the characterisation given to the relevant legislative provisions by Arnold J in Jack Wills (see above at [29]). In the body of [82], before quoting the passage from Jack Wills I have set out above (again at [29]), he gave his own description of the type of unfairness recognised in Jack Wills:

“Taking advantage of the distinctive character or reputation of an earlier mark means the consumers are more likely to buy the goods or services of the later mark than they would have otherwise been if they had not been reminded of the earlier mark. As a result, the marketing of the later mark will not require as much effort or investment due to the familiarity that the relevant public would already feel with it or the message they are sent about what to expect.”

36. That seems to me to be a correct statement of the relevant legal principle, and it is that principle which Mr Hopkins then went on to apply in his para. [87]. That being so:
- i) I detect no error of approach in the fact that Mr Hopkins made no comment in para. [87] about Monster having any specific intention to benefit – whether directly or in Mr Norris QC’s *diffuse* sense – from Red Bull’s reputation and goodwill. That is not a necessary part of the inquiry.
 - ii) Neither do I think it correct that Mr Hopkins impermissibly elided the “*link*” issue and the separate question of unfair advantage. It seems to me entirely clear that he considered both questions, and properly addressed himself to the second by reference to a form of unfairness which the law plainly recognises, and which involves asking whether an identifiable effect on consumer behaviour is unfair when viewed objectively, whatever the subjective intention of the party bringing it about. In conducting his analysis at his para. [87], Mr Hopkins was straightforwardly asking himself whether that form of unfairness was actually made out on the facts. Although it is obviously correct, as Mr Norris QC emphasised in argument, that merely obtaining a commercial advantage is not enough for a case under s.5(3) to be made out (see, e.g. Whirlpool, in which Lloyd LJ said at [136]: “... *there must be an added factor of some kind for that advantage to be characterised as unfair*”), this was not just a case of a commercial advantage. There *was* unfairness, the “*added factor*” being the boost to their business Monster were likely to obtain from the impact on consumer behaviour of the similarity between the two marks, which would result in Monster selling more while paying less. That was objectively unfair, and there was no justification for it (i.e., no “*due cause*”, to use the statutory language). As I see it, that is a legitimate conclusion in principle, and I see nothing to persuade me otherwise in the fact that in other cases on very different facts Courts have reached the conclusion that although the defendant obtained a commercial advantage there was no unfairness (see, e.g., Argos Ltd v. Argos Systems Inc [2018] EWCA Civ. 2211; [2019] F.S.R. 3 at [109]: no unfairness in the defendant having obtained a small income stream from Google as a result of unwanted internet traffic which arrived at its website).
 - iii) Neither do I consider that Mr Hopkins was precluded from reaching the decision he did by the fact that he had earlier found, in dealing with the question raised by s.5(2)(b), that there was no likelihood of confusion between the marks. The question under s.5(3) was a different one, namely whether consumer behaviour was likely to be influenced in a way which produced an objectively unfair result. As I see it, there is no error of principle or logical inconsistency in answering the first question in the negative and the second question in the affirmative. As I read it, Arnold J in Jack Wills took the same view of the issue of principle,

because at [104] he said that in dealing with the unfair advantage question he was prepared to assume there was no risk of confusion between the Jack Wills logo and the Pigeon logo. The Court of Appeal in Argos Ltd v. Argos Systems Inc plainly thought the same, because at [102] Floyd LJ said the following, in discussing Art. 9(1)(c) of the Council Regulation (EC) 2007/2009 (my emphasis added):

“Although categorised (in a manner which may seem odd to English lawyers) as a form of ‘injury’, the taking of unfair advantage of the distinctive character or the repute of a mark, within art. 9(1)(c), does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor”.

Mr Hopkins’ Evaluation

37. Having dealt with the issue of legal principle, the question then becomes whether Mr Hopkins’ evaluation that there was an unfair advantage on the facts of this case is impeachable on any basis. I think not.
38. The starting point here is that an appeal Court should exercise caution before reversing a lower Court or tribunal’s evaluation of the facts. Even in the case of a multifactorial assessment or evaluation (which I take Mr Hopkins’ analysis to be, rather than simply a finding or findings of primary fact), the Court should be slow to interfere. As Arnold J emphasised in his guidance in Apple Inc. v. Arcadia Trading Ltd [2017] EWHC 440 (Ch), at [11], even where the appellate body has doubts about whether the decision was right, it should go on to:

“... consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation ...”.
39. Mr Norris QC for Monster was critical of the lack of evidence underpinning Red Bull’s position and Mr Hopkins’ conclusion. While he accepted that in a case such as the present, where the contested mark has not in fact been used in the UK, it was not necessary to show proof of *actual* unfair advantage, he said that all the same an objector has to prove a serious risk of unfair advantage, and here there was no evidence to support such a conclusion. In fact, he said common sense pointed in the opposite direction. For example, Monster is a huge, multi-billion dollar company that sells millions of cans of energy drinks globally every year, and so it is unrealistic to think it would obtain any advantage from the similarity between RED DAWG and RED BULL. It has its own reputation and in terms of driving consumer behaviour will stand on its own two feet.
40. On this point, I am afraid I am again unpersuaded by Mr Norris’ submissions, clear and effective though they were. In short, I am unpersuaded that the evaluation carried out by Mr Hopkins in his para. [87] involved any error of principle or was clearly wrong.
41. As it seems to me, and as I have explained above, analysed critically that evaluation contained two broad elements, namely (1) an implicit assumption that, in adopting the

RED DAWG mark, Monster were intending to seek to influence the economic behaviour of consumers of their products; and (2) an express finding that the similarity between RED BULL and RED DAWG, although not apt to cause confusion, would nonetheless make it easier for Monster to sell its products without incurring the marketing costs that would otherwise have been required.

42. It seems to me those were assessments Mr Hopkins was perfectly well able to come to. I do not think I can conclude that he was wrong in doing so.
43. Again, as to the method for conducting an evaluation of the type in question, there is useful guidance to be gleaned from the Jack Wills decision.
44. At [83], Arnold J dealt with how one should assess the potential for use of the contested mark to have an impact on the economic behaviour of the defendant's consumers. It was not necessary for the claimant to adduce positive evidence that consumers had in fact changed their behaviour. It was enough to show a risk, as long as it was a real or serious one. Arnold J. thought the correct way of approaching the issue was by analogy with the approach laid down by the Court of Justice in the Environmental Manufacturing decision, in the following passages at [42] and [43]:

“42. Admittedly, Regulation No 207/2009 and the Court's case-law do not require evidence to be adduced of actual detriment, but also admit the serious risk of such detriment, allowing the use of logical deductions.

43. None the less, such deductions must not be the result of mere suppositions but, as the General Court itself noted at paragraph 52 of the judgment under appeal, in citing an earlier judgment of the General Court, must be founded on 'an analysis of the probabilities and by taking account of the normal practice in the relevant commercial sector as well as all the other circumstances of the case'.”

45. This confirms, if confirmation were needed, that the Court or tribunal can entirely permissibly draw inferences based on the inherent probabilities and by taking account of normal practice in the relevant sector and the circumstances of the case. The Court or tribunal cannot proceed on the basis of “*mere suppositions*”, but an inference based on the inherent probabilities and the normal practice in the relevant sector will not be a mere supposition. It will be a rational and properly motivated conclusion.
46. In my opinion, the conclusions expressed by Mr Hopkins were properly motivated in this way. It is inaccurate to characterise them as mere suppositions. As I read it, they were legitimate inferences reflecting the inherent probabilities, arrived at in light of the findings in the Decision as a whole and informed by Mr Hopkins' experience as a Hearing Officer of commercial practice in the exploitation of trade marks.
47. To express it in more concrete terms, it seems to me it was entirely legitimate for Mr Hopkins (1) to proceed on the basis that in adopting the RED DAWG mark, Monster were intending to seek to influence the economic behaviour of consumers of their products – indeed, that would seem the most obvious reason for doing so; and (2) to infer that the similarity between RED BULL and RED DAWG, although not apt to

cause confusion, would nonetheless make it easier for Monster to sell its products without incurring the marketing costs that would otherwise have been required. Both appear to me to be entirely legitimate and common-sense propositions. Even if one assumes, as Mr Norris QC argued, that there were some factors possibly pointing in the other direction, that does not mean that the overall evaluation was wrong. It is very often the case that there are competing factors in an evaluation, and that is why a decision needs to be made. This Court should not interfere unless it is satisfied that the decision is one which clearly should not have been made. I simply do not consider this is such a case.

Overall Conclusion and Disposition

48. My overall conclusion, therefore, is that the appeal fails and must be dismissed.